1-21

OAL Dkt. No. EDU 05838-20
Agency Dkt. No. 136-6/20

New Jersey Commissioner of Education

Final Decision

Jessika Herrera,

Petitioner,

v.

Board of Education of the City of Plainfield, Union County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 4, 2021
Date of Mailing: January 5, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05838-20
AGENCY DKT. NO. 136-6/20

JESSIKA HERRERA,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD UNION COUNTY,

Respondent.

Nicholas Poberezhsky, Esq. (Caruso Smith Picini, attorneys) for petitioner

Philip E. Stern, Esq., (DiFrancesco Bateman, attorneys) for respondent.

Record Closed: November 12, 2020 Decided: November 18, 2020

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

On June 24, 2020, the matter was transmitted to the Office of Administrative Law as an Emergent Relief matter.

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement via e-mail on November 12, 2020.

Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 18, 2020

Ernest M. Bongiovanni

DATE

ERNEST M. BONGIOVANNI., ALJ

Date Received at Agency:

Date Mailed to Parties:

id

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE IN FULL ("Agreement") is made this 18th day of July 2020, by and between Jessika Herrera (Petitioner or Party) and the Plainfield Board of Education (Respondent or Party), collectively referred to as the "Parties".

WHEREAS, on or about July 24, 2020 Petitioner filed an emergent motion with the Commissioner of Education regarding denial of a requested three- year (3) leave from the Respondent in the above- matter;

WHEREAS, the matter was heard via Zoom before the Ernest Bongiovanni, ALJ, Office of Administrative Law on July 2, 2020, with counsel for each Party and the Parties participating; and

WHEREAS, the Parties wish to resolve this matter in accordance with the terms set forth herein; and

WHEREAS, the Parties have by way of compromise and accord settled all claims raised in Petitioner's emergent motion without adjudication of any issues of fact or law;

NOW THEREFORE, the Parties agree as follows:

1. **RECITALS**

The above recitals are hereby referred to and incorporated herein by reference.

2. **SCOPE OF AGREEMENT**

It is the Parties' mutual intention to settle (through this Agreement) all claims in the Petitioner's emergent motion. As a result, the parties agree as follows;

(a) Respondent grants Petitioner a (1) one – year leave from the District for the 2020-2021 school year;

(b) On or before May 3, 2021, Petitioner will notify the District in writing of her intention to either:(1) return to the District as a Counselor for the 2021-2022 school year; or (2) resign from the District as of the May 3, 2020;

(c) If Petitioner does not provide the notice required as set forth in (b) above, the Parties understand and agree that Petitioner's failure to comply as set forth will constitute Petitioner's resignation from the District.

3. **LANGUAGE**

The language of this Settlement Agreement and Release has been negotiated and is a product of the draftsmanship of all of the Parties, and shall in all cases be construed as a whole according to its objective and fair meaning and shall not be interpreted in favor of or against any party. Not by way of limiting the foregoing, the interpretation of any provision (in part or in whole) of this Settlement Agreement and Release shall not, in any manner, be interpreted against the any Party as the drafter of the Agreement.

4. **ENTIRE AGREEMENT**

This Agreement constitutes the entire agreement between the Parties.

5. **AUTHORITY OF SIGNATORIES**

Each signatory represents that she or he is a Party or has been duly authorized by a Party to sign on that Party's behalf and that in the case of the Board, all procedural formalities attendant to the execution of this Agreement have been satisfied.

6. **LAW GOVERNING**

This Agreement shall be governed by the laws of the State of New Jersey.

7. **EXECUTION IN COUNTERPARTS**

The Parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

8. **BOARD APPROVAL**

The Parties understand and agree that this Agreement is subject to approval of the Board of Education.

9. **EFFECTIVE DATE**

The effective date of this Agreement shall be the next day following the date upon which the Plainfield Board of Education formally ratifies and executes this Agreement this Agreement.

By signing this Agreement, the Parties certify that they have reviewed this Agreement and fully understand its meaning and terms. Furthermore, the Parties certify that they have had the opportunity to discuss this Agreement with their respective attorney's and that they are fully satisfied with their respective attorneys' representation.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties have executed this Settlement Agreement and General Release as of the dates set forth below:

WITNESS:

BOARD SECRETARY

DATED: 7/28/20

PLAINFIELD BOARD OF EDUCATION:

PLAINFIELD BOARD OF EDUCATION
BOARD PRESIDENT

DATED: 7/28/20

WITNESS:

NICK POGREZHSKY, ESQ.

DATED: 7/7/20

JESSIKA HERRERA:

JESSIKA HERRERA

DATED: 07/07/2020

2-21
OAL Dkt. No. EDU 03248-19
Agency Dkt. No. 6-1/19

New Jersey Commissioner of Education

Decision

Joyce Cason,

Petitioner,

v.

New Jersey Department of Education, Criminal History Review Unit,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon review, the Commissioner agrees with the Administrative Law Judge that petitioner has abandoned her appeal by failing to appear at telephone conferences on July 22 and November 5, 2020, and failing to respond to discovery requests. Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition is hereby dismissed with prejudice.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 4, 2021
Date of Mailing: January 5, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 03248-19
AGENCY DKT. NO. 6-1/19

JOYCE CASON,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,
Respondent.

Joyce Cason, petitioner, pro se

Jaclyn M. Frey, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: November 17, 2020 Decided: November 17, 2020

BEFORE **MARGARET M. MONACO,** ALJ:

STATEMENT OF THE CASE

Petitioner, Joyce Cason, challenges the determination by the Department of Education, Criminal History Review Unit (the CHRU), that she is permanently disqualified

from employment with an educational institution under the supervision of the Department of Education based upon her criminal record.

PROCEDURAL HISTORY

On or about January 11, 2019, petitioner filed a Petition of Appeal with the Commissioner of Education challenging her employment disqualification. On or about February 21, 2019, respondent filed a motion to dismiss in lieu of an Answer. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed for determination as a contested case. A telephone conference was held on April 10, 2019, after which respondent withdrew its motion to dismiss and filed an answer on or about April 18, 2019. A prehearing conference was held on June 14, 2019, during which the hearing was scheduled for December 20, 2019, and a Prehearing Order was issued on June 17, 2019. The hearing was adjourned at the parties' joint request and rescheduled for June 17, 2020 and later adjourned to August 11, 2020. During a telephone conference on December 18, 2019, petitioner was directed to respond to respondent's discovery requests by January 31, 2020. The undersigned later extended the time for petitioner to respond to the discovery requests to March 16, 2020. By letter dated July 1, 2020, Ms. Frey advised that petitioner had not provided discovery by the extended deadline and requested a telephone conference. By e-mail dated July 20, 2020, petitioner was informed that a telephone conference would be held on July 22, 2020 at 3:00 p.m. Although Ms. Frey attended that telephone conference, there was no appearance by petitioner. Subsequently, the August 11, 2020 hearing was adjourned, and respondent filed a motion to compel discovery on or about August 19, 2020. Petitioner did not file a response or opposition to that motion, which I granted by Order dated September 2, 2020. Pursuant to that Order, petitioner was ordered to provide discovery responses within twenty days of the date of the Order or by September 22, 2020. By letter dated October 1, 2020, Ms. Frey advised that petitioner had not provided any discovery responses as ordered and requested a telephone conference. By letter dated October 20, 2020, the undersigned informed petitioner that "a **MANDATORY** telephone conference in this matter will be held on November 5, 2020 at 3:00 p.m." The letter further informed petitioner that "a failure by her to participate in this conference will

result in the dismissal of her Petition." Although Ms. Frey attended that telephone conference, there was no appearance by petitioner.

FINDINGS OF FACT

I **FIND** the following uncontested **FACTS**:

1. Petitioner was afforded proper notice of the telephone conferences on July 22 and November 5, 2020.

2. Neither petitioner nor a representative on petitioner's behalf appeared for the July 22 and November 5, 2020 telephone conferences.

3. Petitioner did not contact the undersigned to request an adjournment of the scheduled telephone conferences or to advise that she could not appear for the telephone conferences on July 22 and November 5, 2020.

4. To date, petitioner has not contacted the undersigned in writing or by telephone concerning her failure to appear for the scheduled proceedings on July 22 and November 5, 2020 or to explain the reason for her failure to appear.

5. Petitioner has failed to respond to respondent's discovery requests.

6. Petitioner has failed to comply with the Order dated September 2, 2020.

CONCLUSIONS OF LAW

Petitioner failed to appear at the scheduled proceedings on July 22 and November 5, 2020, and she failed to provide an explanation for nonappearance. See N.J.A.C. 1:1-14.4(a) (providing that if, after appropriate notice, a party does not appear at a scheduled proceeding, the judge shall direct the Clerk to return the matter to the transmitting agency if the judge does not receive an explanation for the nonappearance within one day).

Petitioner has also failed to comply with established discovery deadlines, including the September 2, 2020 Order requiring her to provide discovery responses within twenty days of the date of the Order. Based upon the foregoing, I **CONCLUDE** that petitioner has failed to prosecute, and has abandoned, her appeal. Accordingly, I **CONCLUDE** that petitioner's Petition of Appeal should be dismissed.

ORDER

I **ORDER** that petitioner's Petition of Appeal be and hereby is **DISMISSED WITH PREJUDICE.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 17, 2020
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

3-21

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of:

ERIC HALL

and

NORTH HUNTERDON-VOORHEES REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY

Agency Docket No. 190-9/20

Walt De Treux, Esq., Arbitrator

Hearing Date: 10/30/20
Decision Date: 1/4/21

Appearances: For the Respondent – Edward A. Cridge, Esq., *MELLK O'NEILL*
For the School District – Teresa L. Moore, Esq., *RIKER DANZIG*

Introduction and Statement of Relevant Facts

Respondent Eric Hall served as the Voorhees High School boys' wrestling team coach during the 2019-20 season. Hall is also a special education teacher in the North Hunterdon-Voorhees Regional School District. For the 2019-20 school year, he was assigned to teach in a Bethlehem Township (NJ) school.

On January 23, 2020, the wrestling team had a match against Bridgewater-Raritan Regional High School. The next morning, North Hunterdon-Voorhees Athletic Director Brian Baumann learned from Bridgewater-Raritan Athletic Director John Maggio that a Bridgewater-Raritan parent complained that a Voorhees coach had aggressively grabbed one of the Voorhees wrestlers. Baumann reported the conversation to Voorhees Regional High School Principal Ron Peterson. On Peterson's instruction, Baumann asked AD Maggio for any video footage of the incident and for a statement from the parent. Pending Baumann's request, Peterson received a copy of the footage from a Bridgewater-Raritan Assistant Principal.

Peterson and Baumann reviewed the footage, which did not have audio. It showed two Voorhees wrestlers running on to the mat in celebration after a Voorhees victory. Their presence on the mat is against the rules. Coach Hall can be seen grabbing both students and pulling them off the mat. One of the wrestlers walks away from Hall and moves near some chairs. Hall walks around several team members to get near the wrestler. He grabs the wrestler near his neck before pushing him with enough force that he stumbled backwards and landed in a seated position in one of the chairs.

After seeing the video, Baumann and an Assistant Principal met with the wrestler who was pushed and asked him why Hall had "put his hands on your neck." The wrestler confirmed that the incident occurred after he ran onto the mat.

Baumann immediately suspended Hall from his coaching position. Later that day, Hall was suspended from his teaching position.

On February 21, 2020, North Hunterdon-Voorhees Regional School District Superintendent Jeffrey Bender issued a notice of tenure charges against Hall seeking his dismissal for unbecoming conduct "[b]y attacking two student athletes" at the wrestling match. For reasons not explained at hearing, the Board did not certify the charges to the New Jersey Commissioner of Education until August 31, 2020. On September 22, 2020, the Commissioner "deemed the charges to be sufficient, if true, to warrant dismissal or reduction in salary." The matter was referred to an arbitrator for adjudication.

On October 30, 2020, a hearing was held, during which time both parties had a full and fair opportunity to present documentary and other evidence, examine and cross-examine witnesses, and offer argument in support of their respective positions. The District completed

its case-in-chief on October 30. Prior to the next scheduled hearing day, Respondent notified the Arbitrator and the District that he rested his case without calling any witnesses. At the same time, he filed a "Motion for Judgment," which I considered to be his closing brief. The District filed its brief soon thereafter; and on my leave, Respondent filed a reply brief. The matter is now before me for a decision.

Issue

Has the North Hunterdon-Voorhees Regional High School District Board of Education established the allegations of unbecoming conduct against Respondent Eric Hall as set forth in the tenure charges? If so, do those charges warrant dismissal? To what remedies are the parties entitled?

Analysis and Decision

At hearing, Respondent raised evidentiary objections related to the testimony of Assistant Wrestling Coach Ricky Kurtz and the admissibility of the security video footage of the incident. I allowed Kurtz to testify, but withheld my ruling on Respondent's objection pending receipt of the parties' written argument included as part of their closing briefs. I admitted the video footage, but indicated to Respondent that he could raise any argument as to its sufficiency or competency as part of his closing argument. In his closing brief,[1] Respondent argues that the video was not properly authenticated, and therefore, was admitted only as hearsay evidence. He posits that the District's reliance on the video does not satisfy its

[1] Respondent referred to his closing brief as a "Motion for Judgment."

obligation to present competent, non-hearsay evidence under New Jersey's "residuum rule." Each issue is discussed separately below.

Testimony of Ricky Kurtz

The TEACHNJ statute instructs the parties on the exchange of evidence prior to hearing. It reads in relevant part,

> "Upon referral of the case to arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses. N.J.S.A. 18A:6-17.1(b)(3)

The Commissioner of Education notified the parties that the case had been referred to an arbitrator by letter dated September 22, 2020. Two days later, the District served on Respondent its witness list and summary of testimony. Ricky Kurtz was not included as a witness on that list. Respondent served his witness list and evidence to the District on October 20, 2020, 10 days prior to the first scheduled day of hearing. Ricky Kurtz was listed on Respondent's list of witnesses. Two days later, the District supplemented its witness list with two additional names, including Ricky Kurtz.

Respondent objected at hearing when the District called Kurtz as a witness in its case-in-chief based on the District's failure to list Kurtz on its initial witness list. As noted, I allowed Kurtz to testify while reserving a ruling on Respondent's objection.

As the parties recognized, the employer's obligation to provide all evidence "[u]pon referral of the case to arbitration" has generated substantial litigation over the meaning of "[u]pon referral." Although some arbitrators have found that evidence must be turned over "precisely when the matter was referred to arbitration,"[2] the prevailing interpretation, and the one accepted by this Arbitrator, applies some degree of reasonableness to account for the logistics of providing such information. Respondent presumably agrees, as he did not object to the District's initial witness list submitted two days after the date of the referral letter.

The District's supplemental listing of Kurtz as a witness one month after the referral to arbitration and eight days prior to hearing clearly does not comply with even a liberal reading of the statute. The District correctly notes that Kurtz was not a surprise witness, as Respondent had included him on its own witness list. Respondent was not prejudiced in any way by the late inclusion of Kurtz. Nonetheless, I am compelled to follow the statutory timelines for the exchange of evidence. The District offered no reason for its failure to list Kurtz on its initial witness list. It was well aware of his limited role in the incident the day following the wrestling match. The statue instructs that the employer "shall be precluded from presenting any additional evidence at hearing" beyond that which was included in their exchange of evidence "[u]pon referral to arbitration." According, I sustain Respondent's objection to Kurtz' testimony and order it stricken from the record. This Award neither cites to or relies in any way on his testimony.

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[2] *In the Matter of the Tenure Hearing of Marie Ebert,* Agency Dkt No. 267-9/14 (Deneberg, 2015)

Video Footage

The day after the wrestling match, AD Baumann heard from AD Maggio that a parent had complained that Respondent aggressively grabbed a wrestler. Neither ADs had witnessed the incident. Principal Peterson asked Baumann to see if video footage existed. In the meantime, an Assistant Principal from Bridgewater-Raritan forwarded Peterson the footage.

Peterson and Baumann relied primarily on that video footage to suspend Respondent from coaching, and the District relied primarily on that video footage in filing tenure charges to dismiss Respondent from his teaching and coaching duties. Baumann saw an email from the complaining parent, but did not attempt to interview that parent. Baumann met with the wrestler, but he did not ask him to describe the incident. Rather, he simply asked him why Respondent grabbed him by the neck. Both Baumann and Peterson admitted at hearing that they acted against Respondent based on the conduct they viewed on the video.

Respondent argues that the video footage is hearsay evidence because it has not been authenticated, and therefore, is insufficient to serve as competent evidence upon which the tenure charges can be sustained.[3]

The District stipulated that the video was not authenticated in the sense that it did not confirm with Bridgewater-Raritan how the video was created or inquire how it was secured and transmitted to the District. Respondent asserts that, at the least, the District was obligated to call an eyewitness to the incident to confirm that the video accurately portrayed the incident.

[3] Respondent cites to the "residuum rule" articulated by the Court in *Wilson v. State,* 60 N.J. 36 (1972), which stated in relevant part, "But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it. At 51-52, citations omitted.

Although the District did not ask Bridgewater-Raritan for "authentication," in *State v. Wilson,* 135 N.J. 4, 637 A.2d. 1237 (N.J. 1994), the Court, citing *Evidence Rule 901,* explained that "the authentication requirement is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims." At 17. The Court noted, "...any person with the requisite knowledge of the facts represented in the photograph or videotape may authenticate it. *(citation omitted)* An authenticator need not even have been present at the time the photograph was taken, so long as the witness can verify that the photograph accurately represents its subjects." *(citation omitted)* At 14-15.

Peterson and Baumann learned of a possible incident at the wrestling match on January 23, 2020. They asked Bridgewater-Raritan for security footage of the match. A Bridgewater-Raritan official forwarded footage of a wrestling match dated January 23, 2020 that clearly showed Respondent and wrestlers, including the one that was pushed. Baumann was able to clearly identify the subjects in the video based on his familiarity with them.

There is no valid concern that the video is not what it purports to be. As the *Wilson* Court recognized, "the authentication requirement is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims." Peterson's testimony that he received the video from a Bridgetown-Raritan Assistant Principal and Baumann's testimony identifying the date of the match and the subjects in the video are sufficient to support a finding that the footage is of the incident at the January 23, 2020 wrestling match.

For those reasons, I found at hearing that the video was admissible, and I now find that it is competent, non-hearsay evidence supporting the tenure charges.

Unbecoming Conduct

The video depicts Respondent forcefully pulling two wrestlers off the mat after they went on to celebrate a teammate's victory. Once off the mat, one wrestler moves away from the mat and his teammates. Respondent walks around those teammates, approaches the wrestler, grabs him near the neck, and pushes him backward. The wrestler stumbles back and lands seated in a chair.

Respondent's actions are clearly unbecoming conduct for a high school coach. If it is not readily apparent that a coach cannot assault one of his athletes, the coaches are well trained in the standards they must meet. The NJSIAA and NJSCA Coaches Handbook and AD Baumann's "Directives for the Season" make clear a coach cannot use physical force against an athlete. Principal Peterson testified that he had no previous issues with Respondent as a coach, but Respondent "crossed a line that he can't come back from."

Peterson and Baumann's decision to suspend Respondent from coaching, and the District's tenure charges seeking to dismiss him from his coaching position, is well supported by the video evidence. Respondent unnecessarily and aggressively manhandled an athlete, an action sufficiently egregious to justify his dismissal from coaching.

Accordingly, I find that the District established the allegations of unbecoming conduct against Respondent in his position as a coach.

The District, however, failed to present sufficient evidence to establish that Respondent's misconduct as a coach impacts his ability to serve in his position as a special education teacher.

Respondent forcefully grabbed and pulled two wrestlers off the mat. Both Peterson and Baumann characterized that action as inappropriate but were more understanding because it happened in the moment and in the immediate excitement of the competition. They found his subsequent physical interaction with the one wrestler unacceptable because he had a least a few moments to deliberate and distance himself from the wrestlers' possible infraction at the end of the match. I agree with their evaluation of the incident and Respondent's level of culpability, but the District has not adequately explained how misconduct in the context of athletic competition is a reliable predictor of Grievant's future behavior in a classroom setting.

Peterson explained at hearing that he could not put Respondent in front of students again "knowing this is how he reacted." But the District offered no prior evidence that Respondent had ever physically confronted a student in the classroom, a setting far removed from an athletic competition. Respondent's summative evaluations for his teaching role for the 2011-12 through the 2018-19 school years consistently rate him as effective. He had two disciplinary actions (a reprimand in the 2019-20 school year and a salary increment withholding in the 2018-19 school year) on his record, neither of which related to interactions with students. In its brief, the District cited to numerous arbitration cases that sustained dismissals of teachers who had engaged in physical aggression toward a student. All those cases involved teachers engaged in misconduct while performing their duties as a teacher.

Respondent was hired for the coaching position separate and apart from his hiring as a teacher. He coached for Voorhees High School. He was a teacher at North Hunterdon High School, assigned to a Bethlehem Township school at the time of the incident. The District failed to adequately explain why Respondent's misconduct as coach at Voorhees impacted his ability

to teach at North Hunterdon or the Bethlehem Township school. Voorhees High School Principal Peterson persuasively testified to the reasons Respondent was no longer fit to coach for the high school. But he admitted that he did not supervise Respondent in his teaching capacity, which diminishes the effectiveness of his testimony as to why Respondent is no longer fit to be a teacher. No administration official from North Hunterdon testified on the impact of the incident on Respondent's teaching position. The evidence simply does not establish that Respondent's inappropriate physical aggression during an athletic competition translates to Respondent's fitness to maintain his composure and act appropriately and professionally in the classroom.

For these reasons, I find that the District's evidence did not establish allegations of unbecoming conduct against Respondent in his position as a special education teacher.

Award and Remedy

The District established the charge of unbecoming conduct against Respondent Eric Hall in his position as a Voorhees High School coach. Accordingly, the tenure charges related to the coaching positions are sustained, and dismissal from Respondent's coaching positions is warranted.

The District did not establish the charge of unbecoming conduct against Respondent Eric Hall in his position as special education teacher. Accordingly, the tenure charges related to the teaching position are dismissed.

As remedy, the District is ordered to remove the dismissal from the teaching position from Respondent's record. It is further ordered to reinstate Respondent to his former teaching

position without loss of seniority as soon as practicable after the date of this Award. It is further ordered to make Respondent whole for any losses, if any, incurred as a result of his dismissal from the teaching position.

The Arbitrator shall retain jurisdiction of the case for the sole purpose of resolving any dispute over the implementation of the remedy.

Walt De Treux

WALT De TREUX

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of:

ERIC HALL

Agency Docket No. 190-9/20

and

NORTH HUNTERDON-VOORHEES REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY

Affirmation

I, Walt De Treux, affirm that I am the individual who executed this Decision and Award.

Walt De Treux

WALT De TREUX 1/4/21

6-21

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Pennsauken, Camden County,

Petitioner,

v.

Lovell Pugh-Bassett, Interim Executive County Superintendent; Board of Education of the Township of Haddon, Camden County; and A.A., on behalf of minor child, A.L.,

Respondents.

Synopsis

Petitioner, the Board of Education of the Township of Pennsauken (Pennsauken), appealed the determination of the respondents, Lovell Pugh-Bassett, Interim Executive County Superintendent (Pugh-Bassett), and the Board of Education of the Township of Haddon, that A.A. and her minor child are homeless. Pennsauken contended that A.A. and A.L. are domiciled in Pennsauken, as they have resided in the Pennsauken home of A.A.'s mother for more than eighteen months, and further argued that Pennsauken is therefore not financially responsible for tuition costs related to A.L.'s attendance in Haddon Township schools. Pennsauken and Pugh-Bassett filed cross-motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; the issue to be determined here is whether A.A. and her minor child are homeless; although respondent A.A. has repeatedly indicated that her residence in Pennsauken is temporary, she has been living in her mother's Pennsauken home since 2017; as such, A.A. cannot continue to be considered homeless even if she initially moved to Pennsauken because she had been evicted from her previous home in Haddon Township. The ALJ determined that the family is no longer homeless as they have resided in Pennsauken at a fixed, regular and adequate nighttime residence for more than one year; therefore, Pennsauken has no financial responsibility for A.L.'s attendance in Haddon Township schools, and A.L. should be placed in Pennsauken schools if A.A. so desires. Accordingly, the ALJ granted Pennsauken's motion for summary decision and reversed Pugh-Bassett's homelessness determination.

Upon review, the Commissioner is constrained to remand this matter to the OAL as she is unable to determine from the present record whether the family is homeless. The Commissioner noted, *inter alia*, that although domicile attaches immediately when a child's dwelling becomes fixed, regular and adequate, homelessness determinations require a fact-specific analysis that includes the intentions of the parents or guardians. *M. O'K. v. Board of Education of the Borough of Cresskill, et al*, Commissioner Decision No. 325-14, decided August 12, 2014 at 3, *aff'd*, A-0828-14T4 (App. Div. Sept. 8, 2016). Such an analysis is not possible based upon the record before the Commissioner, as it is unclear whether the family is residing in the Pennsauken home out of necessity or whether it has become a permanent residence. Accordingly, the cross motions for summary decision were denied and the matter was remanded to the OAL for further proceedings consistent with the Commissioner's decision.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

6-21

OAL Dkt. No. EDU 16086-19
Agency Dkt. No. 94-5/19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Pennsauken, Camden County,

Petitioner,

v.

Lovell Pugh-Bassett, Interim Executive County Superintendent; Board of Education of the Township of Haddon, Camden County; and A.A., on behalf of minor child, A.L.,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by respondent Lovell Pugh-Bassett, Interim Executive County Superintendent (Pugh-Bassett), and the reply thereto filed by petitioner Pennsauken Board of Education (Pennsauken). Respondent Haddon Township Board of Education (Haddon Township) and respondent A.A. did not file exceptions.

This matter involves a homelessness determination regarding A.A. and her minor child, A.L. The family resided in Haddon Township from 2012 through 2016, when they were evicted due to financial hardship. After temporarily living with a friend in Bellmawr, they

moved into A.A.'s mother's home in Pennsauken in August or September of 2016 or 2017.[1] A.A. previously lived in the home for fifteen years as a child. The house has an unspecified number of bedrooms, a bathroom, electricity, running water, television, and a kitchen with a refrigerator, oven and stove top. While living in the Pennsauken home, A.A. cared for her mother, who had become handicapped. However, A.A. indicated in discovery responses that she wants to get her own place and possibly take her mother with her.

A.L. has continued to attend school in Haddon Township from the time the family was evicted in 2016 to the present. Upon moving to Pennsauken, A.A. informed Haddon Township on September 13, 2017 that her goal was to move back to the township so A.L. could finish elementary school at Strawbridge Elementary. She told Haddon Township again, on July 31, 2018, that her Pennsauken address was still temporary and that she wanted A.L to remain enrolled in Haddon Township's schools. On August 2, 2018, Haddon Township informed Pennsauken that as of September 1, 2018, A.L. would be deemed domiciled in Pennsauken because the family had lived there for one year. At that time, Pennsauken became financially responsible for the cost of A.L.'s education in Haddon Township. On December 17, 2018, following a meeting with Pennsauken's Homeless Liaison, A.A. informed the district that her living arrangement was temporary and that she was doubling up with more than one family due to economic hardship.

Following a request by A.A. to determine A.L.'s McKinney-Vento eligibility, Pugh-Bassett issued a determination on March 28, 2019, which found that A.L. is homeless, as the family lost their apartment due to financial hardship and has been residing with relatives out of necessity. Accordingly, Pugh-Bassett found that Pennsauken is financially responsible for

[1] The timeline of when A.A. moved into the Pennsauken home is unclear. While A.A.'s answer admits that she moved in August or September of 2017, her responses to interrogatories indicate that it was 2016.

A.L.'s education. Pennsauken filed an appeal challenging the homelessness determination, seeking for A.L. to be placed in Pennsauken's schools, if the family so desires, and a finding that Pennsauken would not be financially responsible for A.L. to attend Haddon Township schools.

On cross-motions for summary decision, the Administrative Law Judge (ALJ) concluded that the family was not homeless as they have resided at a fixed, regular and adequate nighttime residence for more than one year in Pennsauken. The ALJ found that although A.A. has repeatedly indicated that the residence is temporary, she has been living in her family home in Pennsauken since 2017. As such, even if she initially moved to Pennsauken because she had been evicted, she cannot continue to be considered homeless. Accordingly, the ALJ found that Pennsauken has no financial responsibility for A.L.'s attendance at Haddon Township's schools, and that A.L. should be placed in Pennsauken's schools, if A.A. desires.

Upon review, the Commissioner is constrained to remand this matter as she is unable to determine from the present record whether the family is homeless. Under the McKinney-Vento Act, homeless children are defined as "individuals who lack a fixed, regular and adequate nighttime residence," which includes "children sharing housing with other persons due to loss of their own housing, economic hardship, or a similar reason." 42 *U.S.C.A.* § 11434a. Similarly, under state law, homeless children are defined as "child[ren] or youth who lack[] a fixed, regular and adequate residence pursuant to *N.J.S.A.* 18A:7B-12 and *N.J.A.C.* 6A:17-2.2," which includes children living in the "residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own." *N.J.A.C.* 6A:17-1.2 and 2.2 (emphasis added).

Thus, conducting a homelessness evaluation to determine whether a child's home is considered fixed, regular and adequate requires a fact-specific analysis and "cannot rest upon a

simple calculation of the amount of time that children have spent in a particular location or municipality." *M. O'K. v. Board of Education of the Borough of Cresskill, et al*, Commissioner Decision No. 325-14, decided August 12, 2014 at 3, *aff'd*, A-0828-14T4 (App. Div. September 8, 2016). In conducting such a fact-specific inquiry, the Commissioner must consider the totality of the circumstances, as "[t]he reasons for the children's homelessness, their living conditions, and the resources and intentions of the parents or custodians are relevant." *Ibid.*

The Commissioner has previously addressed the fact-specific nature of a homelessness inquiry. In *M. O'K., supra,* following the foreclosure of their home in Cresskill, the O'K family occupied the bottom floor of their relatives' house in Little Ferry, which consisted of one small bedroom and a common area, without a bathroom or kitchen. The parents and two of the children shared the bedroom, while their third child slept in the common area. At the time of the litigation, neither parent was employed, and the family's sole income consisted of Social Security Disability benefits. During the pendency of the litigation, the O'K family represented that they were actively searching for a house in Cresskill. The Commissioner found, and the Appellate Division affirmed, that the O'K family became homeless due to the foreclosure of their home in Cresskill, and although they had been deemed domiciled in Little Ferry as a result of their residence in the district for over one year, they continued to remain homeless due to their shared living conditions and the parents' economic hardship.

In contrast, in *State-Operated School District of the City of Camden, Camden County v. C. Ann Volk, Executive County Superintendent, New Jersey Department of Education, and E.H., on behalf of minor child, K.M.*, Commissioner Decision No. 172-17R, decided June 20, 2017, the family relocated from Voorhees to Camden due to economic hardship that prevented them from continuing their lease. In the Camden residence, the family was able to use

the entire residence and was not relegated to a portion of the home that would otherwise be considered inadequate. E.H., the children's mother, argued that the residence was inadequate because the siblings had to share a room, which the Commissioner found was not uncommon. Furthermore, given E.H.'s ongoing employment at an annual salary of $65,000, the Commissioner was not persuaded that she was unable to find suitable housing in Voorhees, particularly in light of her testimony that she had stopped looking for apartments. The Commissioner found that the family was not residing in the Camden residence of out necessity and that it qualified as a "fixed, regular, and adequate" nighttime residence, such that the family was not homeless. *Ibid.*

Similar to *Volk*, in *J.G., on behalf of minor children, T.G. and C.G. v. Board of Education of the Township of Edison, et al,* Commissioner's Decision No. 125-20, decided June 15, 2020, the G. family moved in with J.G.'s mother in Edison after being evicted from their home in Milltown. The family was able to use three of the four bedrooms, the kitchen, bathrooms, all common areas, and utilities in the Edison home. J.G. and his wife were both employed, with an income of $71,000 a year, but they did not pay rent or contribute to housing costs, other than food and a storage facility. While they stated that their intent was to move back to Milltown, there was no documentation of their search for a new home, and J.G. admitted that he had not submitted a rental application in at least six months. The Commissioner found that, while J.G.'s intention may be to eventually move back to Milltown, the totality of the facts and circumstances demonstrate that the family is no longer homeless.

Here, the Commissioner cannot determine on the present record whether A.L. is homeless because it is unclear if the family is residing in the Pennsauken home out of necessity or whether it has become a permanent residence. There was no hearing on the merits, and A.A.'s

discovery responses fail to paint a clear picture as to the family's living situation. All the record demonstrates is that the home has bedrooms, a bathroom, and a kitchen. As such, the Commissioner cannot establish whether A.A. and A.L. have their own rooms, share a room, or sleep in a common area. Additionally, the Commissioner has no information on whether A.A. has an income, such that she can afford rent, or whether she has made any efforts to find a permanent home in Haddon Township. The fact that she has lived in the Pennsauken home for three years does not alone demonstrate that she is no longer living there out of necessity, especially when weighed against her stated intent that the living situation is temporary. Therefore, further information is necessary to determine whether the home is fixed, regular and adequate such that A.L. is no longer homeless under state and federal law.

Accordingly, Pennsauken's motion for summary decision is denied, Pugh-Bassett's cross-motion for summary decision is denied, and the matter is remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 6, 2021
Date of Mailing: January 8, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 16086-2019
AGENCY REF. NO. 94-5/19

BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,

Petitioner,

v.

LOVELL PUGH-BASSETT, INTERIM EXECUTIVE COUNTY SUPERTINTENDENT; BOARD OF EDUCATION OF HADDEN TOWNSHIP, CAMDEN COUNTY; AND A.A. ON BEHALF OF MINOR, A.L.

Respondents.

William C. Morlok, Esq., for petitioner Pennsauken Township Board of Education (Parker McCay, P.A., attorneys)

Michael Stanton, Esq., for respondent Haddon Township Board of Education (McCrosson and Stanton, P.C., attorneys)

Sadia Ahsanuddin, Deputy Attorney General, for respondents New Jersey Department of Education and Lovell Pugh-Bassett (Gurbir S. Grewal, attorney General of New Jersey, attorney)

A.A., o/b/o Minor Child, **A.L.,** respondent, pro se

Record Closed: August 27, 2020 Decided: October 9, 2020

BEFORE **CATHERINE A. TUOHY**, ALJ:

STATEMENT OF THE CASE

Petitioner, Board of Education of the Township of Pennsauken (Pennsauken), challenges the homelessness determination by the County Executive Superintendent. Petitioner contends that A.A. and her minor child, A.L., are not homeless, but are domiciled in their school district, having lived with A.A.'s mother (and A.L.'s grandmother) in the township of Pennsauken for over one and a half years. At issue is whether A.A. and her minor child are homeless.

PROCEDURAL HISTORY

This matter arose with the filing of a petition of appeal by Pennsauken on May 6, 2019. The State respondents, the New Jersey Department of Education (DOE) and Interim Executive County Superintendent Lovell Pugh-Bassett (ECS Pugh-Bassett) filed an answer on October 29, 2019. Respondent Haddon Township Board of Education (Haddon Township) filed its answer on November 12, 2019. The matter was transmitted by the Department of Education Office of Controversies and Disputes to the Office of Administrative Law (OAL) as a contested matter where it was filed on November 13, 2019 pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. An initial telephone pre-hearing conference was conducted on January 9, 2020 and subsequent telephone conferences were conducted February 19, 2020, February 26, 2020 and March 11, 2020. A.A. did not appear for these conference calls. An initial hearing was scheduled for March 26, 2020 but was adjourned due to COVID-19. A follow-up telephone conference was conducted on June 12, 2020 at which time A.A. appeared and agreed to file an answer and provide discovery.

A.A., on behalf of her minor child A.L., filed an answer to the petition and provided answers to interrogatories and responses to requests to admit on July 6, 2020. A subsequent telephone conference was conducted on July 9, 2020 at which time all parties appeared. It was agreed that the matter was appropriate for summary decision as there were no material facts in dispute as evidenced by A.A.'s answer to the petition, answers to interrogatories and responses to requests to admit. Pennsauken filed a motion for summary decision dated July 14, 2020. The State respondents filed opposition to same and cross-moved for summary decision dated August 10, 2020. Pennsauken filed its reply and opposition to the cross-motion on August 17, 2020. There being no further submissions filed, the record closed on August 27, 2020.

FACTUAL DISCUSSIONS AND FINDINGS

Based on the documents submitted by the parties in support of and in opposition to the motions for summary decision, I **FIND** the following as **FACT**:

Respondent, A.A. and her minor child, A.L. resided in Haddon Township from 2012 through 2016. Due to financial hardship, A.A. was evicted from her Haddon Township residence in 2016 and she and her daughter moved in temporarily with a friend in Bellmawr. In August or September 2017, A.A. and her daughter moved in with A.A.'s mother in her Pennsauken home and continue to reside there. At all times relevant herein, A.L. has attended school at Strawbridge Elementary in Haddon Township.

On September 13, 2017, A.A. completed a Haddon Township Homeless Students Parent Consultation and Educational Placement Form indicating that the Pennsauken address was a temporary address and that her last district of residence was the Haddon Township address and her previous school attended was Strawbridge Elementary in Haddon Township. A.A. indicated on the form that her goal was to move back to Haddon Township so A.L. could finish out elementary school at Strawbridge Elementary (Petition, Exhibit A). A.A. also filled out a McKinney-Vento Education Program registration form dated September

13, 2017 but noted that she did not need any of those services, but if things changed, she would contact them (Petition, Exhibit A).

On July 31, 2018, A.A. completed another Haddon Township Homeless Students Parent Consultation and Educational Placement Form indicating that the Pennsauken address was still a temporary residence and her last district of residence was in Haddon Township. She indicated that she wanted A.L. to attend Strawbridge Elementary again (Petition, Exhibit A).

By letter dated August 2, 2018, Anthony Fitzpatrick, Haddon Township Supervisor of Instruction wrote to Mitzi Giletto, the Pennsauken Homeless Education Liaison and advised that A.L. will become a legal resident of Pennsauken on September 1, 2018 after one full year of being categorized as being homeless, based on the Egg Harbor v. Mainland decision that established that a homeless family is considered to be legally domiciled in a school district after being in that district for a year (Petition, Exhibit A).

On December 17, 2018, A.A. met with the Homeless Liaison for Pennsauken, Rochelle Elliot, who completed a Pennsauken School District Family in Transition Form – Family Information interview with A.A. The form indicated that the last school attended was Strawbridge Elementary and her last permanent address was her Haddon Township address. The handwritten notes on the form indicate that "Mom is back in her childhood home." Under the "Reason for being homeless" section of the form, there is a handwritten note "Father passed who was paying half of the rent which resulted in her being evicted. Since his passing her mom has become handicapped. She is the caregiver @ this time. She wants her dgt to complete Strawbridge." (Petition, Exhibit C.)

A.A. completed a Pennsauken School District Student Residency Affidavit as to Homeless Status, dated December 17, 2018 and indicated that her current Pennsauken address was a temporary living arrangement due to loss of housing or economic hardship. A.A. indicated on the form that her last permanent address was the Haddon Township address and where the form indicated "Student's Present Living Situation", A.A. checked off

"Doubling-Up with more than one family in a house or apartment for economic hardship/similar reason". A.A. indicated on the form that it was her wish that her child return to her previous school, Strawbridge Elementary in Haddon Township (Petition, Exhibit C).

Also, during the meeting of December 17, 2018, A.A. completed another McKinney-Vento Regional Education Program intake form but wrote on the form that A.L. was in no need of additional services, but if anything changed, she would notify the Pennsauken liaison. (Petition, Exhibit C.)

By letter dated March 28, 2019, respondent ECS Pugh-Bassett, advised the Pennsauken Superintendent that the DOE Camden County Office of Education had been contacted by A.A. to make a McKinney-Vento eligibility determination for A.L. Based on the criteria outlined at N.J.A.C. 6A:17-2.2, the county office determined that A.L. is McKinney-Vento eligible and that Pennsauken is fiscally responsible for the student based on the fact that the family lost their apartment due to financial hardship and that the family is residing with friends/relatives out-of-necessity (Petition, Exhibit D).

A.A. has lived in the Pennsauken home for over fifteen years of her life, as it was her family home.

A.A. is living in the Pennsauken home and taking care of her mother who is disabled.

The Pennsauken home has bedrooms; a bathroom; a kitchen with a refrigerator, oven and stove top; running water; electricity; and a television. The Pennsauken home is an adequate place to live with regular sleeping accommodations.

LEGAL ANALYSIS

The petitioner, Pennsauken and respondents, DOE and ECS Pugh-Basset, both seek relief pursuant to N.J.A.C. 1:1-12.5. Petitioner seeks summary decision determining that: A.A. and A.L. are not homeless as they have resided at a fixed, regular and adequate

residence for over twelve months in Pennsauken; that Pennsauken has no financial responsibility for A.L.'s attendance at Haddon Township schools; and that A.L. should be placed in the Pennsauken public school district, if A.A. so desires. Respondents seek summary decision: confirming the ECS' determination that A.A. and A.L. are homeless as they lost their apartment in Haddon Township due to financial hardship and that the family is residing with relatives out-of-necessity; and that Pennsauken is financially responsible for A.L.'s attendance at Strawbridge Elementary.

N.J.A.C. 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c) which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986)). When the evidence "is so one-sided that

one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 251-2, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

Following the Brill standard, after considering all the papers and evidence filed in support and in opposition to petitioner's and respondents' motion and cross motion for summary decision, **I CONCLUDE** that there are no genuine issues of material fact that require a plenary hearing and that this matter is ripe for summary decision.

Although N.J.S.A. Const., Art. 8, Section4, paragraph 1 provides that free public education is a fundamental right under the New Jersey Constitution, it is well known that parents may not simply choose the school district that they wish their children to attend: the general rule is that school districts are responsible for providing a free education to children "domiciled" within the school district. N.J.S.A. 18A:38-1(a) states that Public schools shall be free to any person over five and under twenty years of age who is domiciled within the school district. "A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district." N.J.A.C. 6A:22-3.1(a)(1).

Under the McKinney-Vento Homeless Education Assistance Improvement Act of 2001, 42 U.S.C.A. § 11431 et seq., state educational agencies must ensure that each homeless child and youth has equal access to the same public education as every other child and youth.

The protections offered to homeless students and their parents under the federal McKinney-Vento Act and New Jersey's corresponding state law represent an exception to otherwise applicable residency rules. In contrast to the basic premise that students must change schools when they leave a school district, the laws protecting homeless students generally allow parents the choice to keep their children enrolled in their original school district if the parents relocate to another school district as the result of being homeless N.J.S.A. 18A:38-1(f); N.J.A.C. 6A:22-3.2(d). The district of residence for

children whose parents temporarily moves from one school district to another as the result of being homeless shall be the District in which the parent or guardian last resided prior to becoming homeless N.J.S.A. 18A:7B-12(c).

Under the federal McKinney-Vento Act and New Jersey's corresponding law, the term "homeless" refers to individuals who lack a fixed, regular and adequate residence. Federal law refers to the lack of an adequate "nighttime" residence 42 U.S.C. Sec.11434a (referring to 42 U.S.C.A. Sec.11302(a)(1)); N.J.S.A. 18A:7B-12(c); N.J.A.C. 6A17-1.2.

N.J.A.C. 6A:17-2.2 states that:

> (a) A district board of education shall determine that a child is homeless for purposes of this subchapter when he or she resides in any of the following:
>
> 1. A publicly or privately operated shelter designed to provide temporary living accommodations, including:
>
> i. Hotels or motels;
>
> ii. Congregate shelters, including domestic violence and runaway shelters;
>
> iii. Transitional housing; and
>
> iv. Homes for adolescent mothers;
>
> 2. A public or private place not designated for or ordinarily used as a regular sleeping accommodation, including:
>
> i. Cars or other vehicles including mobile homes;
>
> ii. Tents or other temporary shelters;
>
> iii. Parks;
>
> iv. Abandoned buildings;
>
> v. Bus or train stations; or

vi. Temporary shelters provided to migrant workers and their children on farm sites;

3. The residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own;

4. Substandard housing; or

5. Any temporary location wherein children and youth are awaiting foster care placement.

[N.J.A.C. 6A:17-2.2.]

This subchapter and subsection, however, must be read, in conjunction with 42 U.S.C.A. § 11302(a)(1), which defines "homeless" for the McKinney-Vento Act, and N.J.S.A. 18A:7B-12(c), which defines "homeless" for school-funding purposes. Under the former, "homeless" means lacking "a fixed, regular, and adequate nighttime residence." Under the latter, "homeless" means temporarily lacking "a fixed, regular and adequate residence." Thus, both definitions have at their core the concept of a fixed, regular, and adequate place to live with regular sleeping accommodations.

This shared concept is not a coincidence, as the New Jersey regulatory scheme, looks to the federal regulatory scheme for its definition of terms. See N.J.A.C. 6A:17-2.1 ("Nothing in this subchapter shall limit the educational rights of homeless children and youth or school district responsibilities under Subtitle VII-B of the Stewart B. McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.")).

Financial responsibility of the district of residence terminates when the family is deemed "domiciled" in another district, which occurs when the family has lived in another district for a full year or longer. At this time, financial responsibility shifts to the school district in which the student now resides. N.J.S.A. 18A:38-1(d) states: "Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-round dwelling place within

the district for one year or longer shall be deemed domiciled within the district for the purposes of this section."

Petitioner relies on Board of Education of the Township of Egg Harbor, Atlantic County, Petitioner, v. Board of Education of the Mainland Regional High School District, Atlantic County and New Jersey Department of Education, Division of Finance, Respondents, 170-, 210 WL 5691969 (N.J. Adm. Dec. 30, 2010) for the proposition that even if a family is homeless, it nonetheless achieves domicile for school law purposes after a year of residence, even if the family lived in motels in the school district. With that designation of domicile in the District, comes the provision by the district of a public education to the minor children.

Haddon Township, as the district of residence, was responsible for A.L.'s tuition when she first became homeless and she continued to go to school there throughout the 2017-2018 school year. After residing in Pennsauken for more than one year, A.A. and A.L. were deemed domiciled in Pennsauken pursuant to N.J.S.A. 18A:38-1(d) and financial responsibility shifted to Pennsauken. Pennsauken welcomes A.L. to enroll in school in their district but disputes the fact that she is homeless and entitled to continue in Haddon Township at Pennsauken's expense. Respondents argue that A.A. and A.L. remain homeless and A.L. is entitled to continue school in Haddon Township at Pennsauken's expense.

The ECS' determination that A.L. is McKinney-Vento eligible and that Pennsauken is fiscally responsible for the student was based on the fact that the family lost their apartment due to financial hardship and that the family is residing with friends/relatives out-of-necessity. There was no other analysis undertaken with regards to homelessness. It does not appear that any consideration was given to the fact that A.A. is currently residing in her family home and is the caregiver to her disabled mother. It does not appear that the ECS considered the adequacy of the Pennsauken home or the length of time A.A. has lived there.

The determination of whether a student is considered "homeless", triggering the protections for homeless students available under the law, is fact sensitive. In M. O'K. and S. O'K., A. O'K. and C. O'K. v. Bd. Of Educ. of the Borough of Cresskill and Bd. Of Educ. of the Borough of Little Ferry, OAL No. 14830-13, Agency No. 214-9/13 (N.J. Comm'r of Educ. Aug. 12, 2014); aff'd, 2016 WL, 4699166 (N.J. Sup. Ct. App. Div. Sept. 8, 2016, the school district argued that the students who lived with their parents in the grandparents' home were no longer "homeless" where they had lived there for over a year. The family prevailed in their argument that they were still "homeless" in part because five people occupied the bottom floor of the house which had no shower, sink or kitchen. This was found to be less than a regular and adequate nighttime residence.

More recently, an administrative law judge (ALJ) wrote that "homelessness is best viewed in a continuum." State-Operated Sch. Dist. of Camden v. Volk, EDU 4521-16, Initial Decision (March 22, 2017), modified, Comm'r (June 20, 2017), at *11, http://njlaw.rutgers.edu/collections/oal/. In that case, the ALJ thoroughly examined whether a family in a borderline situation was homeless and considered the totality of the circumstances. Among the factors the ALJ considered were intent, fixed location, regular use, and adequacy. The ALJ determined that the family intended to stay in their current living situation because they stopped looking for another place to live; that the location was fixed and that the use was regular because the family had lived in the same place for several years; and that their living situation was adequate because the children had a designated sleeping area and access to a kitchen and bathroom facilities, despite the sharing of rooms and limited space. To the extent that homeless status is identified as one without a "fixed, regular and adequate" living place, given the very lengthy period of residence, the adequacy of the living place and the regularity of occupation, the ALJ found that the child did live in a "fixed, regular, and adequate residence" and concluded that she was not homeless. See also L.C. on behalf of her Minor Child B.C. v. Bd of Educ. of the Twp. of Branchburg, Somerset County, 96 N.J.A.R. 2d(EDU)1003 (Commissioner found that "while her living arrangements with her brother [in his apartment] may not be permanent in the sense that she may wish to eventually return to Branchburg, the

evidence shows them to have become sufficiently fixed, regular, and adequate so as to preclude a finding of homelessness.")

The ECS' determination that A.L. is McKinney-Vento eligible and that Pennsauken is fiscally responsible for the student was based on the fact that the family lost their apartment due to financial hardship and that the family is residing with friends/relatives out-of-necessity. There was no other analysis undertaken with regards to homelessness. It does not appear that any consideration was given to the fact that A.A. is currently residing in her family home and is the caregiver to her disabled mother. It does not appear that the ECS considered the adequacy of the Pennsauken home or the length of time A.A. has lived there.

A.A. has been living in her mother's Pennsauken home with her daughter A.L. since 2017. The Pennsauken home is A.A.'s family home and she had previously resided there for fifteen years. A.A. is currently living there with A.L. and taking care of her mother who is disabled. The home is a fixed, regular, and adequate place to live with regular sleeping accommodations. Although A.A. has repeatedly indicated this is a temporary residence and she intends to return to Haddon Township, she has been living in her family home in Pennsauken since 2017. Even if initially she was considered homeless after being evicted from her Haddon Township apartment in 2016, she has resided in Pennsauken for more than one year in a fixed, regular and adequate home and can no longer be considered homeless as both the federal and New Jersey definitions of homelessness, have at its core, the lack of a fixed, regular and adequate nighttime residence.

For the reasons stated, I **CONCLUDE** that A.A. and A.L. are not homeless as they have resided at a fixed, regular and adequate place to live with regular sleeping accommodations for over twelve months in Pennsauken; that Pennsauken has no financial responsibility for A.L.'s attendance at Haddon Township schools; and A.L. should be placed in the Pennsauken public school district, if A.A. so desires. I further **CONCLUDE** that the ECS' determination should be **REVERSED.**

ORDER

Based on the foregoing, it is hereby **ORDERED** as follows:

1. The motion for summary decision filed by Pennsauken is **GRANTED**.

2. The cross-motion for summary decision filed by the DOE and ECS is **DENIED**.

3. The March 28, 2019 determination by the ECS is **REVERSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 9, 2020
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: October 9, 2020

Date Mailed to Parties: October 9, 2020

CAT/mel

APPENDIX

LIST OF EXHIBITS

For Petitioner:

Pennsauken's July 14, 2020 Notice of Motion for Summary Decision, Brief in Support, Statement of Undisputed Facts with attached Exhibits A through D

Pennsauken's Letter Brief dated August 17, 2020

For Respondents:

State Respondents, the New Jersey Department of Education and Interim Executive County Superintendent Lovell Pugh-Bassett's Letter Brief in Opposition to Pennsauken's Motion and in support of their Cross-Motion for Summary Decision dated August 10, 2020 with attached Exhibits A, B, and a copy of the Petition with attached Exhibits A through E

Berdecia, Christina

From:	Microsoft Outlook
To:	Jennifer Killough; Karin Molnar
Sent:	Friday, October 9, 2020 12:52 PM
Subject:	Relayed: EDU 16086-19 BOE of the Twp. of Pennsauken v. Lovell Pugh-Bassett et al (Initial Decision)

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

Jennifer Killough (jennifer.killough-herrera@doe.nj.gov)

Karin Molnar (Karin.Molnar@doe.nj.gov)

Subject: EDU 16086-19 BOE of the Twp. of Pennsauken v. Lovell Pugh-Bassett et al (Initial Decision)

Berdecia, Christina

From:	Microsoft Outlook
To:	William Morlok; mstantonlaw@comcast.net; Sadia Ahsanuddin; aage77@yahoo.com
Sent:	Friday, October 9, 2020 12:54 PM
Subject:	Relayed: EDU 16086-19 BOE of the Twp. of Pennsauken v. Lovell Pugh-Bassett et al. (Initial Decision)

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

William Morlok (wmorlok@parkermccay.com)

mstantonlaw@comcast.net (mstantonlaw@comcast.net)

Sadia Ahsanuddin (Sadia.Ahsanuddin@law.njoag.gov)

aage77@yahoo.com (aage77@yahoo.com)

Subject: EDU 16086-19 BOE of the Twp. of Pennsauken v. Lovell Pugh-Bassett et al. (Initial Decision)

8-21

8-21SEC

SEC Dkt No. D02-20
Agency Dkt. No. 238-11/20

New Jersey Commissioner of Education

Final Decision

In the Matter of Melissa Moore,
Board of Education of the Borough of Somerdale,
Camden County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) – finding that respondent violated the School Ethics Act for failure to timely file her Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent failed to file her Disclosure Statements despite the issuance of its October 27, 2020 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty, nor has she instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. Accordingly, respondent is hereby removed – effective on the date of mailing of this decision – as a school official found to have violated the School Ethics Act for failure to file her Disclosure Statements.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 8, 2021
Date of Mailing: January 12, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D02-20
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Melissa Moore,
Somerdale Board of Education, Camden County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 27, 2020, and served on October 27, 2020, through electronic mail, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.[1]

The OTSC issued by the Commission provided notification to Respondent that she had twenty (20) days to respond to the OTSC, and that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute. The Commission discussed this matter at its meeting on November 24, 2020.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. To this end, and annually, on or before April 30th of each year, all school officials, as defined in *N.J.S.A.* 18A:12-23, must file Disclosure Statements with their local board secretaries or charter school designees. *N.J.A.C.* 6A:28-3.1(a). In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

Respondent is a returning school official and, therefore, was required to file her Disclosure Statements by April 30, 2020. However, pursuant to Executive Order 159, and because of the ongoing Coronavirus (COVID-19) pandemic, the deadline for returning school

[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

officials to file their Disclosure Statements was extended until July 31, 2020. Despite this extension, Respondent failed to file her Disclosure Statements within the required timeframe.

By correspondence dated approximately October 7, 2020, from the Camden County Office of Education, Respondent was reminded that her Disclosure Statements had not yet been filed with the Commission. This correspondence further advised Respondent that if she failed to file her Disclosure Statements by October 14, 2020, the Commission had the authority to issue an OTSC, find her in violation of the Act, and recommend a penalty up to and including removal for her non-compliance.

When the correspondence from the Camden County Office of Education failed to cause Respondent to file her Disclosure Statements, the Commission sent her another letter dated October 15, 2020, and informed Respondent that failure to file her Disclosure Statements by October 23, 2020, would result in the Commission voting to issue an OTSC. The Commission further advised that, if an OTSC was issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file her Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by October 23, 2020, and despite receiving multiple reminders and opportunities to file her Disclosure Statements, an OTSC was issued by the Commission at its meeting on October 27, 2020. After having been served with the OTSC, Respondent still failed to file her completed Disclosure Statements, or to otherwise respond to the OTSC.

III. Decision/Penalty Recommendation

Based on the record as set forth above, at its meeting on November 24, 2020, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The Commission readily acknowledges and is sympathetic to the fact that the Coronavirus has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that Disclosure Statements are filed annually, can be completed from any computer or device with an internet connection, and that it was only required to issue an OTSC to ***two (2)*** of more than sixteen thousand (16,000) school officials about the statutory obligation to file Disclosure Statements. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files her Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: November 24, 2020

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D02-20

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), at the Somerdale Board of Education; and

Whereas, as a returning school official, Respondent was required to file her Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2020; and

Whereas, pursuant to Executive Order 159, and because of the ongoing Coronavirus (COVID-19) pandemic, the deadline for returning school officials to file their Disclosure Statements was extended until July 31, 2020; and

Whereas, Respondent failed to file her Disclosure Statements by July 31, 2020;

Whereas, at its meeting on October 27, 2020, and after several letters were sent to Respondent advising her of the need to file her Disclosure Statements, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file her Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent failed to file her Disclosure Statements following issuance of the OTSC; and

Whereas, Respondent failed to otherwise file a response to the OTSC; and

Whereas, at its meeting on November 24, 2020, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file her Disclosure Statements; and

Whereas, at its meeting on November 24, 2020, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files her Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its meeting on November 24, 2020, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at its public meeting on November 24, 2020.

Kathryn A. Whalen, Director

9-21+SEC
SEC Dkt No. D03-20
Agency Dkt. No. 239-11/20

New Jersey Commissioner of Education

Corrected Final Decision

In the Matter of Amy Vandergrift,
Board of Education of the Township of Greenwich,
Gloucester County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) – finding that respondent violated the School Ethics Act for failure to timely file her Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent failed to file her Disclosure Statements despite the issuance of its October 27, 2020 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty, nor has she instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. Accordingly, respondent is hereby removed – effective on the date of the mailing of this decision – as a school official found to have violated the School Ethics Act for failure to file her Disclosure Statements.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 15, 2021
Date of Mailing: January 15, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D03-20
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Amy Vandergrift,
Greenwich Township Board of Education, Gloucester County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 27, 2020, and served on October 27, 2020, through electronic mail, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.[1]

The OTSC issued by the Commission provided notification to Respondent that she had twenty (20) days to respond to the OTSC, and that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute. The Commission discussed this matter at its meeting on November 24, 2020.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. To this end, and annually, on or before April 30th of each year, all school officials, as defined in *N.J.S.A.* 18A:12-23, must file Disclosure Statements with their local board secretaries or charter school designees. *N.J.A.C.* 6A:28-3.1(a). In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

Respondent is a returning school official and, therefore, was required to file her Disclosure Statements by April 30, 2020. However, pursuant to Executive Order 159, and because of the ongoing Coronavirus (COVID-19) pandemic, the deadline for returning school

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

officials to file their Disclosure Statements was extended until July 31, 2020. Despite this extension, Respondent failed to file her Disclosure Statements within the required timeframe.

By correspondence dated approximately October 7, 2020, from the Gloucester County Office of Education, Respondent was reminded that her Disclosure Statements had not yet been filed with the Commission. This correspondence further advised Respondent that if she failed to file her Disclosure Statements by October 14, 2020, the Commission had the authority to issue an OTSC, find her in violation of the Act, and recommend a penalty up to and including removal for her non-compliance.

When the correspondence from the Gloucester County Office of Education failed to cause Respondent to file her Disclosure Statements, the Commission sent her another letter dated October 15, 2020, and informed Respondent that failure to file her Disclosure Statements by October 23, 2020, would result in the Commission voting to issue an OTSC. The Commission further advised that, if an OTSC was issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file her Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by October 23, 2020, and despite receiving multiple reminders and opportunities to file her Disclosure Statements, an OTSC was issued by the Commission at its meeting on October 27, 2020. After having been served with the OTSC, Respondent still failed to file her completed Disclosure Statements, or to otherwise respond to the OTSC.

III. Decision/Penalty Recommendation

Based on the record as set forth above, at its meeting on November 24, 2020, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The Commission readily acknowledges and is sympathetic to the fact that the Coronavirus has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that Disclosure Statements are filed annually, can be completed from any computer or device with an internet connection, and that it was only required to issue an OTSC to ***two (2)*** of more than sixteen thousand (16,000) school officials about the statutory obligation to file Disclosure Statements. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files her Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.



Robert W. Bender, Chairperson

Mailing Date: November 24, 2020

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D03-20

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), at the Greenwich Township Board of Education; and

Whereas, as a returning school official, Respondent was required to file her Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2020; and

Whereas, pursuant to Executive Order 159, and because of the ongoing Coronavirus (COVID-19) pandemic, the deadline for returning school officials to file their Disclosure Statements was extended until July 31, 2020; and

Whereas, Respondent failed to file her Disclosure Statements by July 31, 2020;

Whereas, at its meeting on October 27, 2020, and after several letters were sent to Respondent advising her of the need to file her Disclosure Statements, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file her Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent failed to file her Disclosure Statements following issuance of the OTSC; and

Whereas, Respondent failed to otherwise file a response to the OTSC; and

Whereas, at its meeting on November 24, 2020, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file her Disclosure Statements; and

Whereas, at its meeting on November 24, 2020, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files her Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its meeting on November 24, 2020, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at its public meeting on November 24, 2020.

Kathryn A. Whalen, Director

11-21

11-21

OAL Dkt. No. EDU 05244-17
Agency Dkt. No. 31-2/17

New Jersey Commissioner of Education

Final Decision

Board of Education of the City of Englewood, Bergen County,

Petitioner,

v.

Board of Education of the Borough of Englewood Cliffs, Bergen County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 12, 2021
Date of Mailing: January 12, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05244-17
AGENCY REF. NO. 31-2/17

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,
Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,
Respondent.

Dennis McKeever, Esq., for Petitioner (Sciarrillo, Cornell, Merlino, McKeever & Osborne, attorneys)

Stephen R. Fogarty, Esq., for Respondent (Fogarty & Hara, attorney)

Record Closed: November 16, 2020 Decided: November 17, 2020

BEFORE: **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner seeks an Initial Decision restricting Respondent from sending any of its public high school age students to any school district other than Petitioner's school district, among other things.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on April 18, 2017, as a contested case.

A prehearing conference was held on April 25, 2017. A prehearing order was entered on the same date.

Stephen P. Fogarty, Esq., filed a substitution of attorney on December 14, 2017, substituting for Vito Gagliardi, Esq., Porzio, Bromberg, Newman, the withdrawing attorney.

Dennis McKeever, Esq., Sciarrillo, Cornell, Merlino, McKeever & Osborne, filed a substitution of attorney on June 6, 2018, substituting for Mark A. Tabakin, Esq., Weiner Law Group, the withdrawing attorney.

A telephone conference with counsel was held on May 30, 2017, to discuss outstanding discovery. The June 6, 8 and 13, 2018 hearing dates were adjourned to permit Respondent to file a motion to dismiss for failure to provide discovery.

Respondent filed a motion to dismiss for failure to provide discovery on June 9, 2018. Petitioner requested an extension to file a reply and comply with discovery to July 9, 2018, without consent, on June 22, 2018. That request was granted by the undersigned. Petitioner filed its response to the motion to dismiss on July 6, 2018.

The motion was denied by Order dated July 13, 2018. Thereafter, by letter dated July 13, 2018, counsel for Respondent requested that I reconsider that Order as respondent had not filed a sur-reply. The undersigned was under the impression that a sur-reply would not be filed. The Order of July 13, 2018 is hereby vacated.

Respondent filed its sur-reply on July 13, 2018. Counsel for petitioner requested oral argument. Oral argument on respondent's motion to dismiss was held on August 8, 2018. The motion to dismiss was denied by Order dated August 8, 2018.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached Settlement Agreement.

I have reviewed the terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,

2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

It is hereby **ORDERED** that the parties comply with the terms of the settlement agreement; and

It is further **ORDERED** that Petitioner's petition is withdrawn with prejudice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 17, 2020
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: 11/18/20

Date Mailed to Parties: 11/18/20

FOGARTY & HARA, ESQS.
21-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
(201) 791-3432 Telecopier
Attorneys for Respondent
Board of Education of the Englewood Cliffs
Public School District
Our File No.: 144

BOARD OF EDUCATION OF THE ENGLEWOOD PUBLIC SCHOOL DISTRICT, Petitioner, v. BOARD OF EDUCATION OF THE ENGLEWOOD CLIFFS PUBLIC SCHOOL DISTRICT, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL Docket No.: EDU 5244-17N Agency Ref. No.: 31-2/17 **SETTLEMENT AGREEMENT**

THIS AGREEMENT is made and entered into as of this _____ day of _____ 2020 by, among, and between the Board of Education of the Englewood Public School District ("Englewood" or "Petitioner") and the Board of Education of the Englewood Cliffs Public School District ("Englewood Cliffs" or "Respondent").

WHEREAS, Respondent has designated Petitioner's Dwight Morrow High School as the high school for its students pursuant to N.J.S.A. 18A:38-11; and

WHEREAS, on or about February 15, 2017, Petitioner filed a Verified Petition for a Declaratory Ruling with the Commissioner of Education, bearing Agency Reference No. 31-2/17 and OAL Docket

No. EDU 5244-17N (the "Petition"), wherein Petitioner set forth certain allegations regarding the sending/receiving relationship between Petitioner and Respondent; and

WHEREAS, Respondent filed an Answer to the Petition and Separate Defenses denying each and every count in the Petition because it believes it acted lawfully and properly at all times and in all respects; and

WHEREAS, the Parties, each having received independent legal advice in this matter, have agreed that their mutual interests require them to resolve this dispute upon the terms and conditions more fully set forth hereinafter.

NOW, THEREFORE, in consideration of the mutual promises of the parties to this Full and Final Release of All Claims and Settlement Agreement ("Agreement"), the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Withdrawal of the Petition.** Upon execution of this Agreement by both parties, the parties' attorneys shall execute and file a voluntary stipulation of dismissal with prejudice of the Petition.

2. **Sending-Receiving Relationship.** Englewood Cliffs and Englewood shall each establish a committee for the purpose of meeting to discuss and develop an updated send-receive describing the educational services being purchased by Englewood Cliffs and the parties' respective rights and responsibilities in accordance

with the applicable New Jersey statutes and rules and regulations of the State Board of Education.

(a) Englewood and Englewood Cliffs shall agree upon a schedule of meeting dates to establish the terms of their sending receiving relationship during the 2020-2021 school year.

(b) Englewood and Englewood Cliffs shall use their best efforts to finalize and approve a written contractual agreement on or before April 30, 2021.

(c) The January 6, 1966 Agreement between Englewood and Englewood Cliffs is hereby acknowledged as being the only prior written send-receive agreement between the parties and Dwight Morrow High School continues to be the designated high school for Englewood Cliffs students.

3. **Special Education.** In consideration of the withdrawal of the Petition, the parties agree to implement the following provisions regarding Respondent's special education students commencing with the incoming freshman class of 2018-2019.

(a) The Englewood Cliffs Child Study Team (CST) will be responsible for identifying the needs of special education students (both in district and out of district) enrolled in Englewood Cliffs prior to their attendance at Dwight Morrow High School. Each eighth

grade student's individual education program (IEP) will be reviewed by the Englewood Cliffs CST and Englewood CST at a transition meeting attended by both parties no later than February 1 of the students' eighth grade year

(b) Englewood agrees to provide all services of its CST to Englewood Cliffs high school students attending Dwight Morrow High School or other appropriate educational placements in accordance with N.J.A.C. 6A:14-1 et seq. Englewood Cliffs students will have access to the full continuum of special education programs and services set forth in N.J.A.C. 6A:14-1 et seq. at Dwight Morrow High School to ensure that they receive a free appropriate public education (FAPE) in the least restrictive environment. In-district special education programs and services will be considered the preferred least restrictive environment and out-of-district placements will be considered only if the Englewood Cliffs student cannot receive FAPE within the in-district program options, including but not limited to participation in educational programs, interscholastic athletic and/or intramurals teams, activities, and events; extracurricular clubs, activities and events; and other school-related events and activities, and in accordance with State and federal regulations.

(c) Charges for any Englewood Cliffs students placed in any special education program shall accrue for that program only from the date of enrollment in the specialized program. Written notification shall be provided to Englewood Cliffs prior to placement in such a special education program.

(d) Decisions regarding out-of-district placements for Englewood Cliffs students shall be made jointly and cooperatively between the Englewood Cliffs CST and Englewood CST. Englewood will include Englewood Cliffs in all discussions regarding potential out-of-district placements of Englewood Cliffs students. Englewood Cliffs will necessarily include Englewood in all discussions regarding potential out of district placements. The Englewood CST shall make a good faith effort to reach agreement with the Englewood Cliffs CST concerning each IEP for an out of district placement.

(e) By February 1 of each year, Englewood will provide Englewood Cliffs with a list of all the Englewood Cliffs' students who are currently in out-of-district placements, the address of each placement, length of time the students have been in those placements, anticipated duration of the placements, and the rationale for those out-of-district placements. Each

time an Englewood Cliffs student is placed out-of-district, the name of the student, address of the out-of-district placement, anticipated duration of the placement, and rationale for the placement will be provided to Englewood Cliffs as soon as practicable.

(f) Once a student is enrolled at Dwight Morrow High School, the Englewood CST shall be responsible for expediting any out-of-district placement that has been jointly and cooperatively agreed upon by Englewood Cliffs and Englewood and informing the Englewood Cliffs and Englewood School Business Administrators and CSTs of arrangements and costs.

(g) In no event shall Englewood Cliffs be responsible for any legal fees or other costs associated with a dispute relating to an Englewood Cliffs student's IEP that has been developed by Englewood.

(h) Commencing with the incoming freshman class for the 2018-2019 school year for whom Englewood participated in the transition meetings, it will be the responsibility of Englewood to implement and monitor the Englewood Cliffs students' high school IEPs. It will continue to be the responsibility of Englewood Cliffs to implement and monitor students' high school IEPs for those

students placed out of district prior to the 2018-2019 school year without collaboration with Englewood.

(i) When an Englewood Cliffs student attends an out-of-district placement, Englewood Cliffs shall be responsible for any and all costs related to the placement, including but not limited to, the tuition and transportation costs for said placement in lieu of the per pupil tuition cost. Englewood Cliffs shall enter into a contract directly with the identified out of district provider and make all such tuition and other payments directly to the provider of such services. Englewood shall facilitate the transportation services and bill Englewood Cliffs accordingly.

(j) If an Englewood Cliffs student requires additional special education services, staffing, and/or equipment for which Englewood incurs billable costs, Englewood Cliffs shall reimburse Englewood for same. These costs include the following:

(1) One-to-one aides, nurses, and interpreters prescribed in an IEP for a specific Englewood Cliffs student.

(2) Externally contracted professional services (i.e., applied behavior analysis therapy), prescribed in an IEP for a specific Englewood Cliffs student

because he/she requires professional services neither present on the Englewood staff nor typically found in public school staffs. For purposes of this Agreement, "professional services" means services rendered or performed by a person authorized by law to practice a recognized profession and whose practice is regulated by law and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training.

(3) Extended school year services when they are prescribed in an IEP for a specific Englewood Cliffs student who is placed in an out-of-district educational setting.

(4) Specialized equipment not already available within Englewood if specifically prescribed in the IEP for an Englewood Cliffs student. Englewood Cliffs will thereafter own the equipment unless it is purchased from Englewood Cliffs by Englewood. If such equipment, however, will be usable and available for at least one other student during a four-year

period, then the cost shall not be billed to Englewood Cliffs.

(k) In accordance with N.J.A.C. 6A:23A-17.1, Englewood Cliffs will pay Englewood the actual direct instructional cost per student for resource room services calculated on an hourly basis when resource room is prescribed in an IEP for a specific Englewood Cliffs student.

4. **Mutual Releases.** In exchange for the terms set forth above, and subject to the terms of this Agreement, the parties hereby mutually release and discharge each other (as well as their elected members, trustees, officials, employees, and agents) from all claims, demands, actions, judgments, damages, liabilities, and executions of any kind, known or unknown, that were brought or could have been brought for any acts or omissions through the date of this Settlement Agreement in connection with the Petition. It is also expressly understood, however, that either party may bring an action to enforce the terms of the within Agreement. Each party understands that it is the intention of this Settlement Agreement to fully dispose of all claims. In that regard, each party agrees not to act in concert with a third party to prosecute or otherwise pursue a claim against the other party for any acts or omissions, known or unknown, through the date of this Settlement Agreement.

5. **Severability**. The provisions of this Agreement are severable and, if any part is found to be unenforceable, the other portion shall remain fully valid and enforceable. This Agreement shall survive the termination of any arrangements contained herein.

6. **Attorney's fees**. All parties shall bear their own attorneys' fees, costs, and/or expert witness fees for the entirety of any actions or matters related to the foregoing matter. This settlement is the compromise of disputed claims and shall never be treated as an admission of liability by either party for any purpose. It is expressly said that neither party is the prevailing party for any purpose, including attorneys' fees, costs, and/or expert witness fees.

7. **No Admission**. This Agreement shall never be treated as an admission of liability or wrongdoing by either party for any purpose.

8. **Representation**. The Parties represent and agree that they have had the opportunity to discuss all aspects of this Agreement with an attorney of their choice, that they have carefully read and fully understand all the provisions of this Agreement, that they understand the final and binding effect of the Agreement, and that they freely and voluntarily enter into this Agreement without duress or coercion.

9. **No Reliance.** This Agreement constitutes the entire understanding of the parties with respect to the subject matter hereof, and there are no representations, warranties, covenants or undertakings other than those expressly set forth herein. Each party acknowledges that they are not relying upon any oral statements, representations, promises or expectations which are not expressly and explicitly set forth in this Agreement, which alone fully and completely expresses all agreements between the parties.

10. **Full Understanding.** The parties acknowledge that they are entering into this Agreement of their own accord and without any undue influence, coercion or pressure of any kind; that all the provisions of this Agreement, as well as all questions pertinent thereto, have been fully and satisfactorily explained to them; that they have given due consideration to such provisions and questions, and understand them clearly; that the provisions embodied in this Agreement are in all respects acceptable to them and that they, therefore, accept these provisions in full and final satisfaction of all claims and demands which have been raised or which could have been raised in any litigation.

11. **Waiver.** The failure of either party hereto to insist upon the strict conditions of this Agreement or to exercise any right, remedy, or election herein contained or permitted by law

shall not constitute or be construed as a waiver or relinquishment for the future of such covenant, agreement, term, provision, limitation, condition, right, remedy, or election, but the same shall continue to remain in full force and effect. NO covenant, agreement, term, provision, limitation, or condition of this Agreement shall be deemed to have been waived by either party unless such waiver shall be in writing, signed by such party or its duly authorized agent.

12. **Governing Law.** This Agreement shall be governed and construed under the laws of the State of New Jersey.

13. **Captions.** The captions of the sections of this Agreement are inserted only as a convenience and for reference and shall in no way define, limit, or describe the scope of this Agreement or any section or provision thereof. References to section numbers are to those in this Agreement unless otherwise noted

14. **Entire Agreement.** This Agreement contains the entire agreement between the parties hereto and any executory agreement hereinafter made between them shall be ineffective to change, modify, relieve, discharge, terminate, or effect an abandonment to this Agreement, in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, waiver, release, discharge, termination, or the effecting of the abandonment is sought.

15. **Counterparts**. The Parties may execute this Agreement in counterparts, each of which is deemed an original and all of which only constitute one original. An electronic or facsimile signature of this Settlement Agreement by one or all parties shall be considered an acceptable form and manner of execution upon delivery to the other.

IN WITNESS WHEREOF, the parties have caused this Settlement Agreement to be approved on their behalves by duly authorized officers.

WITNESS:

Jessenia Kan
Business Administrator/
Board Secretary

DATED: 9/29/2020

BOARD OF EDUCATION OF THE ENGLEWOOD CLIFFS PUBLIC SCHOOL DISTRICT

BY: Shanna J
SHANNA JAFRI
Board President

DATED: 9/29/2020

WITNESS:

CHERYL BALLETTO
Business Administrator/
Board Secretary

DATED: _____

BOARD OF EDUCATION OF THE ENGLEWOOD PUBLIC SCHOOL DISTRICT

MOLLY CRAIG BERRY
Board President

DATED: _____

15. **Counterparts.** The Parties may execute this Agreement in counterparts, each of which is deemed an original and all of which only constitute one original. An electronic or facsimile signature of this Settlement Agreement by one or all parties shall be considered an acceptable form and manner of execution upon delivery to the other.

IN WITNESS WHEREOF, the parties have caused this Settlement Agreement to be approved on their behalves by duly authorized officers.

WITNESS:

BOARD OF EDUCATION OF THE ENGLEWOOD CLIFFS PUBLIC SCHOOL DISTRICT

_____

Business Administrator/
Board Secretary

BY: _____
SHANNA JAFRI
Board President

DATED: _____

DATED: _____

WITNESS:

BOARD OF EDUCATION OF THE ENGLEWOOD PUBLIC SCHOOL DISTRICT

CHERYL BALLETTO
Business Administrator/
Board Secretary

DATED: 10/21/2020

MOLLY CRAIG BERRY
Board President

DATED: 10/21/2020

BOARD

21-B-05 APPROVAL – SETTLEMENT AGREEMENT WITH ENGLEWOOD CLIFFS BOARD OF EDUCATION

BE IT RESOLVED, the Englewood Board of Education approves a settlement agreement with Englewood Cliffs Board of Education and authorizes the Board President to execute the settlement.

I do hereby certify that the aforegoing
is a true and exact copy of a resolution
adopted by the Englewood Board of Education
on 10-15-2020
Date

Board Secretary/Business Administrator

ENGLEWOOD CLIFFS PUBLIC SCHOOLS
143 Charlotte Place
Englewood Cliffs, NJ 07632-2681
Telephone (201) 567-7292 FAX: (201) 567-2738

Jennifer Brower, Ed. D.
Superintendent of Schools

Jessenia Kan
Business Admin/Board Secretary

CERTIFIED RESOLUTION

F14. **BE IT RESOLVED** that the terms, stipulations and conditions as established in the Settlement Agreement between the Englewood Board of Education and the Englewood Cliffs Board of Education which is annexed to this Resolution, are hereby adopted and approved by the Board. The Board President and Business Administrator/Board Secretary are hereby authorized and directed to execute the Settlement Agreement and any other documents necessary to effectuate same.

Board Members Present for Vote: Eugene Chang, Philip Choi, George Drimones, Edmond Duda, Katherine Kang, Kevin Liau, Gerard Misk, Susan Pak, and Shanna Jafri.

Absent from Vote: None

Motion was made by Mr. Choi and seconded by Mr. Misk to approve Resolution F14.

AYES:	9
NAYS:	0
ABSTENTIONS:	0

I hereby certify that the within Resolution was adopted by the Englewood Cliffs Board of Education at a Special Meeting held September 29, 2020 by the majority of the Board.

Jessenia Kan
Business Administrator/Board Secretary

Dated: September 29, 2020

12-21

OAL Dkt. No. EDU 02397-20
Agency Dkt. No. 5-1/20

New Jersey Commissioner of Education

Final Decision

S.M., on behalf of minor children, J.Y., J.Y. and L.D.

Petitioner,

v.

Board of Education of the City of Gloucester, Camden County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled October 28, 2020 OAL hearing, has been reviewed. Petitioner did not file an explanation for the failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 12, 2021
Date of Mailing: January 12, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

13-21

New Jersey Commissioner of Education

Final Decision

L.B., on behalf of minor child, B.C.,

Petitioner,

v.

Board of Education of the Township of Washington, Gloucester County,

Respondent.

Synopsis

Pro se petitioner appealed the determination of the respondent Board that B.C. has not resided within the Washington Township School District since July 6, 2019 and is therefore not eligible to receive a free public education in Washington Township Public Schools. The Board filed a motion for summary decision, which petitioner failed to answer, and sought reimbursement of tuition for the period of B.C.'s ineligible attendance.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner notified the Board at the end of the 2018-2019 school year that she was moving from her previous address in Sewall to an address in Pine Hill, which is located outside of the respondent's school district; however, B.C. was never registered in Pine Hill schools, and continued to attend Washington Township schools for the 2019-2020 school year; pursuant to *N.J.S.A.* 18A:38-1(b)(2), petitioner has the burden of proof in a determination of residency; and petitioner has offered no competent proof that she and B.C. were domiciled within Washington Township after July 6, 2019. The ALJ concluded that B.C. was not entitled to receive a free public education in the Washington Township School District following the 2018-2019 school year; accordingly, the respondent Board is entitled to reimbursement for tuition costs in the amount of $18,077 for the 2019-2020 school year, plus $100.43 per school day from the beginning of the 2020-2021 school year through the date of this decision, during which time petitioner's minor child was ineligible to attend school in respondent's district.

Upon review of the record in this matter, the Commissioner concurred with the ALJ's findings and conclusion. The Initial Decision was adopted as the final decision in this matter, and the petitioner was ordered to reimburse the Board for tuition in the amount of $18,077, plus $100.43 for every school day during the 2020-2021 school year that B.C. attended Washington Township schools. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

13-21

OAL Dkt. No. EDU 07411-20
Agency Dkt. No. 103-5/20

New Jersey Commissioner of Education

Decision

L.B., on behalf of minor child, B.C.,

Petitioner,

v.

Board of Education of the Township of Washington, Gloucester County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1]

Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain her burden of establishing that she was a domiciliary of Washington Township from July 6, 2019 to the present, or that her minor child, B.C., resided with a domiciliary of Washington Township who was responsible for B.C.'s care and support. The Commissioner further concurs with the ALJ's conclusion that B.C. was, therefore, not entitled to a free public education in the District's schools during that time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in Washington Township. Therefore, the Board is entitled to tuition reimbursement in the amount

[1] Correspondence sent by petitioner, which the Commissioner deems to be her exceptions, were not timely pursuant to *N.J.A.C.* 1:1-18.5 and were therefore not considered by the Commissioner.

of $18,077 for the 2019-2020 school year, plus $100.43 per school day from the beginning of the 2020-2021 school year to the date of this decision, during which time petitioner's minor child was ineligible to attend school in respondent's district.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $18,077 for the 2019-2020 school year, plus $100.43 per school day from the beginning of the 2020-2021 school year to the date of this decision, for tuition costs incurred during the time period in which B.C. was ineligible to attend school in Washington Township. The petition of appeal is hereby dismissed.

IT IS SO ORDERED. [2]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 12, 2021
Date of Mailing: January 12, 2021

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

January 13, 2021

VIA EMAIL
Stephen Fogarty, Esq.
Fogarty & Hara
21-00 208 South
Fair Lawn, New Jersey 07410

Robert Schwartz, Esq.
Schwartz Law Group
12 Centre Drive
Monroe Township, New Jersey 08831

Re: *In the Matter of the Tenure Hearing of Thomas Curry, School District of the Borough of Bergenfield, Bergen County, Agency Dkt. No. 253-12/20.*

Dear Counsel:

I have reviewed the record in the contested case entitled *In the Matter of the Tenure Hearing of Thomas Curry, School District of the Borough of Bergenfield, Bergen County, Agency Dkt. No. 253-12/20.* The record includes the District's request to withdraw the tenure charges filed in this matter, as well as the respondent's formal resignation filed with the District. In light of this information, I find that no purpose would be served by further proceedings in this matter.

Accordingly, I approve the dismissal of the tenure charges with prejudice and dismiss the matter as a contested case before me.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

14-21L

18-21

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

18-21L

January 26, 2020

Benjamin W. Spang, Esq.
Dilworth Paxson LLP
457 Haddonfield Road, Suite 700
Cherry Hill, NJ 08002

Dr. James J. Lynch
4 Wilshire Boulevard
Swedesboro, NJ 08085

Re: *James J. Lynch v. Michael Skowronski, East Greenwich Township Board of Education, Gloucester County, Agency Dkt. No. 4-6/20A, Commissioner Decision No. 284-20SEC*

Dear Parties:

I have reviewed the materials filed in connection with appellant, James Skowronski's Motion for Reconsideration of the December 15, 2020 Commissioner decision.

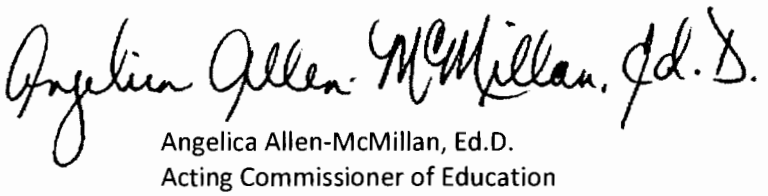
Pursuant to *N.J.A.C.* 6A:3-1.15(b)(2), a motion for reconsideration shall be determined based upon the following:

i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
iii. newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

Upon review and consideration of the submissions, I find that the appellant has failed to satisfy the factors set forth in *N.J.A.C.* 6A:3-1.15(b)(2). Appellant's motion is based on arguments previously made during the proceedings before the Office of Administrative Law and School Ethics Commission, which were duly considered in rendering the December 15, 2020 decision. The appellant's disagreement is simply with the outcome of the decision, which is not a sufficient basis for the decision to be reconsidered.

Accordingly, the Motion for Reconsideration is hereby DENIED.[1]

Sincerely,



Angelica Allen-McMillan, Ed.D.
Acting Commissioner of Education

c: State Law Library

VIA EMAIL ONLY

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

19-21

19-21SEC

SEC Dkt No. 25-16
OAL Dkt. No. EEC 07118-17
Agency Dkt. No. 10-12/19A

New Jersey Commissioner of Education

Final Decision

In the Matter of Lorenzo Richardson,
Jersey City Board of Education,
Hudson County.

This matter involves an appeal of the School Ethics Commission's (Commission) November 20, 2019 decision that appellant Lorenzo Richardson, a member of the Jersey City Board of Education (Board), violated *N.J.S.A.* 18A:12-24(g) and *N.J.S.A.* 18A:12-24.1(e) of the School Ethics Act (Act) by filing a petition of appeal seeking to compel action by the board of education on which he served. Having carefully reviewed the Commission's decision and the record in its entirety, the Commissioner finds that the Commission's decision finding that appellant violated the Act is supported by sufficient, credible evidence, and that appellant failed to establish that the decision is arbitrary, capricious, or contrary to law. *N.J.A.C.* 6A:4-1.1(a). However, the Commissioner disagrees with the Commission's recommended penalty of censure and modifies the penalty to a reprimand.

This matter arises from a complicated dispute regarding the contract of the Superintendent of the Jersey City school district. Appellant believed that the Board was required to vote on the renewal or nonrenewal of the Superintendent's contract[1] and, when he was

[1] The question of whether the Board was required to vote on the contract is not before the Commissioner in this appeal and will not be addressed.

unsuccessful in getting the Board to hold a vote, he filed a petition of appeal with the Commissioner against the Board president and attorney. Appellant was not authorized by the Board to file the petition of appeal. Thereafter, a member of the public filed a complaint against appellant with the Commission. The Commission found probable cause that appellant violated *N.J.S.A.* 18A:12-24(g) and *N.J.S.A.* 18A:12-24.1(e). Following a hearing at the Office of Administrative Law, the Administrative Law Judge (ALJ) concluded that appellant violated *N.J.S.A.* 18A:12-24(g) and *N.J.S.A.* 18A:12-24.1(e) and recommended a penalty of a reprimand. In its November 20, 2019, decision, the Commission adopted the ALJ's factual and legal determinations, but modified the recommended penalty to a censure.

In his appeal and exceptions, appellant argues that the ALJ found that his conduct was "not overtly unethical or conflicted," which should have ended the analysis. Appellant contends that there is no legal basis to find a *per se* violation of the Act, as the ALJ did here. According to appellant, the Act was not intended as a set of strict liability rules; rather, the Act's purpose is to prevent actual conflicts and self-dealing. Appellant claims that he was not attempting to gain a personal advantage for himself or anyone else, unlike the board members in various cited cases who were found to have violated the Act. Instead, appellant argues that he was merely trying to compel the board to hold a formal vote on the Superintendent's contract – an action within the scope of his duties as a board member, and one similar to actions by board members in cited cases who were found not to have violated the Act.

With respect to the penalty, appellant argues that the Commission improperly enhanced the penalty recommended by the ALJ. First, appellant disputes the Commission's finding that because he had been a Board member for more than four years, "he should be acutely aware of his ethical obligations under the Act." Appellant points out that at the time he

filed the petition of appeal that gave rise to this matter, he had served for only one year and had received, at most, one training session. Second, appellant contends that the Commission misstated the record in finding that he did not want the Board president and attorney to be aware of his filing, because the documents demonstrate that both of them were copied on the petition of appeal, and the attorney specifically acknowledged in his testimony that he received a copy of the petition at the time it was filed. Finally, appellant takes issue with the Commission's conclusion that a reprimand will not deter board members from taking unilateral actions, because a reprimand is, in fact, designed to deter unethical conduct and there is nothing to suggest that a reprimand would not be an effective and sufficient deterrent.

In reply, the Commission argues that its decision that appellant violated *N.J.S.A.* 18A:12-24(g) and *N.J.S.A.* 18A:12-24.1(e) was reasonable and supported by the record. The Commission notes that appellant does not dispute the ALJ's factual findings and admits that he filed a petition against the Board's president and attorney, challenging the official actions of the Board, without the Board's approval to do so. According to the Commission, the plain and unambiguous language of the Act proscribes appellant's conduct. Furthermore, the Commission contends that there is no "intent" or "mens rea" element to any of the provisions of the Act, contrary to appellant's arguments.

The Commission also contends that a penalty of censure is appropriate. In response to appellant's argument that he had only been a member of the Board for one year at the time of his actions, the Commission argues that there is no period of time for which ignorance may justify the violation of public trust. The Commission indicates that appellant misinterpreted the portion of its decision stating that appellant did not copy the Board's president and attorney, because that statement referred to a letter appellant sent to the Commissioner – but not the Board

president or attorney – seeking intervention, prior to filing the petition of appeal on which all parties were copied. Finally, the Commission takes issue with appellant's characterization of its determination that a reprimand was not the appropriate penalty. The Commission argues that it did not find that reprimands were ineffective, but rather that if overt divisiveness such as appellant's is not publicly sanctioned, it will undermine the work of the Board and the fidelity of its decision-making process, such that it was appropriate for the Commission to modify the penalty to a censure.

Upon a comprehensive review of the record, the Commissioner finds that the decision of the Commission that appellant violated *N.J.S.A.* 18A:12-24(g) and *N.J.S.A.* 18A:12-24.1(e) is supported by sufficient credible evidence, and appellant has not established that the Commission's decision is arbitrary, capricious, or contrary to law. *N.J.S.A.* 18A:12-24(g) provides that a board member shall not represent any person or party other than the Board in connection with any proceeding involving the school district in which he serves. By filing a petition of appeal with the Commissioner that involved the Jersey City school district, without authorization of the Board, appellant plainly violated the statute. Moreover, his action went beyond the scope of his duties and had the potential to compromise the Board. *N.J.S.A.* 18A:12-24.1(e); *N.J.A.C.* 6A:28-6.4(a)(5).

Appellant cites to *Molica v. Sayre, Pequannock Township Bd. of Educ., Morris City.*, SEC Dkt. No. 07-13 (June 24, 2014) as an example of a board member who was found not to have violated the Act. In that matter, the ALJ found, and the Commission affirmed, that a board president who participated in a telephone conference with the board attorney and superintendent about a legal issue, the result of which was the board attorney sending a letter to a third party, did not take private action that could compromise the board even though the rest of

the board was not involved in the conference or the decision to send the letter. Appellant argues that he also consulted privately with the Board president and attorney regarding his concerns, so he also should be found not to have violated the Act. But appellant's argument disregards the fact that his discussions with the Board president and attorney are not what resulted in the finding that he violated the Act. The action that violated the Act was appellant's filing of a petition of appeal – an action that requires the approval of the majority of the Board – without authorization.

In another case cited by appellant, *Good v. Brattoli, Little Ferry Bd. of Educ., Bergen Cty.*, SEC Dkt. No. 21-14 (November 25, 2014), the respondent board member received a complaint from the public that the complainant board member allegedly misused a school vehicle. The respondent asked for additional information to corroborate the complaint and then forwarded all of the information to the superintendent. The Commission found that the respondent did not make personal promises or take action beyond the scope of her duties that had the potential to compromise the board and that, in fact, she had a duty to report a constituent's concerns to the superintendent for resolution. Appellant argues that he was acting similarly by communicating with appropriate officials about an issue that was likely to impact the school. However, instituting a legal action – without approval of the Board and adverse to the Board – is a step far beyond gathering and communicating information within the district.

In regard to the appropriate penalty, the Commissioner disagrees with the Commission and finds a reprimand to be appropriate. The penalty section of the Commission's decision contains several factual inaccuracies, which were not persuasively corrected by the Commission's brief on appeal. First, the Commission relied on the fact that appellant has been a board member for more than four years, despite the fact that appellant had been a board member

for only one year at the time of his actions in this case. While the Commissioner agrees with the Commission that ignorance of the law cannot be excused no matter how brief a time a board member has served, the Commission cannot rely on a long period of service to support an enhanced penalty when appellant did not, in fact, have a long period of service at the time of his actions. The Commission also noted that appellant did not copy the Board president or attorney on his petition of appeal. While the Commission's brief attempts to explain that this statement referred to his initial letter to the Commissioner, that argument is unavailing, as the decision very clearly states "when [appellant] filed his petition of appeal with Commissioner, he failed to copy" the Board president and attorney.

Removing these factually incorrect bases for assessing a penalty of censure, the Commission's remaining rationale is that without a greater sanction than a reprimand, there is no deterrent to a board member taking unilateral action by filing a legal proceeding against the board on which he serves. The Commissioner cannot agree that a decision finding that appellant violated the Act, and reprimanding him for doing so, is not a deterrent to other board members who might be considering legal action against the boards on which they serve.

Notably, in assessing a penalty of reprimand, the ALJ found that appellant's actions were not self-serving. While this finding does not prevent a conclusion that appellant violated *N.J.S.A.* 18A:12-24(g) and *N.J.S.A.* 18A:12-24.1(e) – because neither provision requires that the board member receive a benefit from his actions – it is relevant in determining the appropriate penalty. In *IMO Carvalho, Neron, Nina, and Rodriguez*, Commissioner Decision No. 168-18A (June 1, 2018), the Commissioner determined that a reprimand was the appropriate penalty for board members who had a conflict of interest but did not receive a benefit from their

actions. Here, the same penalty of reprimand is appropriate for appellant, who violated the Act by taking action against the Board but did not do so out of self-interest.

Accordingly, appellant is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Angelina Allen-McMillan, J.d.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 26, 2021
Date of Mailing: January 26, 2021

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

20-21

Agency Dkt. No. 4-1/20

New Jersey Commissioner of Education

Final Decision

Alan Maloney,

Petitioner,

v.

New Jersey State Interscholastic Athletic Association,

Respondent.

For Petitioner, Alan Maloney, Ralph A. Paolone, Esq.

For Respondent, New Jersey State Interscholastic Athletic Association, Steve P. Goodell, Esq. and Scott T. Miccio, Esq.

This case involves an appeal of a decision of the New Jersey State Interscholastic Athletic Association (NJSIAA), suspending petitioner Alan Maloney from officiating any wrestling matches for the 2019-2020 and 2020-2021 seasons. On appeal, petitioner argues that the NJSIAA's decision was arbitrary, capricious, and unreasonable because the NJSIAA did not have jurisdiction to suspend him and the decision was not supported by the record. Petitioner also argues that he did not receive due process before the NJSIAA.

Athletic competition in New Jersey's public schools is overseen by the NJSIAA, a voluntary, non-profit organization which promulgates the rules and regulations governing high school athletics. *See, e.g., B.C. v. Cumberland Reg. Sch. Dist.*, 220 *N.J. Super.* 214, 234 (App. Div. 1987). One of these rules is the Sportsmanship Rule, which, among other things, provides for disciplinary action for any person who "engages in harassing verbal or physical conduct related to race, gender, ethnicity,

disability, sexual orientation or religion at an interscholastic event." NJSIAA Bylaws, Article IX, Sec. 3(D). The NJSIAA has the authority to "investigate and take appropriate action on any reported flagrant violation of the sportsmanship rule." NJSIAA Bylaws, Article IX, Sec. 5(A). Violations "shall be resolved in a manner sufficient to correct the problem," which can range from written findings to disciplinary action. NJSIAA Bylaws, Article IX, Sec. 5(C).

On December 18, 2018, petitioner officiated a wrestling match between Buena Regional High School and Oakcrest High School. Student-athlete A.J.'s hair was styled in locs, a traditionally Black hairstyle in which the hair is rolled. According to the wrestling rules at the time,[1] he was required to wrestle using a hair cover, but he came to the mat at the beginning of his bout with a hair cover that did not meet the requirements of the rules because it did not attach to his ear guards. After petitioner informed A.J. and his coach that the hair cover did not meet the requirements, a trainer from A.J.'s school cut his hair on the side of the mat so that A.J. would not have to forfeit the match. The incident was widely reported in the media. Following the incident, the NJSIAA convened a task to investigate the incident. The NJSIAA also referred the incident to the New Jersey Division on Civil Rights (DCR) as a potential bias incident. The joint effort resulted in a Memorandum of Agreement (MOA), issued on September 18, 2019, in which the NJSIAA and the DCR agreed that the NJSIAA would suspend petitioner from officiating any matches for the 2019-2020 and 2020-2021 seasons and require petitioner to undergo training prior to reinstatement as an official.

On October 10, 2019, the NJSIAA issued a written decision supplementing the MOA and formally suspending petitioner. The NJSIAA found that petitioner was not credible when questioned, offering inconsistent explanations and making statements that were not supported by the evidence. The NJSIAA noted that petitioner was required to inspect students' hair covers upon arriving at the site, but

[1] The wrestling rules have subsequently been changed. Additionally, with the passage of the Crown Act, P.L. 2019, c. 272, New Jersey law now explicitly prohibits discrimination based on hairstyles associated with race.

failed to follow the protocol; had he done so, the later problems would have been avoided. The NJSIAA found that petitioner permitted A.J. to wrestle after the haircut, even though A.J.'s hair was still not in its "natural state," which was inconsistent with petitioner's own alleged rationale as to why A.J. needed the hair cover. A 2016 incident, in which the New Jersey Wrestling Officials Association (NJWOA) Ethics Committee suspended petitioner for using a racial slur and getting in a physical altercation with a fellow official at a social event following a youth wrestling tournament, was found to be an aggravating factor. Finally, due to the widespread attention the incident received, the NJSIAA found that petitioner's presence at events would be disruptive and would not ensure "a safe and healthy playing environment" for all students.

On January 7, 2020, petitioner filed a petition with the Commissioner of Education challenging the decision of the NJSIAA. On appeal, petitioner notes that Section 1, Article VII of the NJSIAA's Officials Handbook (Handbook) provides that protests based on an official's misapplication of the playing rules will not be honored. According to petitioner, this provision prohibits the NJSIAA from taking action against him based on the discrepancy of his allowing the student to wrestle after his haircut even though the hair was not in its natural state, rendering its decision arbitrary, capricious, and unreasonable. Petitioner contends that the NJSIAA's sportsmanship rule does not apply to officials or referees because the definition of "any person" who is subject to the rule is "athletic department, staff member, Student Athlete or a fan or spectator associated with a member school," with no reference to officials or referees. Petitioner argues this exclusion was intentional, because officials and referees are independent contractors and not subject to control or discipline by the NJSIAA directly. In fact, petitioner contends that the Handbook states that all complaints against officials who are members of the Officials' Association "shall" be handled through the internal processes of the Officials' Association;

"shall" is a mandatory term and does not afford the NJSIAA discretion. According to petitioner, the NJSIAA erred in determining that the NJWOA had disqualified itself by prejudging the issue.

Petitioner also argues that the NJSIAA's decision to suspend him deprived petitioner of his income, constituting discipline that mandates a formal hearing with the opportunity to present evidence, call witnesses, cross-examine witnesses, and receive a transcribed record. According to petitioner, the NJSIAA's failure to provide him with these due process rights renders its decision arbitrary, capricious, and unreasonable. Petitioner notes that the NJSIAA conducted witness interviews but did not provide petitioner with notice or the opportunity to question the witnesses, or a transcript of the statements; moreover, the witnesses were not placed under oath. Petitioner contends that if the NJSIAA wanted to discipline an official who was a member of the Officials' Association, the NJSIAA was required to conduct a full hearing before the Controversies Committee to ensure his due process rights. Petitioner also argues that there were flaws in the NJSIAA's investigation, including failing to interview critical witnesses and instead relying on interviews conducted by the DCR, even though the task force did not participate in the interviewing of those witnesses and could not judge their credibility without seeing their appearance, demeanor, and body language. According to petitioner, the NSIAA did not acknowledge alleged inconsistencies between the interviews and written statements.

Finally, petitioner argues that there was no bias incident because he enforced the rules of wrestling as per the National Federation of State High School Associations (NFHS) Rule Book and as interpreted by all officials in New Jersey. According to petitioner, the record is devoid of any witness testimony stating that he acted in a biased manner toward the student, and the NJSIAA's decision does not make any determination that he acted with bias. Petitioner notes that no one – not the coaches, the student, his parents, or anyone involved – complained about petitioner's behavior. Instead, petitioner argues that the record confirms that he applied the rule appropriately as interpreted. Petitioner claims

that other officials have required wrestlers to cut their hair before wrestling, but he is the only official disciplined by the NJSIAA for doing so. Petitioner argues that other individuals, including the coach and the student, were at fault for the incident, but were not disciplined.

In reply, the NJSIAA argues that the Commissioner may not overturn a decision of the NJSIAA if due process has been granted, the decision is supported by sufficient, credible evidence in the record, and the NJSIAA's actions were not arbitrary, capricious, or unreasonable. According to the NJSIAA, there is no requirement in its Constitution, Bylaws, or Rules and Regulations that a member school must file a complaint in order for the NJSIAA to initiate an investigation;[2] in fact, the NJSIAA claims that it has a fundamental obligation to its member schools and student-athletes to investigate bias claims – regardless of how it learned of the incident – and to report them to the DCR. The NJSIAA argues that it was permitted to investigate pursuant to its Sportsmanship Rule, which provides authority to "investigate and take appropriate action on any reported flagrant violation of the sportsmanship rule." NJSIAA Bylaws, Article IX, Sec. 5(A). According to the NJSIAA, the rule does not limit who may be investigated, and the broad wording and intent of the rule demonstrates that it is designed to be applied liberally, such that it includes the conduct of officials. The NJSIAA notes that the definition of unsportsmanlike conduct "shall include but not be limited to" conduct by athletic departments, staff members, student athletes, fans, and spectators, and that the list of categories of individuals is meant to be exemplary, not exhaustive. NJSIAA Bylaws, Article IX, Sec. 3. The NJSIAA contends that it would be unreasonable not to investigate bias incidents. According to the NJSIAA, the use of the phrase "any person" in the Sportsmanship Rule cannot be ignored or reduced to "mere surplusage," citing *DKM v. Residential Props. Corp. v. Twp. of Montgomery*, 182 *N.J.* 296, 307 (2005). Furthermore, the NJSIAA points to case law concluding that when a statute is ambiguous, the reviewing court may adopt the

[22] The NJSIAA also notes that it received a letter from the student's attorney seeking an investigation, as well as a tort claim notice that it was obligated to investigate.

agency's interpretation if it is based upon a permissible construction of the statute. *Thomas v. Frank*, 791 *F. Supp.* 470, 473 (D. N.J. 1992).

The NJSIAA argues that the NJWOA disqualified itself from reviewing this matter when it sent a letter from its officers and members in support of petitioner weeks before the task force had conducted its first interview, even though it knew the NJSIAA was in the process of investigating. Moreover, the NJSIAA contends that by filing a letter in support of petitioner and attempting to aid the investigation, the NJWOA tacitly acknowledged that the NJSIAA had the authority to investigate one of its officials.

The NJSIAA contends that petitioner received due process. The NJSIAA argues that there is no fundamental right under the Fifth Amendment to appear on a list of certified officials or to be employed to referee a high school wrestling match; moreover, the decision was limited to a two-year period and did not impact petitioner's membership in the NJWOA or his ability to officiate non NJSIAA-events. On the other hand, the NJSIAA has a fundamental obligation to protect its member schools and their students. According to the NJSIAA, petitioner appeared before the task force, with counsel, and had every opportunity to provide his side of the story. Finally, the NJSIAA claims that there were no additional or substitute safeguards that were available or appropriate. The NJSIAA notes that the Sportsmanship Rule does not require that a hearing take place or that the matter be referred to the Controversies Committee.

The NJSIAA argues that its decision is narrowly tailored, supported by sufficient credible evidence in the record, and consistent with its fundamental obligation to protect its member schools and student-athletes. According to the NJSIAA, all of the conclusions supporting petitioner's suspension are based solely on statements that petitioner himself made and uncontroverted evidence in the record. The NJSIAA alleges that considering the widespread attention the incident received, the inconsistencies in

petitioner's explanations, petitioner's prior race-based incident, and the need to protect schools and student-athletes, the two-year suspension was more than justified.

It is well-established that the Commissioner's scope of review in matters involving NJSIAA decisions is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. A petitioner seeking to overturn a decision of the NJSIAA bears the burden of proof. *Id.* As such, the Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that it applied such rules in a patently arbitrary, capricious or unreasonable manner.[3] *See N.J.A.C.* 6A:3-7.5(a)(2); *see also B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Moreover, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration." Bayshore, supra, at 199-200. Therefore, the Commissioner may not substitute her own judgment for that of the NJSIAA, where due process has been provided and where there is sufficient credible evidence in the record to serve as a basis for the decision reached by the NJSIAA. *N.J.A.C.* 6A:3-7.5(a)(1); *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259.

Upon consideration of the record and in light of the prescribed standard of review, the Commissioner finds that the petitioner has not met his burden on appeal. As a threshold matter, the petitioner was afforded adequate due process before the NJSIAA, having been given notice of the proceedings and an opportunity to present his case, with the assistance of counsel. The Sportsmanship Rule does not require the NJSIAA to hold a hearing in order to impose disciplinary action and, affording

[3] Arbitrary and capricious means "willful and unreasoning action, without consideration and in disregard of circumstances." *Bayshore Sew. Co. v. Dep't of Envt. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974) (citations omitted).

the NJSIAA the deference which it is due to interpret its own Bylaws, the Commissioner declines to expand the rule to include such a provision.[4]

Further, the Commissioner cannot find that the NJSIAA applied its rules in a patently arbitrary or unreasonable manner. The NJSIAA applied a broad interpretation of the phrase "any person" subject to the Sportsmanship Rule to include officials, but a broad interpretation is not *per se* an unreasonable one. Indeed, the plain language of the phrase demands a broad interpretation. Moreover, the Commissioner accepts the NJSIAA's interpretation of the phrase that follows – "athletic department, staff member, Student-Athlete or a fan or spectator associated with a member school" – to be in the nature of an example, rather than an exhaustive list. In the absence of any precedent narrowly defining "any person" to include only those persons named, there is nothing to demonstrate that the NJSIAA interpreted and applied the phrase arbitrarily in this case. Additionally, the Affiliation Agreement between the NJSIAA and the NJWOA-Southern Chapter provides that officials agree to comply with all provisions of the NJSIAA's Bylaws, and the Commissioner finds it well within the realm of reason for the NJSIAA to determine that that agreement includes officials abiding by the Sportsmanship Rule. The Affiliation Agreement also provides that it does "not in any way impair" the NJSIAA's authority to deal with controversies or impose discipline, and the Bylaws provide that the NJSIAA's President and Executive Director have the authority to investigate violations of the Sportsmanship Rule.

Having concluded that petitioner may be subject to disciplinary action for violating the Sportsmanship Rule, the Commissioner must next determine whether petitioner did violate the Rule. While petitioner argues that the NJSIAA could not discipline him for his misinterpretation or misapplication of the playing rules, that is not what occurred. The NJSIAA disciplined petitioner because his conduct resulted in a student-athlete with a traditionally Black hairstyle being placed in the

[4] Given that no hearing is required, the Commissioner cannot conclude that the NJSIAA violated petitioner's due process rights by not adhering to the hearing procedures outlined in the Bylaws for other controversies that do require hearings.

untenable position of choosing between forfeiting an important match and having his hair cut in front of his teammates, opponents, coaches, and spectators. The Commissioner concurs with the NJISAA that video of the incident gives the impression that A.J. was publicly humiliated as a result of his hairstyle. Moreover, the Commissioner cannot conclude that the NJSIAA was arbitrary, capricious, or unreasonable in finding that petitioner was not credible and contradicted himself, and that he failed to take action earlier in the event to prevent the incident.

Likewise, the penalty imposed on petitioner for violation of the NJSIAA's rules was not arbitrary, capricious, or unreasonable, nor were the NJSIAA's conclusions that petitioner had engaged in prior misconduct that served as an aggravating factor for purposes of determining the penalty and that petitioner's suspension was necessary to protect schools and student-athletes from the disruption his presence at events would cause. The NJSIAA applied its rules in an appropriate and reasonable manner in light of its duty to ensure a safe and healthy playing environment for student athletes.

Accordingly, the NJSIAA's decision is upheld and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[5]

Angelica Allen-McMillan, J.d.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 26, 2020
Date of Mailing: January 26, 2020

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

21-21

OAL Dkt. No. EDU 16002-19
Agency Dkt. No. 273-10/19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Lakewood, Ocean County,

Petitioner,

v.

New Jersey Department of Education, Ocean County Office of Education,

Respondent.

The record of this matter and the Settlement Agreement transmitted by the Office of Administrative Law have been reviewed. The agency is a party to this matter; therefore, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), the Settlement Agreement is deemed to be the final decision in this matter.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 26, 2021
Date of Mailing: January 26, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT

TOWNSHIP OF LAKEWOOD BOARD OF EDUCATION, OCEAN COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, OCEAN COUNTY OFFICE OF EDUCATION,

Respondent.

OAL DKT. NO. EDU 16002-19
AGENCY DKT. NO. 273-10/19

Michael I. Inzelbuch, Esq., for petitioner (Law Office of Michael I. Inzelbuch, attorney)

Sydney Finkelstein, Deputy Attorney General, for respondent (Gurbir S. Grewel, Attorney General of the State of New Jersey, attorney)

Record Closed: December 14, 2020 Decided: December 15, 2020

BEFORE **JACOB S. GERTSMAN,** ALJ t/a:

This matter concerns the challenge of Petitioner Township of Lakewood Board of Education, Ocean County (Board or Lakewood), in accordance with N.J.A.C. 6A:30-4.1, to the interim review conducted by Respondent New Jersey Department of Education, Ocean County Office of Education (Department), as to the New Jersey Quality Single Accountability Continuum (NQSAC).

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached document.

I have reviewed the terms of settlement and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached document.

2. The settlement fully disposes of all issues in controversy between them and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

December 15, 2020
DATE

JACOB S. GERTSMAN, ALJ t/a

Date Received at Agency: 12/15/2020

Date Mailed to Parties: 12/16/2020

JSG/nd

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement Agreement

6 Pages – 12/11/2020 – 1:57 pm

TOWNSHIP OF LAKEWOOD BOARD OF EDUCATION, OCEAN COUNTY

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, OCEAN COUNTY OFFICE OF EDUCATION,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

Agency Docket No.: 273-10/19
OAL Docket No.: EDU 16002-2019S

SETTLEMENT AGREEMENT

WHEREAS, the Township of Lakewood Board of Education ("Lakewood") and the New Jersey Department of Education ("the Department") have mutually agreed to settle the above-captioned matter, with Gubir S. Grewal, Attorney General of New Jersey, by Sydney Finkelstein, Deputy Attorney General, appearing on behalf of the Department, and Michael I. Inzelbuch, Esq. appearing on behalf of Lakewood Board of Education and

WHEREAS, N.J.A.C. 6A:30-1.1 establishes the implementation of the New Jersey Single Accountability Continuum ("NJQSAC") system as required by N.J.S.A. 18A:7A-3; and

WHEREAS, N.J.A.C. 6A:30-2.1 requires that the Department shall evaluate and monitor school districts' performance and capacity in five key components of school district effectiveness including: (1) Instruction and program; (2) Personnel; (3) Fiscal management, (4) Operations; and (5) Governance; and

WHEREAS, N.J.A.C. 6A:30-3.1 requires that the Commissioner shall conduct a comprehensive review of each school district every three years and the comprehensive shall be based on the Department-developed weighted quality performance indicators; and

WHEREAS, N.J.A.C. 6A:30-4.1 requires the Commissioner to issue a final determination letter detailing a school district's performance and placement on the performance continuum, based on the comprehensive review, which is pursuant to N.J.S.A. 18A:7A-11 and N.J.A.C. 6A:30-3.1(a); and

WHEREAS, N.J.A.C. 6A:30-4.1(a)(2) requires that each school district that satisfies at least eighty (80) percent of the weighted quality performance indicators in each of the five key components of school district effectiveness, a designation as a "high performing" school district and a recommendation for the State Board to certify, for a period of three years, the school district as providing a thorough and efficient education; and

WHEREAS, N.J.A.C. 6A:30-4.1(a)(3) requires that for each school district satisfying less than eighty (80) percent in one or more of the weighted quality performance indicators in each of the five key components of school district effectiveness, notification the school district has not met the comprehensive review's requirements and shall be directed to begin improvement, pursuant to N.J.A.C. 6A:30-5.2; and

WHEREAS, N.J.A.C. 6A:30-4.1(a)(5) requires notification the school district may seek reconsideration of the Commissioner's placement of the school district on the performance continuum within seven days of receiving the determination letter;

WHEREAS, in accordance with N.J.A.C. 6A:30-4.1, Lakewood appealed the Fiscal Management indicator score of 56% for the August 2019 NJQSAC and;

WHEREAS, the Department, following Lakewood's request to review and reconsider the scores, raised the Fiscal Management score from 56% to 64% after Lakewood provided additional documentation and proof of progress; and

WHEREAS, Lakewood was not reinstated all points for the Fiscal Management indicator because DOE determined that they did not reconcile their accounts and failed to implement the Standard Operating Procedural Manual, Lakewood disputes same; and

WHEREAS, this matter arose from the October 19, 2019 Petition of Appeal filed by Michael I. Inzelbuch Esq. on behalf of Lakewood in regards to the scores received for the Fiscal Management indicator of the NJQSAC; and

WHEREAS, Lakewood appealed the Fiscal Management indicator scores for the August 2019 and September 2019 NJQSACs; and

WHEREAS, during the course of litigation, Lakewood received a score of 72% on Fiscal Management on the August 4, 2020

NJQSAC; and

WHEREAS, during the course of litigation and in accordance with N.J.A.C. 6A:30-4.1, Lakewood appealed the Fiscal Management indicator score of 72% for the August 2020 NJQSAC; and

WHEREAS, the Department, following Lakewood's request to review and reconsider the scores, raised the Fiscal Management score from 72% to 80% after Lakewood provided further clarification and proof of progress, allowing Lakewood to be considered a "high performing district"; and

WHEREAS, Lakewood previously was not reinstated all points for the Fiscal Management indicator because DOE determined that they did not reconcile their accounts and failed to implement the Standard Operating Procedural Manual, Lakewood disputes same; and

WHEREAS, during the course of litigation Lakewood moved before the ALJ with a motion for proposed amendments or in the alternative a Motion for Consolidation to include August 4, 2020 QSAC scores and the ALJ granted the amending of the petition and to include said scores; and

WHEREAS, during the course of litigation and in furtherance of settlement, Lakewood provided a letter, dated December 8, 2020, from independent auditor Matthew Holman of Holman Frenia Allison, P.C. stating that all accounts had been reconciled and the Standard Operating Procedural Manual had been implemented;

and

WHEREAS, based on this information, the Department is satisfied that Lakewood reconciled their accounts and implemented the Standard Operating Procedural Manual, therefore warranting the addition of 8 points on the Fiscal Management Indicator of the NJQSAC, thereby, raising the score to 88% with the other four NJQSAC area scores remaining as follows: Instruction and Program 80%, Governance- 100%, Operations- 91%, Personnel- 96%; and

NOW THEREFORE, the parties hereto agree to settle the above-captioned matter upon the following terms:

1. This agreement will be codified in a decision of settlement issued by the ALJ.

2. The Department will reinstate eight (8) points to the Fiscal Management Indicator #2 for the 2019-2020 NJQSAC, thereby raising the score to 88%.

3. The parties agree that this agreement fully resolves all issues between them arising from the Petition of Appeal.

Michael Inzelbuch, Esq.
Attorney for Petitioner

By: _____
Michael Inzelbuch, Esq.

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent

By: _____
Sydney Finkelstein
Deputy Attorney General

I execute same with the Authority of the Board (via poll) and after review by Administration, Monitor, and Independent Auditor

NH

Dated: 12/11/2020 - 1:57pm.

Dated: 12/11/2020

22-21

COMMISSIONER, NEW JERSEY DEPARTMENT OF EDUCATION

IN THE MATTER OF THE PROCEEDING BETWEEN:

Amada Sanjuan, "Respondent" or "Tenured Assistant Principal"

- and -

School District of West New York, "Petitioner" or "District"

Agency Docket No: 218-10/20

AWARD AND OPINION

Appointment:	Oct. 28, 2020
Hearings:	Dec. 8 and 10, 2020
Posthearing Briefs:	Jan. 6, 2021
Date of Award:	Jan. 21, 2021
Arbitrator:	Perry A. Zirkel

APPEARANCES:

For the West New York School District

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Factual Findings[1]

On or about September 1997, the District hired Amada Sanjuan as a full-time bilingual teacher.[2] She served in that position at the elementary and secondary levels until 2012. From 2012 until 2015, she served as a disciplinarian at the middle school, which was a teaching position with a stipend.

In approximately March 2016,[3] the District appointed her to an assistant principal's position. Her initial assignment in this position was in the system-wide early childhood education program, followed by about a year as an assistant principal at the middle school, and next as acting principal in the early childhood education program until summer 2019.

In August 2019, the District assigned Sanjuan to be one of the five assistant principals at the Memorial High School.[4] For her entire career in the District until the incident at issue in this case, she had not received any discipline and generally had a solid reputation among staff and students.

On Wednesday, February 12, 2020, Sanjuan attended an evening student activity as part of her duties at the high school, which consists of three connected buildings. The activity was upstairs in one of the buildings, and she went to her locker to obtain her laptop computer. Asked by a teacher to provide a welcome for a parent-teacher organization meeting downstairs in the cafeteria, she walked over from the annex building to the stairway that went down to the cafeteria area. She called her adult daughter on her cellphone on the way. She stopped for a few

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[1] Two prefatory clarifications about the language in this Award may be necessary. First, as is customary for arbitration awards and other adjudicative decisions, the references to witnesses' names herein, after the first identification, is via the surname only. No discourtesy is intended or should be perceived. Second, the use of "*supra*" in the footnotes is merely as cross reference to earlier (i.e., "above") parts of the decision.

[2] She signed her employment contract (Jt. Exhibit 1) at about that time.

[3] The parties stipulated that she became assistant principal in March 2016, although Sanjuan credibly testified that her first appointment to this position was in October 2015. This limited difference is of no moment here, because there is no dispute that she had obtained tenure in this administrative position before the event at issue.

[4] She received her salary letter (Jt. Exhibit) for the 2019–20 school year in July 2019.

seconds at the top of the stairway and, suddenly, fell down the entire flight of stairs, tumbling over and over until landing with a loud thud on the floor below. Hearing the noise, teacher Timothy Perillo, who helping with the meeting, and the custodian hurried to the location, finding Sanjuan sitting on the floor, with her purse to one side, and rubbing her thigh. After conversing with her briefly and retrieving her personal items, including keys, coat, and cellphone, from the stairs, Perillo went to summon one of the other assistant principals, Charles Krajewski. The custodian left to get a glass of water for Sanjuan.

As recorded on a nearby security camera in the hallway,[5] Sanjuan, upon being left alone at that point, reached into her purse and took out a piece of paper. She then stood up and—without any visible impairment—ascended about half-way up the stairway, placed the paper on one of the stairs, and returned to the bottom of the stairway. Resuming her position on the floor, she continued rubbing her left thigh; checked the back of her head with her hands; briefly texted on her cellphone; and then checked her left ankle until the custodian returned with a paper cup of water.

Next, Perillo returned with Krajewski, who had an extended conversation with Sanjuan and checked the back of her head. Another co-worker brought a chair, in which they helped her up to sit. First, Sanjuan sat, then stood, then sat, rubbing and checking her left hip and thigh. After Krajewski left again temporarily and after conversing further with the custodian and Perillo, Sanjuan pointed up the stairs twice.[6] Following her direction, the custodian ascended the stairs, found the piece of paper, and retrieved it.

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[5] Jt. Exhibit 5 (surveillance video).

[6] While Sanjuan successively pointed up the stairs, according to Perillo's credible testimony, she said that she had slipped on a piece of paper. His perception, both in his initial conversation upon finding her after the fall and in this follow-up interaction, was that she was embarrassed but not unclear or disoriented in her statements to him. Krajewski also credibly testified that (1) she attributed her fall to slipping on a piece of paper on the stairs, and (2) based on his experience as a youth athletics coach, she did not evidence any symptoms of a head injury.

Krajewski returned with what appeared to be a wet cloth or cold compress, which Sanjuan held on the back of her head. When she insisted that she did not want an ambulance, Krajewski subsequently drove her to the hospital,[7] where her adult daughter came and took over. At the hospital, Sanjuan received an X-ray, a CT scan, and a medical examination that included a concussion protocol. The emergency room physician sent her home with crutches and medication, authorizing her to return to work on the following Monday.

For the next two days, which were Thursday and Friday, Sanjuan remained home, with the primary problem being a severely swollen and reddened thigh. She had a bump on the back of her head that, compared to her thigh, healed relatively quickly.

In the morning of the first of these two days, the District's benefits coordinator telephoned Sanjuan to fill out the requisite illness/injury report, which is submitted to the worker's compensation carrier in cases of injury at work. Because the school nurse was not on duty the previous evening and because Sanjuan was at home as a result of the accident, the benefits coordinator read each item on the form aloud to Sanjuan on the phone and recorded her answers verbatim on the form. The specific words that Sanjuan used for what had happened were as follows: "[she] saw a piece of paper on the steps and she slipped/lost her balance. She fell down the entire set of steps and landed on her back, hitting her head on the concrete floor."[8] Sanjuan had the opportunity to verify the contents upon subsequently signing the form.

On the same day (February 13), the high school's principal, Oscar Guerrero, viewed the video and, surprised at the segment showing Sanjuan's placement of the piece of paper, summoned assistant superintendent Scott Wohlrab to come from central office to view it.

In the meanwhile during these two days, the principal of one of the elementary schools

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[7] The specific facility was the Hackensack Meridian Health Palisades Medical Center.
[8] Jt. Exhibit 6.

called Alan Roth, who was an administrative assistant to the superintendent and former legal counsel to the District. He reported to Roth that the video of Sanjuan's fall, including the segment with the piece of paper, was circulating among his elementary school staff. Roth viewed the video with Wohlrab and, as authorized by the superintendent and as part of his usual duties, proceeded to investigate both the video-contents and video-dissemination issues.

Because the following week was school vacation, Sanjuan did not return to the District to resume her duties until her next scheduled workday, which was Monday, February 24.

On February 25, near the end of the school day, a colleague told Sanjuan that the video of her fall was in circulation among staff members of the high school and one elementary school. Upset about this unauthorized disclosure of her fall, Sanjuan immediately went to see principal Guerrero to express her concern. He suggested that she contact Wohlrab due his responsibilities for such human resources (HR) issues. She e-mailed Wohlrab and the superintendent that evening to register her complaint about the video's circulation.

On the next day (February 26), at the superintendent's Wohlrab held an investigatory meeting with Sanjuan, her union representative, and Roth. The focus of Roth's and Wohlrab's questioning was on the fall rather than the circulation.[9] In response, Sanjuan reported vaguely recalling a piece of paper at the top of the stairway and falling down the stairs upon bending down to pick it up. She said that she did not have a specific memory of anything else beyond being concerned about potentially injuring her head on her way down and feeling embarrassed when co-workers arrived to help her. Roth and Wohlrab responded that the statement on the illness/injury report appeared to be false based on the entire video, which they than played for

[9] Previous to the meeting, they had already determined that three other staff members, including two administrators, had circulated the video. The result was discipline that was rather limited in comparison to dismissal. Without providing the details, they told Sanjuan that they were taking care of the circulation issue, although they had not yet ascertained its complete specifics and extent.

her. After viewing it with them, she denied having any previous knowledge or refreshed recollection of the paper-placement segment. They also asked how she found out about the circulation of the video, and she declined to identify her source(s). She explained that it would be like a student ratting out, or snitching on, a friend. At the end of the meeting, Wohlrab notified her of her placement on administrative leave pending the conclusion of the investigation.

On October 9, the District submitted tenure charges against Sanjuan to the state education department. Charge 1 was on the grounds of conduct unbecoming based on her "attempt[] to manipulate the scene" and her "false report of the incident." Charge 2 was on the grounds of conduct unbecoming or other just cause, citing "continued lying" in addition to the aforementioned two allegations and characterizing the illness/injury report as "insurance fraud." Charge 3 was on the grounds of insubordination based on her refusal to disclose the information about her source upon Wohlrab's and Roth's questioning. Charge 4 appeared to be a cumulative catchall.

The charges were subsequently processed according to the applicable statutes to the appointment of the arbitrator on October 28 upon the Commissioner's finding of sufficiency.[10] The arbitrator held virtual hearing sessions on December 8 and 10, 2020 and the record closed upon the submission of posthearing briefs on January 6, 2021.

[10] During the intervening period, Sanjuan provided her answer to the charges via her legal counsel.

Applicable Statutes and Policies

The New Jersey tenure laws are extensive,[11] with the relevant provisions including the following examples:

§ 18A:28-5:

a. The services of all teaching staff members employed prior to [Sept. 1, 2012] in the positions of teacher, principal, ..., assistant principal, ... shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the [specified] manner . . . after employment in such district or by such board for . . . [t]hree consecutive calendar years . . . .

§ 18A:6-17.1:

b. (1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

d. Notwithstanding . . . any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

§ 18A:6-17.2:

d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

e. The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a written decision within 45 days of the start of the hearing.

Additionally, the District's policies include the following:

Board of Education Policy No. 3150 – Discipline:[12]

The Board of Education directs all teaching staff members to observe statutes of the State of New Jersey, rules of the State Board of Education, policies of this Board, and

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[11] *E.g.*, N.J. REV. STAT. §§ 18A:6-10 *et seq.* and §§ 18A:28-1 *et seq.* For related regulations, see, e.g., N.J. ADMIN. CODE §§ 6A:3-5.1 *et seq.*

[12] Jt. Exhibit 3.

duly promulgated administrative rules and regulations governing staff conduct. Violations of those statutes, rules, policies and regulations will be subject to discipline.

The Superintendent shall deal with disciplinary matters on a case by case basis. Discipline measures will include verbal and written warnings as appropriate and will provide, wherever possible, for progressive penalties for repeated violations. Penalties may include suspension, withholding one or more increments, and dismissal.

Board of Education Policy No. 3211 – Code of Ethics:[13]

The educator recognizes the magnitude of the responsibility inherent in the teaching process. The desire for the respect and confidence of one's colleagues, of pupils, of parent(s) or legal guardian(s), and of the members of the community provides the incentive to attain and maintain the highest possible degree of ethical conduct. The Code of Ethics of the Education Profession indicates the aspiration of all educators and provides standards by which to judge conduct.

[13] Jt. Exhibit 4.

Discussion

The Respondent's argument of fatal procedural deficiency is not effective in this case. Specifically, the Respondent claimed, for the first time in its posthearing brief,[14] that this case must be dismissed for "lack of sworn statements by ... the witnesses who provided the background information [that was the basis of] the tenure charges."[15] Neither the applicable statutes nor court decisions specify this purported requirement.[16] Instead, the brief relied on an arbitration award that obviously does not suffice for several reasons, including that (a) the Respondent overstated its import[17]; (b) the award provided for dismissal "without prejudice"[18]; and, in any event, it is not at all binding authority.[19] In any event, there was no showing in this case of any prejudice to the Respondent in her receiving notice of the charges and the evidence and her opportunity to respond to them via this arbitration hearing process.

Rather, the focus of this arbitral decision is the assessment of the evidence in relation to the tenure charges and the applicable case law. The Petitioner's tenure charges in this case, when sorted out for to avoid overlap, amount to (1) conduct unbecoming or just cause for the

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[14] Respondent's motion for dismissal and opening arguments did not raise this argument.

[15] Respondent's closing brief, at 4.

[16] *E.g.,* N.J. REV. STAT. § 18A:6-11 (requiring the district administration to present the school board with "a written statement of the evidence under oath to support the charges"); N.J. ADMIN. CODE § 6A:3-5.1(b) (clarifying that this oath requirement applies to the school administrator instituting the tenure charges); N.J. REV. STAT. § 18A:6-17.1(b)(3) (requiring the school board, upon arbitration, to provide to the teacher with "all evidence including ... statements of witnesses"). The Respondent's brief did not cite, and I do not know of, any applicable court decisions in this jurisdiction that provide the purported requirement.

[17] First, the Respondent characterized the most important element of the cited award as the superintendent's lack of firsthand knowledge. Respondent's closing brief, at 5 (quoting from that award that "most importantly ... nothing in the record indicated [the superintendent] directly participated in the investigation"). Instead, the arbitrator in that case explicitly explained that, contrary to this restatement of the teacher's position in the case, "the fact that [the] Superintendent ... did not have firsthand knowledge of investigation is not itself fatal to the Charges." Watchung Borough Bd. of Educ. and Christopher Riley, Agency Dkt. No. 112-520 (2020) (Barron, Arb.), at 14. Second, the Respondent accurately quoted arbitrator Barron's inferred requirement about "signed witness statements" (*id.* at 12), but (1) this inference does not square with arbitrator Barron's previous recitation and summary of the applicable New Jersey legislation and regulations (*id.* at 11), (2) signed does not mean sworn, and (3) he ultimately relied on "multiple shortcomings" concerning the specific sources and supports of the information rather than the lack of sworn witness statements (*id.* at 12–15).

[18] *Id.*

[19] *E.g.*, ELKOURI & ELKOURI HOW ARBITRATION WORKS 11-28 (Kenneth May et al. eds. 2012).

February 12 incident and the Respondent's subsequent accounts of it, and (2) insubordination for refusing an authoritative request to disclosure her source. Although the ultimate determination will be based on their residual combination, the analysis will separately address each of these two categories of conduct in relation to the cited grounds of New Jersey's tenure law.

Alleged Unbecoming Conduct or Just Cause - Respondent's Incident and Accounts

The Respondent's subsequent accounts after the incident, starting with the illness and injury report form and extending to the investigatory interview, included not only inconsistencies with regard to the location and role of the paper, but also and much more importantly, the conspicuous and continued omission of her placement of the paper.

The Respondent's two primary defenses do not countervail the significance of this core conduct. First, the opening statement and the posthearing brief emphatically advanced the argument that the Respondent's conduct did not constitute "insurance fraud," which the tenure charges claimed. However, this claim was only a limited part of tenure charge 2. Moreover, the arbitrator need not determine whether the conduct amounted to insurance fraud, because assuming arguendo that it was not fraudulent in the insurance context, the above-identified incident remained for assessment, per the analysis *infra*, as either possible conduct unbecoming or just cause.

As her second and broader defense, the Respondent claimed that she does not recall anything beyond seeing a piece of paper and falling down the stairs. The first problem with this claim is credibility. In addition to its obvious self-serving nature, especially in the face of the security video, this testimony is cumulatively countervailed by (1) the cogent testimony of her co-workers that she showed no signs of cognitive impairment[20]; (2) the immediate medical

[20] *See supra* note 6.

examination did not yield any diagnosis of a concussion or other such head injury; and (3) her various accounts of the incident, including her immediate statements to co-workers, her report for the illness/injury form the next morning, and her investigatory interview approximately two weeks later provided an additional recollection of a causally connected role of the piece of paper.

The even more critical problem with the "don't remember" defense is that even if it were believable, it does not negate the rather shocking paper-placement and -pointing behavior. Whether she recollected it or not, the evidence is undisputed that the Respondent engaged in this behavior without any evidence that it was somehow involuntary or without consciousness.

The remaining essential part of the determination is whether this clearly proven conduct amounted to "conduct unbecoming . . . or other just cause" under the tenure law.[21] The state's supreme court has clarified that conduct unbecoming is "conduct 'which adversely affects the morale or efficiency of the [District]" or "has a tendency to destroy public respect for [District] employees and confidence in the operation of [public] services."[22] Moreover, the court clarified that "a finding of unbecoming conduct 'need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.'"[23] Although also within the broad meaning of just cause,[24] the Respondent's paper placement/attribution conduct adversely affects the morale or efficiency of the Petitioner.

This conclusion merits careful demarcation. The circulation of the video was attributable

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[21] *See supra* "Applicable Statutes and Policies" section.

[22] Bound Brook Bd. of Educ. v. Ciripompa, 153 A.3d 931, 937 (N.J. 2017) (citing its previous decisions in 1998 and 2010).

[23] *Id.* (citing its 1998 decision).

[24] Indeed, even without any knowledge of why she put the paper on the stairs and of the cogent adverse testimony of her colleagues, any reasonable person viewing the video and being told that the protagonist was a school administrator would conclude that the paper placement was flagrantly unacceptable behavior.

to the District based on the unauthorized disclosure by other employees, who included at least one other administrator with access to the surveillance tapes as part of his or her duties. This fact warrants discounting the effect of the Respondent's conduct on the morale or efficiency of employees more generally or on public respect except for whatever would likely have resulted from typical rumor mills. The residual impact on the necessarily close administrative team of the relatively large urban high school is clearly sufficient for the requisite effect on the district. Although providing due respect for the Respondent's solid service in the school district, her fellow administrators—from the superintendent to the principal of her school to the assistant principal who came to her aid—credibly and understandably testified that her above-identified conduct adversely affected her reliability that was necessary for their collective efficiency. For examples, they cited the trustworthy collaboration needed for effective teacher supervision/ evaluation and student safety/discipline.

Alleged Insubordination

In contrast, the alleged insubordination in this case plays a notably limited supporting role. Although the Respondent's refusal to disclose the identity of her collegial source fits within the rather broad meaning of insubordination,[25] its scope and severity are not particularly weighty in this case. First, the Wohlrab and Roth had already identified the primary perpetrators before questioning the Respondent. Second, the questioning was not focused directly on any additional perpetrators or on the specific recipients of the video dissemination, which were central to the investigation of this related but separable matter. Third, the severity of this insubordination

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[25] *E.g.*., In re Tenure Hearing of Ziznewski, 2012 WL 1231874 (N.J Super. Ct. App. Div. Apr. 13, 2012): "Insubordination" has been found in an employee's willful refusal of submission' to the authority of [his or] her superiors." *Laba v. Bd. of Educ.*, 23 N.J. 364, 385 (1957) . . .; "a 'willful disregard of an employer's instructions ...' or an 'act of disobedience to proper authority'" (quoting *Black's Law Dictionary* 802 (7th Ed. 1999).

would have been clearer if the Wohlrab and Roth had changed their questioning from informal conversation to a formal directive.[26] Nevertheless, particularly as a school administrator, the Respondent is reasonably expected to be more forthcoming in providing such unprivileged information.[27]

Justifiable Penalty

For the over-arching concept of just cause in arbitration generally the just determination of sufficient cause is separable from a resulting just determination of the appropriate consequence, or penalty.[28] In arbitration in modern New Jersey tenure cases, the mitigation of a disproportionately harsh penalty is also generally recognized. First, it appears to be judicially accepted for the tenure cases arbitrated under the alternative avenue of the New Jersey Public Employment Relations Commission.[29] Second, although not yet directly addressed in court decisions concerning arbitrations under the TEACHNJ legislation, the 1967 decision of *In re Fulcomer*[30] required the independent determination under earlier legislation to integrally include "what penalty should justifiably be imposed."[31] Courts have continued to apply the *Fulcomer*

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[26] Neither of these two witnesses was particularly cogent, but they did make clear that their style was to conduct investigatory meetings as informal conversations.

[27] Indeed, her analogy to students was clearly inapposite; one would expect far different behavior from a school administrator than from her students. If anything, a school administrator's more cooperative behavior in investigations should be the model for students rather than the reverse.

[28] *E.g.*, DISCIPLINE AND DISCHARGE IN ARBITRATION 31-35 & 85-89 (Norman Brand ed. 1998); FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION 316-18 (Ray Schoonhaver ed. 1999); MARVIN HILL & ANTHONY SINICROPI, MANAGEMENT RIGHTS 98 (1986) (recognizing that just cause includes not only whether the employer had cause but also whether the employee's discipline was just).

[29] *E.g.*, Linden Bd. of Educ. v. Linden Educ. Ass'n *ex rel.* Mizichko, 997 A.2d 185, 280 (N.J. Super. Ct. App. Div. 2010).

[30] 226 A.2d 30 (N.J. Super. Ct. App. Div. 1967).

[31] *Id.* at 38. More specifically, in this tenure case based on alleged unbecoming conduct, the court concluded that "[a]lthough such conduct certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances. . . . [Additionally,] consideration should be given to the impact of the penalty on appellant's teaching career, including the difficulty which would confront him, as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in this State, with the resultant jeopardy to his [pension] rights." *Id.* at 40.

principle and factors in the tenure context.[32] Indeed, in apparent agreement with the various recent arbitration awards that the Respondent's brief cited and that applied *Fulcomer* to mitigate the penalty of termination,[33] the Petitioner's brief concluded that "it is within the right of the arbitrator to fashion discipline that is less than the dismissal of a tenured school employee."[34]

Yet, the Petitioner's attempt to draw a line at the Respondent's administrative position, which would limit the arbitrator to mitigating the dismissal to a suspension, is without sufficiently solid support. Neither of the two cases that Petitioner cited was at the judicial level. Moreover, the first decision is more akin to the present situation, because the teacher at issue was in a supervisory position. In that case, Commissioner's ultimate decision was to remove tenure as a supervisor but continued it as a teacher.[35] In the other case, the arbitrator's *ultra vires* statement was merely dicta, because his ultimate determination was that "the mitigating evidence that was adduced regarding several charges was neither deemed sufficient to dismiss any specific charge nor to reduce the penalty of termination."[36]

If, instead, said arbitrator had carefully considered the import of the cited "dismissal or

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[32] Specifically, for the alternative of ALJ decisions under the Commissioner's ultimate authority, courts have recognized the applicability of the *Fulcomer* mitigation factors to tenure cases. *E.g.*, In re Geiger, 2015 WL 7261458 (N.J. Super. Ct. App. Div. Nov. 18, 2015); In re Eisenhower, 2014 WL 2742414 (N.J. Super. Ct. App. Div. June 18, 2014); In re Roth, 2013 WL 3284128 (N.J. Super. Ct. App. Div. July 1, 2013).

[33] *E.g.*, Rene Chakmakian and Sch. Dist. of Englewood Cliffs, Agency Dkt. No. 238-9/19 (2020) (Brown, Arb.); Monroe Twp. Sch. Dist. and Ronald Becker, Agency Dkt. No. 211-8/19 (2020) (Gerber, Arb); S. Hackensack Bd. of Educ. and Christopher Masullo, Agency Dkt. No. 1-1/17 (2018) (Cure, Arb.) (all mitigating termination to suspension).

[34] Respondent's closing brief, at 6 n.1.

[35] Hunterdon Sch. Dist. Bd. of Educ. v. McCormick, 1 N.J.A.R. 231 (OAL Jan. 4, 1980) (aff'd by the Commissioner of Education March 3, 1980). Respondent's brief tried in vain to distinguish the case based on the nature of the charges. However, insubordination was common to both cases, and the Petitioner's arguments about the impact of the Respondent's conduct in this case were specific to the particular high standards for administrators and the impact on the administrative team.

[36] David Petrella and Hackensack Bd. of Educ., Agency Dkt. No. 162-2/19 (Simmelkjaer, Arb) (2019) (June 19 clarification of award). Moreover, the general language in the statute about "dismissal or reduction in salary" (N.J. REV. STAT. § 18A:6-16) was as a threshold to proceed to arbitration, not as a limit to the arbitrator's remedial authority. Indeed, if it were, if it were a remedial limit, it is not at all clear how the prevailing mitigation to suspensions (*supra* note 33), unlike withholding of an increment, specifically fits as the intended meaning of a reduction in salary.

reduction in salary" language of the cited tenure statute,[37] the conclusion would be the opposite for two alternative reasons. First, this language is a threshold for the tenure charge(s) moving to the arbitration step rather than being dissolved for insufficiency; it is not necessarily a limit on the arbitrator's subsequent remedial authority. Second, even if there were a showing that the legislature intended it to serve as a remedial limit, said "reduction" obviously is not attached to the narrow meaning of "salary."[38] If it were, the only lesser discipline that would seem to fit within its scope would be withholding of the annual increment. Indeed such a narrow interpretation would not only negate the parties' aforementioned[39] agreement about the arbitrator's remedial authority under this legislation to modify termination to a suspension without pay, but also exclude demotion of a tenured employee, which by definition includes a reduction in pay,[40] from the prescribed protections of this legislation. As an additional consideration, under the New Jersey statutory framework, tenure—like certification—is separable rather than necessarily coterminous for teachers and principals. Consequently, the intended scope of the cited language provides for the application of the procedural protections of the act, including the decisional and remedial authority of the arbitrator, to extend to the various disciplinary employment actions within the broad meaning of reduction in salary.

Finally, both the *Fulcomer* factors that apply to Petitioner and the equitable authority that attaches to the arbitrator converge on discipline that is tailored to fit the particular circumstances of this case. Although the Respondent's conduct justifies the loss of the her administrative

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[37] N.J. REV. STAT. § 18A:6-16 (requiring the Commissioner to refer to arbitration tenure charges upon threshold determination that they are "sufficient to warrant dismissal or reduction in salary").

[38] This narrow meaning would amount to a rate of pay for the agreed upon period, which is typically a year. Thus, for example, if a school board "docked" a professional school employee for any days exceeding the allowable limit sick or personal leave, it would not be understood as a reduction in salary.

[39] *See supra* notes 33–34 and accompanying text.

[40] *E.g.*, Williams v. Bd. of Educ. of Plainfield, 422 A.2d 461 (N.J. Super. Ct. App. Div. 1980).

position, the justifiable impact did not extend to a complete cessation of her employment.[41] The limited scope of the Respondent's incident and accounts in light of her long and solid record of service, predominantly as a teacher,[42] and the effect on her public school career warrant equitable mitigation.[43] More specifically, rather than justifying the loss of her entire career, the Respondent's conduct in question warrants retention of her tenured teaching role in the District.

The final tailoring includes consideration of back pay. The Respondent's failure to be take ownership and be literally accountable for her paper placement/pointing behavior, particularly after viewing the video, warrants that her reinstatement, provided that it is sufficiently prompt, be without backpay. For clarity as to the meaning of "prompt" in the circumstances of this case, the Petitioner shall re-start the pay and benefits of the Respondent within 60 days of receipt of this Award.

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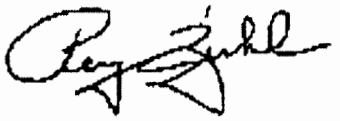
[41] As explained *supra*, the wider effect beyond the high school's small but close-knit administrative staff was the fault of one or more of her fellow administrators, certainly not the Respondent. The Petitioner did not show that the impact had reached students to whom she could be assigned as a teacher, much less whether it would have done so in the absence of the unwarranted dissemination.

[42] As recited more specifically in the "Factual Findings" section, 19 of the Respondent's 23 years of effective service in the District were as a teacher rather than as an administrator. *Supra* notes 2–3 and accompanying text.

[43] *See Fulcomer* factors, *supra* note 31.

Award

In sum, after careful attention to the parties' arguments, the applicable law, and the case evidence, the arbitrator concludes that the Respondent's conduct justified a substantial penalty less severe than termination. The Petitioner shall reinstate her to a teaching position, with her pay and benefits as a teacher with tenure commencing within 60 days of the dates of this Award.



1/21/21

Perry A. Zirkel, Arbitrator — Date

24-21

24-21

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of	:	Agency Docket No. 104-5/20
WYCKOFF BOARD OF EDUCATION, BERGEN COUNTY,	:	Opinion & Award
Petitioner,	:	
-and-	:	
SCOTT LEVY,	:	
Respondent.	:	

APPEARANCES:

FOR THE PETITIONER:
FOGARTY & HARA,
Stephen R. Fogarty, Esq.
Ashley L. Roessler, Esq.

24-21
Sealed Dec

FOR THE RESPONDENT:
CARUSO SMITH PICINI, P.C.
Nicholas Poberezhsky, Esq.

BEFORE: David J. Reilly, Esq., Arbitrator

PRELIMINARY STATEMENT

This matter comes before me on the tenure charges certified on or about May 20, 2020 by the Wyckoff Board of Education (the "Board" or "Petitioner") against Scott Levy ("Respondent"), a tenured teacher, alleging acts of misconduct during the 2019-2020 school year, as well as a recurrent pattern of misconduct over a period of years. (Petitioner Exhibit 1.) In accordance with N.J.S.A. 18A:6-16, on June 10, 2020, I was appointed as the arbitrator to hear and decide this matter.

Hearings on the charges against Respondent commenced on September 23, 2020, and subsequently continued on October 2, 7, 8 and 22, 2020, at the offices Fogarty & Hara in Fairlawn, NJ.[1] During that time, both parties were afforded full opportunity to introduce evidence and present arguments in support of their respective positions. They did so. A stenographic record of the hearing was taken.[2] Upon the conclusion of the October 22, 2020 hearing day, the parties elected to submit post-hearing briefs. With the receipt of those briefs on November 25, 2020, I declared the hearing record closed as of that date.

BACKGROUND

Respondent's employment by the Board as a teacher dates to 2005. (Tr. 768-769.)[3] During that period, he has been assigned exclusively to the Dwight Eisenhower Middle School (the "School"). (Tr. 768.) He has no record of prior tenure charges.

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[1] By agreement of the parties, I attended and conducted the hearing by videoconference.

[2] The hearing transcript consists of 985 pages. References to the hearing transcript will be designated as "Tr." followed by the applicable page number(s).

[3] Respondent's teaching experience totals 23 years, as he was previously employed by two other school districts. (Tr. 769.)

The Tenure Charges

The charges against Respondent read as follows:

CHARGE NO. 1

That Scott Levy, employed as a teacher by the Wyckoff Board of Education, physically assaulted a seventh-grade student under his supervision, in violation of State law and Board Policy; and that such conduct justifies his removal from employment in the District.

CHARGE NO. 2

That Scott Levy, employed as a teacher by the Wyckoff Board of Education, engaged in the harassment and inappropriate touching of a student, K.T., under his supervision, in violation of State law and Board policy; and that such conduct justifies his removal from employment in the District.

CHARGE NO. 3

That Scott Levy, employed as a teacher by the Wyckoff Board of Education, engaged in the harassment and inappropriate touching of a student, A.P., under his supervision, in violation of State law and Board policy; and that such conduct justifies his removal from employment in the District.

CHARGE NO. 4

That Levy has accumulated a substantial record of misconduct in his teaching position for which remedial measures have been taken and failed; and that such pattern further justifies his removal from employment in the District.[4]

The essential facts concerning these charges, including the areas of dispute, can be stated as follows:

Respondent's Employment History with the Board

Respondent has worked at the School as Language Arts teacher since September 2005. (Tr. 768-769.) During that time, his assignments have included the seventh and eighth grade.

[4] On July 10, 2020, Respondent filed a motion for partial summary judgment seeking dismissal of Charge No. 4. I deferred a decision on the motion, stating that it would be decided upon the entirety of the record adduced here. (Tr. 734.)

In testifying regarding his service at the School, Respondent recounted his extra-curricular duties. In particular, he referenced his work running the winter theater program and drama club for approximately nine years. (Tr. 772-773.) In addition, he cited his role as the faculty advisor for the School's newspaper club. The School's then superintendent's satisfaction with the results of the newspaper, he said, led to the establishment of a journalism class, which he was assigned to teach. (Tr. 774.)

Respondent also related his charitable work by which he sought to teach students the importance of giving back. (Tr. 780-781.) For these efforts, he reported receiving numerous commendations. (Tr. 783; Respondent Exhibit 6.) According to Respondent, he also received commendations for his service on the Language Arts Literacy Committee. (Tr. 785-786; Respondent Exhibits 6-7.)

Corrective Action Plans and Annual Evaluations

School Principal Christopher Iasiello testified to counseling Respondent regarding his relationships with students following the 2014-2015 school year. The issue, he explained, was addressed in the Corrective Action Plan ("CAP") issued to Respondent for the 2015-2016 school year. (Tr. 290; Petitioner Exhibit 1.) In particular, he highlighted, the CAP's identified areas for improvement included: "Providing an environment in which each child has positive, nurturing relationships with caring adults and in which you treat students as individuals." (Tr. 294; Petitioner Exhibit 1.)

He noted that in 2014-2015, Respondent had a "very difficult year," primarily with boys who complained of harsh treatment by him. These issues, he said, surfaced from concerns expressed by the students' parents. (Tr. 290.) He related that the complaints also

involved Respondent's female students. (Tr. 290-291.) He averred sharing with Respondent copies of all the parents' letters received by the Board. (Tr. 294-295.)

During the 2015-2016 school year, he recounted meeting regularly with Respondent to review his performance against the CAP. (Tr. 295.) By year-end, he reported concluding that Respondent had failed to satisfy the requirements of the CAP. Respondent's deficiencies, he said, included failing to grade student work and renewed parent complaints regarding his treatment of students, including his use of sarcastic and inappropriate language. (Tr. 296.)

As a consequence of Respondent's failure to satisfy the CAP, he reported withholding his salary increment for 2016-2017 and placing him on a second CAP. (Tr. 300-301; Petitioner Exhibit 1.) This CAP's identified areas for improvement, included, among others, "demonstrate consistently a positive, professional and respectful demeanor toward your students through appropriate daily instruction." (Petitioner Exhibit 1.)

Respondent, he said, demonstrated the requisite improvement to satisfy the CAP. In particular, he explained, "[Respondent] I think took what had happened the year prior seriously and he was a whole different person, and he met everything I asked him to meet." (Tr. 305.)

As a consequence, he confirmed changing Respondent's grade assignment from eighth to seventh for the 2017-2018 school year to give him a "fresh start." (Tr. 306.)

Respondent's annual evaluation for that year, as well as the succeeding year, reflected positive results. (Respondent Exhibits 3-4.)[5]

In testifying, Respondent provided his understanding of the basis for the two CAPs.

[5] Respondent did not receive an annual evaluation for the 2019-2020 school year.

The first, he explained, stemmed from his extended absenteeism during 2014-2015 due to health reasons, which impeded his ability to keep up with the curriculum. (Tr. 851-852.)[6] As a result, he recalled, students and parents complained of his failure to issue grades. The complaints, he acknowledged, also concerned his treatment of students in class. (Tr. 855-856.)

During 2015-2016, he noted his rate of absenteeism continued. As consequence, he reported being placed on a second CAP for 2016-2017 due to his failure meet grading deadlines and attend language art team meetings. (Tr. 858.) He described these reasons as being strictly performance based. (Tr. 859.)

Respondent also testified that prior to the instant charges, he had never been disciplined for inappropriate contact with a student. (Tr. 860.) On cross-examination, in connection with the 2015-2016 CAP, he acknowledged receiving a letter from then Superintendent Kuder that referenced allegations of his inappropriate touching of students. (Tr. 876-883.) He maintained these allegations were false. (Tr. 876-883.)

Retired teacher Mary Ann Phillpott testified to her experience working with Respondent on the seventh grade teaching team from 2018-2020. She described him as always being "professional," and reported that he provided impartial feedback when the team met with parents and students regarding behavior issues. (Tr. 740-741.) Respondent, she said, was always encouraging to the students and presented a calming influence. (Tr. 744-745.)

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[6] In response to his annual evaluation for 2014-2015, Respondent submitted a written rebuttal contesting the cited deficiencies concerning his working with peers, following curriculum, enforcing classroom procedures and rules and communicating with students. (Respondent Exhibit 5.) Explaining his reason for submitting this rebuttal, he cited inconsistencies in the content of the evaluation. Iasiello, he said, included very positive comments, but then concluded the evaluation with a sentence or two citing his failures. (Tr. 862.)

January 3, 2020 Incident Involving Student M.K.

Suzanne Dobson, one of the School's guidance counselors, testified to receiving a complaint regarding Respondent on January 3, 2020 from M.K., a twelve year-old seventh grade student.[7] MK, she recalled, related that during her third period language arts class that day: (1) Respondent had knocked a book from her hands when she approached him for assistance on a writing assignment; (2) after collecting her book and awaiting for him to assist other students, he then reached back and hit her in the face twice. (Tr. 145.)

Describing MK's demeanor, Dobson indicated that she appeared "very upset." M.K., she averred, seemed stunned by Respondent's reported behavior. (Tr. 144, 146.)

Immediately following her conversation with M.K., Dobson confirmed notifying Principal Iasiello and Assistant Principal Charles Giordano of this complaint regarding Respondent. (Tr. 146-147; Petitioner Exhibit 2.)[8]

Iasiello testified that in response to Dobson's email, he met with M.K. later that same day. Upon questioning, he recalled, M.K related her earlier encounter with Respondent during her language arts class. According to Iasiello, she described that upon approaching Respondent for assistance with an assignment, (1) he knocked books from her hands and directed that she return to her seat; and (2) when she had collected the books and repeated her request for assistance, he reached back and struck her face twice. (Tr. 257.)[9]

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[7] The School's guidance counselors rotate grades each year. Doing so, allows each guidance counselor to be assigned the same group of students, as they progress through grades 6 – 8 during their time at the School. (Tr. 140-141.) For the 2019-2020 school year, Dobson was assigned the seventh grade. (Tr. 141.)

[8] Dobson confirmed that her January 3, 2020 email notifying Iasiello and Giordano of MK's complaint incorrectly reports that Respondent slapped her three times, as opposed to two. She attributed this error to her desire to quickly complete and transmit this email. (Tr. 167-168.)

[9] Iasiello related that at his request, M.K. signed a statement confirming this account. (Tr. 261; Petitioner Exhibit 3.)

Iasiello stated that his investigation of this incident included interviewing Students G.C. and A.K., who M.K had identified as witnesses. He related: (1) G.C. reported seeing Respondent knock books from M.K.'s hands and then hit her in the face twice; and (2) A.K. described Respondent as making contact with M.K.'s cheek, as he reached back with his hand in performing a fake yawn, and noted, the contact was not accidental.[10] (Tr. 258-262.)

After these interviews, Iasiello reported speaking with Respondent. When told of M.K's report, he related, Respondent replied, "it's preposterous and there is no way that it happened, completely untrue." (Tr. 267.)

Then acting Superintendent Jeffrey Feifer, who received a report of Iasiello's investigation of M.K's complaint, testified to meeting with Respondent on January 8, 2020. (Tr. 41, 47.) He related that after sharing the information from Iasiello's incident summary, he sought Respondent's account. Respondent, he recalled, denied M.K.'s complaint. He noted that in pressing Respondent whether something may have occurred accidentally, Respondent said, "no, [I have] a great relationship with the kids." (Tr. 45.)[11]

At the conclusion of the meeting, Feifer reported suspending Respondent pending further inquiry. (Tr. 47.) In doing so, he averred finding that Respondent's reported behavior violated several Board policies. These included: (1) District Policy 3211, Code of Ethics; (2) District Policy 3217, Use of Corporal Punishment; (3) District Policy 3280,

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[10] Both G.C. and A.K. confirmed and signed the notes of their interviews. (Petitioner Exhibit 3.) G.C. and A.K. did not testify at the hearing in this matter.

[11] Iasiello, who attended this meeting, gave a similar account. (Tr. 268-269.) He also confirmed reporting this incident to the Institutional Abuse Investigation Unit ("IAIU") of the New Jersey Division of Child Protection & Permanency and the Wyckoff Police Department. (Tr. 270.) In addition, at his direction, M.K. was removed from Respondent's class and transferred to another class for language arts and homeroom.

Liability for Pupil Welfare; and (4) District Policy 3281, Inappropriate Staff Conduct. (Tr. 48-53; Petitioner Exhibit 1.)

In testifying, Student M.K. recounted her January 3, 2020 interaction with Respondent during her third period language arts class. She averred approaching Respondent, while holding her books and a Chromebook laptop, to obtain assistance with her assignment. After initially ignoring her while speaking with two other students, she said, Respondent knocked the books and laptop from her hands. (Tr. 678.) Upon gathering her books and repeating her request, she said, Respondent directed her to sit at an adjacent desk and then continued his conversation with the other students. (Tr. 679.) While seated next to Respondent, she described him as talking with his hands and making contact with her head. Upon questioning the reason he had done so and putting her hands up in defense, she related, he pushed through her hands and made contact with her head a second time. (Tr. 679-680.)[12]

Following these actions, she recalled, Respondent went to another area in the classroom. The two students who had been speaking with him, she said, questioned whether she would be reporting Respondent's behavior to Dobson. (Tr. 682.)[13]

In his testimony, Respondent recalled that on January 3, 2020, M.K approached him while he was in the front of the classroom delivering that day's mini-lesson.[14] (Tr. 802.) M.K., he said, disregarded his directive to return to her seat. (Tr. 802-803.) Electing to

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[12] She confirmed providing this same account of the incident to both Dobson and Iasiello. (Tr. 684-685.) On cross-examination, she acknowledged joking with Respondent on prior occasions. She stated, however, that his actions on January 3, 2020 crossed a line and went too far. (Tr. 707.)

[13] Beyond this January 3, 2020 incident, M.K. testified that she disliked Respondent's treatment of other students in the class. For example, she cited his telling student C.V. to shut up.

[14] The mini-lesson involves approximately eight minutes of direct teacher to student instruction. It is followed by group or independent work that allows the students to apply the concepts presented, so as to achieve the lesson's learning objective. On January 3, 2020, Respondent recalled, the students were tasked with obtaining evidence from their texts to support their thesis. (Tr. 802.)

ignore rather than scold her, he continued with the mini-lesson. (Tr. 803.) Upon concluding the instruction, he reported pushing past her and proceeding to the rear of the classroom, where he worked with a group of students. (Tr. 803-804.)[15]

He acknowledged possibly making incidental contact with M.K., as he walked by her, which may have caused her to drop her books. (Tr. 810-811.) He did not, however, see the books fall from her hands, noting that he would have apologized if he had been aware that his actions had caused her to drop the books. (Tr. 813.)

On further questioning, he denied striking M.K. in the face that day and reported having no recollection of making contact with her face. (Tr. 813.)

He noted that M.K., on occasion, mocked his hand gestures while speaking. If she had been doing so on January 3, 2020, he noted, " I can see myself going like this, like fake yawning to stop her from doing that." (Tr. 817.) But, he had no specific recollection of making such hand movements on that day. (Tr. 818.)[16]

Physical Contact with Student K.T.

Dobson testified that in late January 2020, K.T., another twelve year-old, seventh grade student in Respondent's third period language arts class, met with her to express concerns regarding Respondent. (Tr. 155.) According to Dobson, K.T. reported that Respondent would get close to her when signing out of class and touch her shoulder and back. She also related that on one occasion, Respondent placed his hand on her thigh and

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[15] M.K.'s behavior, he said, had been discussed in grade team meetings that year. In particular, he cited that she would leave her desk and jump in front of other students who had questions. (Tr. 803.) Retired Teacher Phillpott, who also taught M.K. during the 2019-2020 school year, described her as challenging and defiant. (Tr. 748-750.) On cross-examination, she confirmed never identifying such behavior issues in M.K.'s progress reports or report card. She reported instead advising Dobson as to M.K.'s conduct. (Tr. 757-758.)

[16] As for his treatment of other students, he denied calling any students dumb or stupid. In regard to Student C.V., he acknowledged referring to his practice of hiding in the room at the start of class, as being "the dumbest thing in the world to do." He also confirmed jokingly saying "shaddup," which he described as "a Looney Tunes, Bugs Bunny kind of thing." (Tr. 814-815.)

did not remove it until she moved her leg away. (Tr. 156.) This behavior, K.T. stated, caused her to feel very uncomfortable in Respondent's class. (Tr. 156.)

Iasiello testified that upon learning of this report from Dobson, he interviewed K.T. and had her sign a statement. (Tr. 276; Petitioner Exhibit 4.) Her account, he confirmed, referenced that Respondent had touched her back and hands multiple times and on one occasion had placed his hand on her thigh, as he leaned in to look at her computer. (Tr. 278; Petitioner Exhibit 4.)

Iasiello, in turn, notified Feifer of this report and referred the matter to the Board's anti-bullying coordinator Stacey Linzenbold for investigation pursuant to the School's Harassment Intimidation and Bullying ("HIB") policy. In making this referral, he explained that the alleged behavior satisfied the three pillars of the HIB policy – i.e., (1) reasonably perceived as being motivated by an actual or perceived characteristic (e.g., gender); (2) substantially disrupts or interferes with the orderly operation of the school or the rights of students; and (3) reasonably known, under the circumstances, as having the effect of physically or emotionally harming a student, placing a student in fear of such harm or creating a hostile educational environment for the student by interfering with his/her education. (Tr. 280.)[17]

In her testimony, Linzenbold recounted her investigation of K.T.'s complaint. In addition to taking a statement from K.T., she reported interviewing potential student witnesses C.V. and K.G. (Tr. 465, 468-472; Petitioner Exhibit 9.)[18] CV, she said, related that Respondent calls students dumb and says, "shut up" frequently, which he considered to

[17] Iasiello also confirmed reporting this matter to IAIU. (Tr. 282.)

[18] Linzenbold also interviewed several teachers in response to K.T.'s report that Respondent throws a ball at students in the hallway outside his classroom.

be a joke. (Tr. 478.) K.G. confirmed that K.T. had previously shared that Respondent had touched her on the back, hands and thigh. (Petitioner Exhibit 9.)[19]

Linzenbold recalled that in meeting with Respondent as part of this investigation, she shared K.T.'s statement and elicited his response. (Tr. 481.) Respondent, she averred, replied that K.T.'s reports of touching were "absolutely not true," and stated further, "[he] would never put his hands on a student." (Tr. 482; Petitioner Exhibit 9.) Respondent, she noted, also denied calling students dumb or telling them to shut up, but acknowledged using a Looney Tunes voice to say "shaddup." (Tr. 482-483; Petitioner Exhibit 9.)

Linzenbold averred that on the basis of her investigation, she concluded Respondent had harassed K.T. (Tr. 484-485.) His conduct, she said, constituted sexual harassment in that it constituted an unwanted and unsolicited advance. (Tr. 485; Petitioner Exhibit 9.) She documented this finding in her written report, which she shared with Feifer. (Tr. 488; Petitioner Exhibit 9.)

In her testimony, K.T. stated that during the 2019-2020 school year, Respondent would put his hands on her shoulder and back, especially when she was signing out to the leave the classroom. (Tr. 568.) She also noted that on occasion, while reviewing her work, he would put his hand over her hand. (Tr. 569-570.)

In one instance, she said, he leaned over to look at her computer and put his hand on her upper thigh. (Tr. 569, 571.) She reported responding by shifting in her chair and pulling away from him. (Tr. 571-572.) According to K.T., she was "pretty sure" that the contact was not accidental. (Tr. 572.)

[19] C.V. and K.G. did not testify at the hearing in this matter.

She reported telling her friends K.G. and A.P. of Respondent's behavior. A.P., she recalled, replied that Respondent had engaged in the same actions with her. (Tr. 578.)

She also confirmed informing her mother of Respondent's touching. According to K.T., it was at her mother's direction that she reported this matter to Dobson. (Tr. 573.)

Describing her reaction to Respondent's touching, she said, "At first, I really didn't, like, think anything of it, and then, like once it kept happening over and over, like, I started to feel uncomfortable." (Tr. 578.) On cross-examination, she acknowledged never having advised Respondent of this discomfort or requested that he stop touching her. (Tr. 610.)

On cross-examination, she also confirmed being interviewed by an IAIU investigator and a Wyckoff Police Department detective regarding this matter. (Tr. 605, 608.)

In his testimony, Respondent denied ever touching K.T.'s leg or thigh. (Tr. 825.) As to the allegation of touching her back, he stated, "it is possible that I made incidental contact with K.T. on her back when she – either I am trying to get in between the class or if she did something well." (Tr. 825.) He added that he might have touched or patted her shoulder or back in congratulating her for good work. (Tr. 825.) He also reported having no recollection of touching her on the hand other than to move it out of the way when accessing her computer keyboard to provide assistance. (Tr. 826, 919.)

Physical Contact with Student A.P.

In testifying, Dobson recounted receiving a complaint from Student A.P. of inappropriate touching by Respondent during her fifth period language arts class. According to Dobson, A.P., then a twelve year-old seventh grade student, made this report on the same day that K.T. expressed her concerns regarding Respondent's touching. (Tr.

161.) A.P., she said, complained that Respondent would get too close physically and would put his hand over hers while at her desk. Also, on one occasion, she said that he had touched her leg. (Tr. 162-163.) As she had done with K.T.'s allegations, Dobson informed Iasiello of A.P.'s complaint. (Tr. 163.)

Iasiello confirmed receiving this report from Dobson, and, in turn, averred interviewing and obtaining a statement from A.P. (Tr. 284-285; Petitioner Exhibit 6.) Concluding that A.P.'s complaint satisfied the three pillars of the School's HIB Policy, he referred it to Linzenbold for investigation. (Tr. 287.)

In testifying, Linzenbold related investigating A.P.'s complaint in tandem with K.T.'s. She recounted interviewing A.P., as well as several possible student witnesses, including four from A.P.'s fifth period language arts class, A.R., A.O., M.K2. and S.R. (Tr. 494.)[20] Relating their statements, she highlighted: (1) A.R. did not observe Respondent touching students, but reported his third period students had described that "he gets too close;" (2) A.O. stated that Respondent gets too close to students, but did not observe him touching them; (3) M.K2. related witnessing Respondent look down a student's shirt and noted he has gotten too close to her and has touched other students' shoulders; and (4) S.R. averred, "I've seen him touch others' shoulders, but not me." (Tr. 494-497; Petitioner Exhibit 10.)

Linzenbold confirmed speaking with Respondent as part of her investigation. In doing so, she read A.P.'s statement and asked for his response. She recalled, Respondent said, "it was completely untrue," and "this never happened." (Tr. 499; Petitioner Exhibit

[20] These four students did not testify in this matter. Student M.K2. is not the M.K., whose complaint is the subject of Charge No.1 in this matter.

10.) According to Linzenbold, he then offered that his fifth period collaborative teacher Kerry Graziano would confirm he never touches students. (Tr. 499-500.)

In response to this latter assertion, she recounted interviewing Graziano, as part of her investigation. Graziano, she recalled, described Respondent as "touchy" and reported witnessing him touch students on the hands, shoulder and back. (Tr. 501-502; Petitioner Exhibit 10.)

In her testimony, Graziano confirmed this account, noting that Respondent's touching involved both boys and girls. (Tr. 427-429; Petitioner Exhibit 10.) Although describing Respondent's conduct as having crossed a line for her, she confirmed never having discussed it with Respondent or lodged a complaint with the School's administration. She explained that his actions, while "unprofessional," were not "inappropriate." (Tr. 430, 432, 447.)

Upon the completion of her investigation, Linzenbold reported concluding that Respondent had touched A.P. and thereby committed an act of harassment towards her. (Tr. 503.) She documented this finding in her written report, which she shared with Feifer. (Tr. 507.)

In her testimony, A.P. related that Respondent had caused her to feel uncomfortable while in his fifth period language arts class. (Tr. 619-620.) She related that her discomfort stemmed from Respondent making physical contact with her. (Tr. 620.) The contact, she said, included his putting his hand over hers while standing along side her desk. In doing so, she described that he would rub or squeeze her hand slightly. (Tr. 622-623.)

On one occasion, she recalled, while looking at her computer to check her work, "he put his hand on my knee and, like, moved it up my leg." (Tr. 620.) When questioned

whether Respondent's actions in this regard were accidental, she replied, "I don't know for sure, but it didn't – I don't think it wasn't intentional." She explained, "I don't see how you could slip on that, and it wasn't really, like, fast. It was just, like, he seemed to be knowing what he was doing." (Tr. 621.)

According to A.P., she concluded it was necessary to report Respondent's conduct upon learning he had engaged in the same behavior with other students. In support, she cited her conversations with her friends M.K and K.T. (Tr. 625-626.)

On cross-examination, A.P. acknowledged that she had erred in her statement to Iasiello by saying Respondent had placed his hand on the hands of the other girls at her table (i.e., A.O., A.R., M.K2. and S.R.). She averred seeing Respondent get very close to them, but not actually touch their hands. (Tr. 638-641.)

In his testimony, Respondent denied ever touching A.P. on the knee or thigh. He likewise disputed ever touching A.P. or any of his 5th period language arts students on the hand, other than to move their hands off the computer when reviewing and correcting their written work. (Tr. 827-828.)

Shoulder touching, he said, would have been limited to providing a student a congratulatory pat for good work to build confidence. (Tr. 828-829.) He denied ever rubbing or massaging a student's shoulders.

He averred that his only other physical contact with students would have occurred incidentally. Describing how the students' desks were tightly clustered with little separation, he related, "if you are getting into a computer, then occasionally incidental

contact would happen. You would rub your shoulder against their shoulder and then try to move their desk out of the way." (Tr. 829-830.)[21]

Recommendation of Tenure Charges

In their testimony, both Principal Iasiello and then Acting Superintendent Feifer affirmed their conclusions that Respondent had engaged in conduct that was inappropriate and unbecoming. They further averred that discharge was the appropriate penalty. (Tr. 71-73, 252-253; Petitioner Exhibit 1.)

In explaining this decision, Iasiello cited the prior support provided to Respondent and the corrective actions taken, which included two CAPs, the changing of his grade assignment and the withholding of his salary increment. Despite these measures, he noted, Respondent has continued to act in a manner that jeopardizes his students, as evidenced by the complaints at issue here. For this reason, he concluded, Respondent cannot be trusted to make appropriate choices with students in the classroom, and as such, should not remain in his tenured position with the Board. (Tr. 306-307; Petitioner Exhibit 1.)

Feifer expressed similar reasoning for certifying tenure charges against Respondent and seeking his discharge. He reported that the evidence concerning the complaints made by M.K., K.T. and A.P., along with Respondent's pattern of similar conduct as to which corrective action had been taken, caused him to conclude that Respondent should be removed from his position. Such action, he said, was necessary to protect the well being of the students. Further remedial measures, he determined, would be unlikely to succeed and would pose a risk to the students. (Tr. 71-73; Petitioner Exhibit 1.)

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[21] Respondent also testified that the IAIU's investigation of the allegations underlying Charges 1-3 in this matter resulted in an unfounded finding. He also averred that the Wyckoff Police Department never contacted him regarding any of these allegations. (Tr. 844-847; Respondent Exhibit 2.)

DISCUSSION AND FINDINGS

Positions of the Parties

Both parties filed extensive post-hearing briefs. Their respective positions are summarized here.

The Board asserts that it has established all four of the tenure charges brought against Respondent by a preponderance of the evidence. In particular, it highlights that the record confirms Respondent committed the offensive acts underlying these charges. As such, it concludes that application of the governing law here compels a finding that Respondent is guilty of unbecoming conduct warranting his dismissal from his tenured position with the Board.

Reviewing the evidence presented, it avers that the testimony of its eight witnesses should be credited as truthful and reliable. In support, it cites that none of them has any "interest, motive, bias or prejudice" that would undercut their account. *See In Re Borelli,* 91 N.J.A.R.2d 77 (N.J. Adm. Oct. 25, 1991). In addition, it notes, the competent documentary evidence bolsters the credibility of their representations.

Addressing the testimony of the three student witnesses in particular, it asserts that a child's testimony should not be dismissed for lack of credibility unless there is ample basis to find bias. *See In Re Cooke,* 92 N.J.A.R.2d 220 (N.J. Adm. August 30, 1991). It avers that no basis exists to conclude that any of the student witnesses were biased against Respondent. It notes in this regard that Respondent testified to having a good relationship with each student and confirmed they had no reason to fabricate or exaggerate their allegations.

It argues further that the students' interpretation of Respondent's behavior as inappropriate should be accepted. Regardless of Respondent's perception of his behavior, it maintains, the students made plain their reaction to it; namely, shock and discomfort. As they explained, it highlights, Respondent's behavior crossed a line, causing them to report it to the School's administration.

Further, in the case of Student M.K., it points out that two eyewitnesses corroborated her account of Respondent's actions.

In contrast, it asserts, the testimony of Respondent's witnesses should be rejected for want of credibility and/or failing to overcome the weight of the Board's contrary evidence.

Phillpott's testimony, it contends, should not be taken as the whole truth. By her own account, it states, her observation of Respondent's interaction with students was limited to a few occasions during the two years (i.e., 2018-2019; 2019-2020) that she and Respondent were on the same grade team. Those interactions, it points out, were not representative of Respondent's behavior towards students in his classroom, as they occurred in team meetings with a single student and several adults present.

In addition, it stresses that Phillpott seriously undermined her credibility in attempting to minimize Student M.K.'s academic and behavioral excellence. Her efforts to tarnish M.K's version of events by identifying her as "disruptive" and "defiant," it argues, were contradicted by her own prior account of M.K.'s behavior, as recorded on M.K.'s progress reports and report card.

Turning to Respondent, it maintains that his testimony contains serious flaws that warrant its rejection.

In regard to the incident involving M.K., it characterizes his account as illogical and nonsensical. In support, it highlights the following: (1) Respondent's stated decision to initially ignore M.K.'s request for assistance is at odds with the joking relationship he reported having with her; (2) his claim of being unaware that M.K.'s books fell from her hands does not comport with reality, as he certainly would have heard them hit the floor; (3) his contention that M.K. obstructed his path as he sought to walk to another area of the classroom is illogical given his statement that she was standing off to his side; and (4) in addressing whether he made physical contact with M.K.'s face, his account shifted from a complete denial when questioned by the School's administration to an inability to recall when testifying here.

His testimony regarding the other charges, it maintains, reflects similar deficiencies. For example, it points out that he failed to provide any defense other than to deny Students K.T. and A.P.'s allegations when questioned by Iasiello and Linzenbold. Yet, in testifying here, he offered for the first time possible explanations for his reported touching of students, such as congratulatory pats.

This assessment of witness credibility, it contends, compels the following factual findings as to the instant charges.

First, on January 3, 2020, Respondent made inappropriate physical contact with M.K., a student under his supervision, by knocking books from her hands and then attempting to dismiss her by twice using the back of his hand to make contact with her face. These actions by Respondent resulted in emotional harm to M.K.

Second, on multiple occasions during the 2019-2020 school year, Respondent made intentional and inappropriate physical contact with Student K.T. in the classroom, causing

her emotional harm. The physical contact involved touching her hands, back and shoulders, and, in one instance, placing his hand on her thigh and maintaining it there until she moved away from him.

Third, on multiple occasions during the 2019-2020 school year, Respondent made intentional and inappropriate physical contact with Student A.P. in the classroom, resulting in emotional harm to her. His actions in this regard included touching her hands on multiple occasions, and, in one instance, placing his hand on her thigh and maintaining it there until she pulled away.

In addition, it avers, the weight of the credible evidence supports a finding that Respondent has engaged in a habitual pattern of inappropriate behavior towards students over the course of several years for which appropriate remedial action has been taken. Further, it states, his established record of recent behavior as to the three students involved here demonstrates that such remedial measures were unsuccessful and he is beyond rehabilitation.

Addressing the legal principles governing this matter, it highlights that N.J.S.A 18A:6-10 provides for the dismissal of a tenured public school teacher for reasons such as "inefficiency, incapacity, unbecoming conduct, or other just cause." On the record here, it argues, the evidence substantiates Respondent engaged in unbecoming conduct warranting his dismissal.

The New Jersey Supreme Court, it avers, has defined unbecoming conduct as "conduct 'which adversely affects the morale or efficiency of the [Department of Education]' or 'has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services.'" *Bound Brook Bd. of Educ. v. Ciripompa,*

228 N.J. 4, 13 (2017) (quoting *In Re Young,* 202 N.J. 50, 66 (2010) (quoting *Karins v. City of Atlantic City,* 152 N.J. 532, 554 (1998))). Such conduct broadly encompasses any "violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." *Id.* at 13-14.

This standard, it stresses, extends beyond the teacher's ability to perform the "teaching function," so as to encompass "the teacher's presence in the classroom," and whether he/she "pose[s] a danger of harm to the students for a reason not related to academic proficiency." *Gish v. Bd. of Educ. of Paramus,* 145 N.J. Super. 96, 105 (App. Div. 1976) *certif. denied,* 74 N.J. 351 (1977), *cert. denied,* 434 U.S. 879 (1977).

A finding of unbecoming conduct, it submits, does not require proof of any underlying offenses, such as a violation of any civil or criminal statute, Board policy or other rule or regulation. *See Ciripompa,* 228 N.J. at 16-17. As such, it concludes, even though a claim of unbecoming conduct may be predicated upon an alleged violation of statute, policy, rule or regulation (e.g., child abuse), the underlying allegations do not need to be proved to establish the charge of unbecoming conduct. *Id.* at 16-17. This standard, it explains, recognizes that it would be unreasonable to require a school board to defer taking action until events have unfolded to such extent that its students have been harmed or its mission disrupted. *Id.* at 14.

For this reason, it concludes, that I must reject any effort by Respondent to defend against the charges here by citing the lack of a criminal investigation by the Wyckoff Police Department or an adverse finding by IAIU. Instead, it argues, the charges of unbecoming conduct must be determined based upon the supporting evidence presented. The evidence in this regard, it submits, is overwhelming.

As to the factual findings to be made here, it notes that they are subject to the "residuum rule," which is codified at N.J.A.C. 1:1-15.5(b). This regulation states:

> Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness."

This rule, it posits, does not mandate that each individual factual finding be supported by the residuum of legally competent evidence in order to ensure the reliability of the findings. *See Ruroede v. Borough of Hasbrouck Heights,* 214 N.J. 338, 359 (2013). Instead, such evidentiary showing is required only to sustain the ultimate finding(s) of material fact in the matter. *Id.*

In the context of tenure hearings, it explains, "there need not be a residuum of competent evidence to prove each act considered by the Commissioner so long as 'the combined probative force of the relevant hearsay and the relevant competent evidence' sustains the Commissioner's ultimate finding of unbecoming conduct." *In Re Cowan,* 224 N.J. Super. 737, 750 (App. Div. 1988) (quoting *Weston v. State,* 60 N.J. 36, 52 (1972)) (affirmed Commissioner's ultimate finding of one or more acts of unbecoming conduct over multiple years, concluding reliance on hearsay was appropriate to find a particular prior incident that was exemplary of the charged conduct).

Applying this standard here, it submits that the combined force of the relevant, competent evidence presented supports the ultimate findings of fact substantiating that Respondent engaged in the three specific acts of unbecoming conduct that is the subject of Charges 1 – 3.

Finally, as to the issue of penalty, it asserts that in cases involving nearly identical acts of unbecoming conduct, dismissal has been found to be appropriate and warranted.

See, e.g., Dunckley v. Bd. of Educ. of Rockaway Twp., Dkt. No. A-1152-16T1 (App. Div. Mar. 19, 2018) (unpublished), *certif. denied,* 234 N.J. 20 (2018) (dismissed teacher with 42 years service without formal prior discipline for two incidents of inappropriate touching of a female student (shoulder, arm, knee), causing discomfort); *In Re Davis,* Agency Ref. No. 22-1/14 (Symonette 2014) (imposed penalty of dismissal for custodian's unbecoming conduct, which involved touching several female students' hair, causing them to feel uncomfortable).

Applying the principles of these decisions here, it concludes, demonstrates that the same result should follow; namely, Respondent's dismissal. It reasons that Respondent's efforts to deny and/or minimize his alleged actions towards his students reflects his lack of understanding of the egregiousness of his behavior and his failure to learn his lesson from the remedial actions taken in response to his prior similar acts. Therefore, it submits, the Board's mission of providing a safe learning environment for all of its students compels his removal.

Respondent, on the other hand, asserts that the Board has failed to satisfy its evidentiary burden as to all four of the tenure charges brought against him.

Addressing the governing legal principles, Respondent points out that as a matter settled law, the Board bears the burden of proving the allegations of unbecoming conduct by a preponderance of the relevant evidence. *See In Re Polk,* 90 N.J. 550 (1982); *Atkinson v. Parksekian,* 37 N.J. 143, 149 (1962).

Although unbecoming conduct is not defined by statute, he highlights that the courts have recognized the term as involving conduct having "a tendency to destroy public respect for government employees" and "confidence in the operation of [public] services."

In Re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). Further, he points out, in practice, it is accepted that stripping an individual of tenure is the most severe form of discipline that may be imposed, and, as such, generally requires a showing of egregious misconduct of "moral turpitude." *See In Re Kevin Garfine,* Docket No. 317-10/15 (February 15, 2016); *In Re Laurie Olsen-DelGuercio,* Docket No. 268-11/17 (May 10, 2018).

In addition, he submits, an employee subject to tenure charges "has a fundamental due process right to face his accusers at trial." *In Re Richard Vincenti,* Docket No. 255-14 (June 11, 2014). For this reason, he notes, while state law allows the admission of hearsay evidence in administrative proceedings, the residuum rule mandates that legally competent evidence must exist to support it. N.J.A.C. 1:1-15.5(b); see *State v. Weston,* 60 N.J. 36 (1972) (final agency decision may not be based solely on hearsay evidence); *In Re Thomas Strassle,* Docket No. 131-5/16 (October 5, 2016) (hearsay documents alone are insufficient to prove the truth of tenure charges).

In evaluating witness testimony, he asserts, the trier of fact must properly assess credibility. In doing so, he states, the law requires an overall review of the witness's account with consideration of its rationality, internal consistency and the way it "hangs together" with the other evidence. *Carbo v. United States,* 314 F.2d 718, 749 (9th Cir. 1963).

To be believed, he submits, testimony "must be credible in itself" in that "it must be such as the common experience and observation of mankind can approve as probable in the circumstances." *In Re Perrone,* 5 N.J. 514, 522 (1950). For this reason, he maintains, testimony may be rejected when "it is inconsistent with other testimony or with common

experience" or "overborne" by testimony of other witnesses. *Congleton v. Pura-Tex Stone Corp.,* 53 N.J. Super 282, 287 (App. Div. 1958). Likewise, "'the interest, motive, bias or prejudice of a witness may affect his credibility and justify . . . disbelieving his testimony.'" *State v. Salimone,* 19 N.J. Super. 600, 608 (App. Div.), *certif. denied,* 10 N.J. 316 (1952).

The process of credibility assessment, he states, employs the widely accepted tenet of "false in one, false in all." This precept compels the fact finder to discredit the entirety of a witness's testimony when a part of it s found to be untruthful. *See State v. Ernst,* 32 N.J. 567, 583 (1960).

Applying these principles to the record here, he avers, plainly confirms that the Board has failed to prove him guilty of unbecoming conduct by a preponderance of the relevant evidence. In fact, he asserts, it can be more aptly stated that the allegations were effectively disproved at the hearing in this matter.

Addressing Charge No. 1, he highlights that Student M.K. walked back considerably her allegations that formed the basis for this charge. In particular, he references: (1) she clarified the degree of force with which he touched her face, as being a touch, rather than a strike; (2) she confirmed telling Iasiello that he hit her "playfully;" and (3) she acknowledged the possibility that the contact was accidental in that he was talking with his hands at the time.

Moreover, he avers, closer consideration of her testimony reveals reasons to doubt the veracity of even those claims. In support, he cites: (1) Student K.T. who was present in the classroom on January 3, 2020, did not observe the incident; (2) on prompting from the Board's attorney, M.K. departed from her earlier testimony, as well as her prior statements,

by claiming that in addition to her books, he had knocked a Chromebook laptop from her hands, a detail she should have undoubtedly recalled without prompting; and (3) her expressed dislike for his teaching methods and satisfaction with being transferred out of his language arts class.

It follows, he submits, that M.K.'s true concern was his teaching style and not any alleged inappropriate classroom behavior.

Referencing his testimony, he cites his denial of hitting, striking or otherwise making contact with M.K.'s face. Further, he notes, while his testimony allowed for the possibility that he had moved his arms in talking or yawning at the time of this incident, it nonetheless demonstrates that if such movement resulted in his touching M.K., such contact was inadvertent.

Further, he asserts, if it is found that such inadvertent touching occurred, such actions do not rise to the level of unbecoming conduct that would warrant his loss of tenure.

Finally, he notes this charge is flawed as a matter of due process given the serious discrepancy between the alleged conduct (i.e., physical assault) and the evidence presented (i.e., playful or inadvertent touching). Due process, he states, requires clear notice of each accusation so that the respondent to tenure charges can adequately prepare a defense. Under the circumstances here, he was deprived of such opportunity.

Accordingly, for these reasons, he submits that Charge No. 1 should be dismissed.

Turning to Charge No. 2, he avers that K.T.'s allegations were conclusively shown to be false. In support, he cites that M.K., a fellow student in her third period language arts class, testified to never having witnessed him touch any of the students in that class.

Further, he notes, among the investigations conducted by the School's administration, IAIU and law enforcement, a total of ten students were questioned, none of which reported seeing him touch K.T.

In addition, he maintains, K.T.'s allegations are absurd on their face. According to Respondent, it defies belief that he would have rubbed K.T.'s shoulders every day while in a classroom full of students. K.T., he posits, came to recognize this fact during cross-examination, which explains her unprompted claim that the touching occurred while the other students were engaged in independent work. He highlights that she made a similar unsuccessful effort to explain away that the students at her table did not observe Respondent touching her hand on multiple occasions, as she claimed.

As for the alleged touching of her thigh, he avers, her story unraveled upon examination. In this regard, he notes, that when questioned by IAIU, she made no mention of this claim until the second interview, casting doubt on her credibility. In addition, he points out that K.T.'s claim that he threw a ball at students in the hallway outside his classroom was discredited by Linzenbold's investigation.

In sum, he concludes, K.T.'s testimony should be rejected as not credible. Inasmuch as her testimony was the only non-hearsay testimony presented in support of this Charge No. 2, he avers, it necessarily follows that the Board failed to meet its burden of proof and the charge must be dismissed.

Moving on to Charge No. 3, he maintains that here too, the testimony of the student accuser fails for want of credibility. In support, he cites A.P.'s uninvestigated claim that he touched the legs of other female students in her fifth period language arts class. In

addition, he points to her refuted assertion that he touched the hands of the four female students at her table in that class.

Compounding these flaws in her account, he notes, is her statement to the IAIU investigator that she never witnessed him touch any other students. When questioned on cross-examination, she confirmed the accuracy of that statement even though it contradicted her earlier testimony.

These discrepancies, he avers, supports a finding that A.P. made false statements in testifying here. Therefore, he asserts, the false in one, false in all principle compels the dismissal of her entire testimony. *See In Re Hoskins-Nnakwe,* Docket No. 125-6/17 (January 20, 2019) (rejected entirety of student accuser's testimony upon showing that a material component of her claims was false).

Moreover, he contends that upon further review, her testimony reflects other serious inconsistences. For example, he references: (1) her claim that he moved his hand up her leg, a contention that she did not make in any of the investigatory interviews; and (2) her assertion that he squeezed and rubbed her hand, a detail she had not previously revealed.

Other factors casting doubt on her claims, he states, include: (1) the timing and underlying circumstances of her allegations against him; namely, she lodged her complaint only upon speaking with K.T. and M.K., three weeks after his suspension; (2) the lack of corroboration for her account from any of the students in her fifth period language arts class; (3) Graziano's testimony confirming that she did not witness him touch any students inappropriately; (4) the holiday card that he received from K.T., in which she wrote, "Thanks for being a great teacher and always making me smile;" and (5) her statement to

the IAIU investigator that it was only his touching her thigh that caused her to feel uncomfortable.

Accordingly, for all these reasons, he maintains that A.P.'s testimony cannot be credited, and her allegations against him must be rejected. Therefore, he concludes, it must be found that the Board has failed to meet its burden of proof as to Charge No. 3, thus compelling its dismissal.

Finally, in regard to Charge No. 4, Respondent reiterates the arguments presented in his motion for partial summary judgment, by which he requested dismissal of this charge for failing to state a valid cause of action.[22]

In particular, by that motion, he asserted that the charge contravenes the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-117 *et seq.;* N.J.S.A. 18A:6-10 *et seq.,* in that it improperly combines Section 8 charges (i.e., unbecoming conduct) with Section 25 charges (i.e., inefficiency or unsatisfactory work performance). The latter, he maintains, are unfounded given that he has not received two consecutive ineffective or partially ineffective summative evaluations ratings. N.J.S.A. 18A:6-17.3; *see, e.g., In Re Dawkins,* Docket No. 367-16 (October 21, 2016). For this reason, he argues, such portion of the charge that concerns his 2015-2016 and 2016-2017 CAPs cannot stand because they address exclusively performance-related issues.

He reasoned that the Board has referenced the CAPS in this charge in order to dredge up an assortment of complaint letters dating to 2008. Having never been disciplined as to any of those complaints, which include accusations of improper conduct toward

[22] See note 4, *infra.*

students, he maintains that he was never afforded an opportunity to defend himself, nor was a determination ever made as to the truth of those allegations. Therefore, he concludes those outdated claims cannot be used against him now.

He argued further by this motion that Charge No. 4 must be dismissed in its entirety under the doctrines of collateral estoppel, laches and/or waiver. In support, he avers, established precedent under TEACHNJ supports the dismissal of tenure charges (in whole or in part) based upon the petitioner's failure to bring and prosecute them in a timely fashion. *See In Re Jill Buglovsky,* Docket No. 265-9/12 (December 12, 2012), *confirmed, Buglovsky v. Randolph Township Board of Education,* Dkt. No. MRS-C-13-13 (July 16, 2013) (dismissed tenure charges for attendance issues arising a year prior to filing, noting good practice calls for disciplinary charges to be imposed contemporaneously with the offending conduct).

In contesting this charge, he now raises the additional point that the Board failed to present any direct evidence or first-hand eyewitness testimony during the hearing to prove the truth of the complaints of improper conduct contained in the referenced letters. As such, he submits, his contention as to the true basis for the CAPs and related discipline stands uncontested; namely, poor attendance and deficient performance.

He also avers that the CAPs and increment withholding cannot be considered here for progressive discipline purposes. Any such claim, he maintains, has been mooted by the Board's failure to substantiate his guilt on any of the first three charges.

For all these reasons, he submits that Charge No. 4 should be dismissed.

Alternatively, if any of the four charges should be sustained, then, he argues, the record reflects considerable evidence mitigating against imposition of serious discipline.

Such evidence, he states, includes: (1) his demonstrated record of improved performance, as reflected in his evaluations for the 2017-2018 and 2018-2019 school years commending his interaction with students and established classroom culture; (2) his receipt of numerous commendations regarding fundraising for charity; (3) his substantial involvement with extra curricular activities at the School; and (4) his service as a dependable teaching team member, as confirmed by Phillpott.

Further, he points to: (1) his vow to never again make physical contact with students, whether incidental or harmless; (2) his willingness to take professional development courses addressing appropriate teacher-student interactions and classroom management; and (3) his lack of malintent as to any of his reported touching behavior. *See In Re Stephen Michaele,* Docket No. 69/4-19 (August 5, 2019) (citing lack of malicious intent, declined to dismiss or discipline respondent teacher despite established inappropriate touching of students); *In Re Albert D. Porter,* Docket No. 104-4/18 (October 29, 2018) (held respondent teacher's inappropriate conduct with student, including massaging, did not warrant discharge given his lack of malicious or sexual intent).

In sum, he asks that the instant tenure charges be dismissed and he be made whole for all salary and emoluments withheld from him during the pendency of this proceeding. Alternatively, if any of the charges are sustained, then only minor disciplinary action should be imposed.

Opinion

Certain introductory comments are appropriate here. Per the governing statute, the Board is authorized to seek Respondent's dismissal for reasons of "unbecoming conduct or other just cause." N.J.S.A. 18A:6-10. While not defined in the statute, "unbecoming

conduct" is recognized as conduct "[having] a tendency to destroy public respect for [government] employees and confidence in the operation of public services." *Ciripompa,* 228 N.J. at 13. As such, it encompasses violations of recognized standards of behavior for persons holding a position charged with the public trust. *Id.*

In seeking a tenured teacher's dismissal based upon charges of unbecoming conduct, the school board bears the burden of proof. It must establish the charged allegations by a preponderance of the relevant evidence. In addition, it must demonstrate that the gravity of substantiated misconduct warrants the teacher's discharge, as opposed to some lesser disciplinary penalty.

With these principles in mind, I turn to the charges presented here. After a careful and thorough review of the evidence and the parties' respective arguments, I conclude that the Board has substantiated Charge Nos. 1 - 4. My reasons follow.

Charge No. 1

The weight of the credible evidence presented, I find, substantiates this charge. Namely, on January 3, 2020 during Respondent's third period language arts class, he: (1) knocked books from Student M.K's hands when she approached him for assistance with her assignment; and then (2) twice touched her face with the back of his hand by swinging his arms, as she resumed her petition for his help.

My conclusion in this regard necessarily involves making a credibility determination to resolve the competing accounts of this incident offered by M.K. and Respondent. On review, I am persuaded that it is M.K.'s account that must be credited.

I found her testimony recounting Respondent's conduct in this instance to be clear and convincing. She very precisely detailed each step of her encounter with Respondent on

January 3, 2020, which began with Respondent initially ignoring her request for assistance, continued with him knocking books from her hands and then culminated with him swinging his arms and twice touching her face, after she had gathered her books and repeated her petition for help.

She made no attempt to embellish her account. Quite the opposite, she described the degree of contact that Respondent made with her face as being a "touch."

Her testimony was also consistent with the statement she provided to Iasiello later that same day. In addition, the statements of Students G.C. and A.K. who witnessed the incident, corroborated her account.[23]

In contrast, I determine Respondent's alternative account of this incident to be unpersuasive. In particular, I take note that his version of these events has not been consistent, but has evolved over time.

When questioned regarding this matter in January 2020, first by Iasiello, and later by Feifer, he described M.K's report as "preposterous" and "completely untrue." He maintained that position even when Feifer inquired whether the incident could have occurred accidentally.

Yet, in testifying here, he acknowledged the possibility of having knocked the books from M.K.'s hands through incidental contact as he walked past her. But claimed that if that had occurred, he was unaware. As for touching her face with the back of his hand, he described a scenario in which it could have occurred. Namely, if M.K. had been

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[23] As noted above, Students G.C. and A.K. did not testify at the hearing in this case. Instead, their eyewitness account of this incident was presented through Iasiello's testimony and the notes of his interview of each student. Such testimony and documentary evidence are no doubt hearsay, and therefore, cannot be the sole basis for this essential factual finding. For that reason, I cannot and do not place such reliance on this evidence. Instead, consistent with the residuum rule, I rely upon this evidence solely as corroboration for the competent proof presented by M.K.'s testimony. N.J.S.C 1:1-15.5(b); *In Re Cowan,* 224 N.J. at 750.

mocking him for talking with his hands, he could see himself extending his harms in fake yawn to stop her from doing so. However, he had no specific recollection of doing so that day.

On review, I am compelled to conclude that his assertions in this regard are illogical and at odds with normal experience. If he had knocked the books from M.K.'s hands, whether intentionally or inadvertently, he would certainly have been aware, as he would have heard them hit the floor. Likewise, if he had touched M.K.s face with the back of his hand while fake yawning, he surely would have felt the contact.

Laid bare, his testimony strikes me as an attempt to present an alternate account that minimizes his culpability for this incident, while avoiding an affirmative admission. His straddling of the fence in this regard necessarily undermines the credibility of his claims. In sum, it is plain to me that his testimony simply lacks the ring of truth.

I am also unpersauded by his proffered challenges to M.K.'s credibility.

For example, K.T.'s failure to observe and confirm the incident despite being present in the classroom that day does not support Respondent's position. Indeed, he does not claim K.T. was in the immediate area at the time, and, as such, there could be many explanations for her failure to observe his actions towards M.K. Moreover, he offers no explanation for the corroborating accounts provided by the two students with whom he was speaking when the incident occurred.

Likewise, his highlighting of M.K.'s expressed dissatisfaction with his teaching style does not cause me to doubt her account of his actions on January 3, 2020. His suggestion that her concerns in that regard biased her testimony is pure conjecture.

Moreover, his own testimony contradicts this claim inasmuch as he averred that M.K., to his knowledge, had no reason to make false allegations against him. (Tr. 930.)

Similarly, the evidence presented depicting M.K. as defiant and challenging does not undermine her veracity. Even accepting the truth of these claims, which appear to be dubious, they do not support the conclusion that M.K. is untruthful in general or as to this incident in particular.[24] Stated otherwise, no connection exists between M.K.'s cited behavioral issues and her reputation for truth and honesty. Simply put, regardless of whether M.K. misbehaved in class, I am persuaded that she truthfully related Respondent's actions on January 3, 2020.

Finally, contrary to Respondent's claim, I am not persuaded that Charge No. I fails for due process reasons. Notwithstanding the difference between the charge and the evidence presented as to the degree of force with which Respondent made contact with M.K.'s face (i.e., strike vs. touch), I am satisfied that he had clear notice of the essential conduct charged and ample opportunity to prepare his defense. My review of the charge and the accompanying descriptive subparagraphs confirms this conclusion. Moreover, this discrepancy between the charge and the proffered evidence actually weighs in his favor. Plainly then, he has not suffered any prejudice as to this charge that establishes a due process violation.

Accordingly, for all these reasons, Charge No. 1 is sustained.

[24] On review, I find substantial reason to doubt retired teacher Phillpott's testimony averring that M.K. exhibited these behavioral issues while a student in her class during 2019-2020. In support of this conclusion, I note, in particular, that by Phillpott's own admission, her account is at odds with the manner in which she described M.K.'s conduct in the progress reports and report card issued to her.

Charge No. 2

By this charge, Respondent is accused of having engaged in the harassment and inappropriate touching during the 2019-2020 school year of K.T., a student that year in his third period language arts class. On review, I am satisfied that the Board has presented sufficient competent evidence to substantiate this charge.

In her testimony, K.T. very clearly described the touching that she experienced from Respondent during the 2019-2020 school year. This contact included his frequently placing his hands on her shoulder and back, as well as occasionally, putting his hand over hers while looking at her computer to review her work. Further, in one instance, while leaning over to look at her computer, he put his hand on her thigh.

Her account and description of this conduct by Respondent did not change or vary on cross-examination. It was also consistent with the account that she provided when interviewed by Iasiello in January 2020 and later questioned by Linzenbold in connection with her HIB investigation. Further, as confirmed by the HIB investigation, student K.G. corroborated K.T.'s testimony that she had previously advised her of Respondent touching her on the thigh, back and hands.

Further, Respondent has not presented any valid basis for me to doubt K.T.'s account. Indeed, he acknowledged having no reason to believe that K.T. would make false accusations against him. (Tr. 930.)

The cited delay in M.K. informing the IAIU investigator that Respondent had touched her thigh does not undercut her testimony. The IAIU investigator did not testify at the hearing in this case. Her interview notes, which are the only record evidence of her investigation, do not provide a sufficient basis for me to reach the conclusion that

Respondent posits. Stated otherwise, even if K.T. did delay until the second IAIU interview to report that Respondent had touched her thigh, it does not, on the record here, support a finding that she was deceptive.[25]

In fact, all of the other evidence before me suggests the contrary. Indeed, in her initial report to Dobson, as well as in her interviews by Iasiello and Linzenbold, she consistently detailed that Respondent had touched her shoulders, hand and thigh.

The absence of any corroborating witnesses to Respondent's touching of K.T. (e.g., other students in her class) does not compel rejection of her testimony, as Respondent suggests. In view of the reported brevity of his touching of her back and hands, I do not find it unusual that the other students in her class did not have a lasting memory of it. As for the touching of her thigh, there is no evidence that this contact was visible to any of K.T.'s fellow students.

Examining Respondent's testimony, I find it far less persuasive. Here again, his account of the relevant facts has evolved over time.

When questioned by Linzenbold, he declared K.T.'s allegations were "absolutely not true," and stated further, "[he] would never put his hands on a student." However, in testifying here, while holding to his denial of the most serious allegation of touching K.T.'s thigh, he conceded the possibility of having made incidental contact with her back while walking past her in the classroom. He also acknowledged possibly having patted her shoulder or back as a congratulatory gesture for good work. In addition, he conceded touching her hand when accessing her computer keyboard to review her work and provide assistance.

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[25] The same holds true for the other discrepancies that Respondent identifies between K.T.'s account and the IAIU investigator's interview notes.

This sharp dichotomy between Respondent's initial categorical denial of the allegations and his more nuanced testimony casts doubt on his representations. Indeed, his belated offering of a justification for and benign characterization of his possible touching of K.T., without formally admitting to it, suggests a post hoc effort to recast his undeniable misconduct.

In sum, I am persuaded that as charged, Respondent touched K.T. inappropriately on the shoulder, hand and leg. I am also convinced by K.T.'s account that this touching was disturbing and caused her to feel uncomfortable.

I am not, however, satisfied on the evidence presented that Respondent's conduct in this regard constituted sexual harassment or was sexual in nature.

The Board's assertion that Respondent touched K.T. in a sexual manner stems from the one instance when he touched her leg. *See Board's Post-Hearing Brief,* at 72. On review, I do not find, however, that the record supports such a finding.

It is apparent that the Board's claim that Respondent's action was sexually motivated rests entirely upon the location of the touch (i.e., K.T.'s thigh) and her gender (i.e., female). No evidence was presented that Respondent said or did anything in connection with this touch that indicated a sexual motivation. Likewise, the context in which it occurred does not suggest such intent. I note in this regard that K.T. related the touching occurred when Respondent leaned in to look at her computer while providing assistance with her work. Finally, the Board's own witness, Graziano described Respondent as being "touchy" and noted his conduct extended to both boys and girls.

In sum, on the record here, I cannot conclude that it is more likely than not that Respondent's touching of K.T.'s leg was sexual in nature, as opposed to another instance of

his generally inappropriate touching of students. This finding, however, does not absolve Respondent from responsibility. Indeed, I am satisfied that his actions, as established, were, no doubt, inappropriate and support a determination of unbecoming conduct.

Accordingly, for these reasons, Charge No. 2 is sustained.

Charge No. 3

By this charge, Respondent is again accused of engaging in harassment and inappropriate touching during the 2019-2020 school year of a student under his supervision. The student, A.P. was assigned to his fifth period language arts class. From my examination of the record, I am persuaded that the weight of the credible evidence compels sustaining this Charge.

In her testimony, A.P. averred that Respondent's actions during the 2019-2020 school year had caused her to feel uncomfortable in his class. She detailed that the conduct involved him making physical contact with her, which included putting his hand over hers while standing along side her desk. And, on one occasion, she related, he put his hand on her leg above her knee.

Her recounting of Respondent's actions was clear and consistent throughout. It withstood vigorous cross-examination. Further, it did not depart from the essential elements of her prior statements to Iasiello and Linzenbold.

In addition, Respondent acknowledged being unaware of A.P. having any motive to make false allegations against him. Instead, he reported having a very good relationship with her. (Tr. 929-930.)

In his post-hearing brief, Respondent cites various factors to support his claim that she was not a credible witness. *See Respondent's Post-Hearing Brief,* at 30-33. On review, I am unpersuaded by his arguments.

For example, the failure of student's A.R., A.O., M.K2. and S.R. to confirm A.P.'s report that she had witnessed Respondent touch their hands does not provide sufficient reason for me to reject her account of his actions towards her. I found satisfactory her acknowledgement of this error and explanation that what she observed was Respondent getting very close to these students, a point she had made when interviewed by Linzenbold. In fact, during their HIB interviews both A.O and M.K2. related instances of Respondent getting too close to them.

As for the discrepancies that Respondent cites between A.P.'s testimony and her prior statements to Iasiello and Linzenbold, they do not rise to a level that causes me to doubt the essential elements of her account. Likewise, Respondent's comparison of A.P.'s testimony and the IAIU's investigator's notes falls short of providing a sufficient basis to reject Respondent's testimony.[26]

Moreover, in reviewing Respondent's testimony, I am convinced that on balance, A.P.'s account should be credited over his recollection of his interactions with her during the 2019-2020 school year.

As I noted in my determination regarding Charge No. 2, I am struck here too by the manner in which his version of events has shifted from that which he provided during Linzenbold's interview to the testimony he gave here.

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[26] In fact, with the IAIU investigator not having testified and provided context for her notes, it is difficult for me to give them much weight, if any, in this regard.

When Linzenbold shared A.P.'s statement, he replied, "it was completely untrue" and "this never happened."

However, in his testimony, after denying that he had touched A.P. on the knee or thigh, he conceded certain touching of the students in his fifth period language arts class. Such touching, he said, included: (1) moving their hands off their computer when reviewing and correcting their work; (2) patting students on the shoulder as a congratulatory gesture for good work or to build confidence; and (3) incidental contact as he moved through the classroom due to the students' desk being tightly clustered.

Respondent has not offered any acceptable explanation for failing to identify this acknowledged physical contact with his students when previously questioned by Linzenbold. Further, it comes after Graziano, who he had told Linzenbold would corroborate that he never touches students, testified to the contrary.

As such, I am left to conclude that his testimony represents a post hoc effort to conform his version events to Graziano's account, while placing his behavior in the most favorable light possible. Put in this context, his denial of the offending conduct rings hollow.

However, while I am convinced that Respondent, as charged, touched A.P. inappropriately on the hand and leg causing her to feel uncomfortable, I do not find sufficient evidence to conclude that his actions constituted sexual harassment or were sexual in nature.

In asserting that Respondent's actions were sexual in nature, the Board relies upon his touching of A.P.'s leg. *See Board's Post-Hearing Brief,* at 73. My examination of the

record compels me to conclude that there is insufficient evidence to substantiate such motivation by Respondent.

As with my finding regarding Charge No. 2, the record here too is devoid of any evidence, such as statements or other conduct by Respondent at the time, suggesting that he acted for sexual reasons in touching A.P.'s leg. Indeed, in explaining her conclusion that the touching was not accidental, A.P. could reference only her sense of things, stating, "it was just like, he seemed to be knowing what he was doing."

Further, the context in which this touching took place does not lend support to the claim of sexual motivation by Respondent. As A.P. testified, the touching occurred while Respondent was at the side of her desk and looking at her computer to check her work.

Finally, the evidence presented confirms that Respondent's touchy behavior, in general, extended to both boys and girls. Both Graziano and A.P. averred as much.

Therefore, I am unable to conclude that it is more likely than not that Respondent's touching of A.P.'s leg was done in a sexual manner, as opposed to another instance of his non-sexual inappropriate touching of students. Nonetheless, for the reasons stated above, I am persuaded that his touching of A.P. substantiates this charge of unbecoming conduct.

Accordingly, for these reasons, Charge No. 3 is sustained.

Charge No. 4

By this Charge, Respondent is accused of accumulating a substantial record of misconduct, despite remedial measures, and this pattern further justifies his dismissal from employment with the Board. The prior misconduct reportedly includes his unprofessional behavior towards students, as reflected in letters the Board received from parents and students.

As an initial matter, I address Respondent's motion for partial summary judgment, dated July 10, 2020, by which he seeks dismissal of this charge and as to which I previously deferred my ruling. On review, I find unpersuasive both theories that he advances in support of this motion; namely, (1) the charge fails to state a valid tenure charge pursuant to the governing statute, TEACHNJ; and (2) the doctrines of collateral estoppel, laches and/or waiver compel dismissal of the charge

Contrary to Respondent's first theory, I do not read this charge as contravening the governing statute by mixing Section 8 unbecoming conduct allegations with Section 25 claims of unsatisfactory work performance. *See Respondent's Motion for Partial Summary Judgment* at 2-3. Quite the opposite, I am satisfied that the charge is limited to the matter of conduct unbecoming. The Board's reliance upon Respondent's 2015-216 and 2016-2017 CAPs, as supporting evidence for the charge, does not show otherwise.

The CAPs, as Respondent notes, do concern, in part, his unsatisfactory work performance. The Board, however, does not rely upon those portions of the CAPs in connection with this charge. Instead, the testimony presented and the Board's opposition to Respondent's motion, dated July 24, 2020, plainly demonstrate that the Board proffers the CAPs as substantiation of this charge only to the extent they document Respondent's prior inappropriate behavior toward students.

In sum, by this charge, the Board does not accuse Respondent of unsatisfactory work performance, but strictly a pattern of misconduct involving improper behavior towards students.

Turning to the second basis that Respondent posits for dismissal of this charge, I likewise find it unpersuasive. By this charge, the Board does not seek to revisit the manner

in which it previously addressed misconduct by Respondent. Nor does it endeavor to discipline him for long-past acts of alleged misconduct for which no responsive action was ever taken. Instead, as proffered, the charge alleges that when Respondent's most recent alleged unbecoming conduct (i.e., Charge Nos. 1 – 3) is considered together with his past documented misconduct, a pattern of inappropriate behavior towards students is apparent, which further justifies his dismissal. Therefore, the doctrines of collateral estoppel, laches and waiver have no application here and do not provide a basis for dismissing this charge.

Accordingly, for these reasons, Respondent's motion for partial summary judgment seeking dismissal of this charge is denied.

Addressing the merits of this charge, I am satisfied that the weight of the credible evidence substantiates that the CAPs issued to Respondent for the 2015-2016 and 2016-2017 school years both stemmed, in part, from his behavioral issues.

In his testimony, Iasiello affirmed that the reasons for issuing Respondent the 2015-2016 CAP included complaints received during or at the conclusion of the prior school year from students and parents regarding his classroom conduct. One complaint cited that Respondent had caused a female student to feel uncomfortable by touching her shoulders, while others referenced his harsh treatment of and inappropriate statements to students. As a consequence of these circumstances, he reported, the CAP's identified area for improvement listed: "providing an environment in which each child has positive nurturing relationships with caring adults in which you treat students as individuals." (Petitioner Exhibit 1.)

By his testimony, Iasiello also confirmed that Respondent failed to satisfy the 2015-2016 CAP, due, in part, to his treatment of students, including his use of sarcastic or

inappropriate language. For this reason, he averred denying Respondent his salary increment for the succeeding school year and issuing him the 2016-2017 CAP. Similar to the prior year's CAP, its listed areas for improvement included: "demonstrate consistently a positive, professional and respectful demeanor toward your students through appropriate daily instruction." (Petitioner Exhibit 1.)

In contrast, I found Respondent's assertions that both CAPs strictly concerned performance issues unpersuasive.

The express language of the CAPs together with Iasiello's explanatory testimony plainly shows otherwise. Moreover, Respondent's testimony was far from consistent on this point. Indeed, he acknowledged that in issuing the 2015-2016 CAP, Iasiello referenced the complaints from students and parents regarding his behavior in the classroom. (Tr. 855-856.) Further, on cross-examination, he conceded receiving a September 22, 2015 letter from then Superintendent Richard Kuder, explaining that as a result of those complaints, the 2015-2016 CAP was designed to address Iasiello's concerns regarding his overall rapport with students. (Petitioner Exhibit 1.)

Similarly, in testifying as to his understanding of the reasons for the 2016-2017 CAP, he recalled Iasiello referencing continued complaints regarding student issues, although acknowledging that they had declined in number from the prior year. (Tr. 859.) Further, on cross-examination, he confirmed that the 2016-2017 CAP's listed areas for improvement included the "need to demonstrate consistently a positive, professional and respectful demeanor towards [his] students through appropriate daily instruction." (Tr. 894.) On further questioning, he shifted from his prior testimony and conceded that in

addition to performance issues, the second CAP identified continuing concerns regarding his relationship with his students. (Tr. 895-896.)

I also take note that Respondent never contested either CAP. Indeed, he never even submitted a rebuttal. Surely, if the complaints of his inappropriate conduct in the classroom were baseless and did not warrant inclusion in the CAPs, he would have made that fact known to Iasiello. Indeed, the record shows he understood how to do so, inasmuch as he submitted a rebuttal to his 2014-2015 performance evaluation. (Tr. 861-862; Respondent Exhibit 6.)

In sum, I am satisfied that the 2015-2016 and 2016-2017 CAPs substantiate that Respondent previously exhibited inappropriate conduct towards his students and the Board took remedial action to address that behavior. I recognize that much of his prior inappropriate conduct is not directly analogous to the behavior underlying Charge Nos. 1 – 3 at issue here. His past misconduct largely concerned his harsh treatment and improper statements to students; whereas, his recent transgressions involve inappropriate touching. Nonetheless, I find a sufficient linkage between them to sustain this charge that he has engaged in pattern of inappropriate conduct towards his student. Stated otherwise, at its core, his misconduct, both past and present, has caused his students to feel uncomfortable and undermined the learning environment.

Accordingly, for all these reasons, Charge No. 4 is sustained.

Penalty

Turning to the issue of penalty, I find Respondent committed serious misconduct based upon my determinations that he engaged in the unbecoming conduct alleged in Charges Nos. 1 – 3, and which together with his prior misconduct demonstrates a pattern of

inappropriate conduct towards students, as alleged in Charge No. 4. As such, I conclude that a substantial penalty is warranted. However, in view of all the relevant circumstances, I conclude that dismissal is not justified.

It is apparent that in seeking Respondent's dismissal, the Board places greatest weight on its determination that his touching of K.T. and A.P. on the thigh constituted sexual harassment or was sexual in nature. Indeed, Iasiello made this point plain in his testimony when he acknowledged that the Board would not have pursued tenure charges against Respondent if the touching had been limited to contact with the students' hands. (Tr. 399.)

However, for the reasons detailed above, I have not found sufficient evidence to sustain the allegation that Respondent touched K.T. and A.P. in a sexual manner. As such, the gravity of his transgression is reduced from that asserted by the Board. Instead, on the weight of the credible evidence, the Board has demonstrated Respondent's failure to maintain appropriate boundaries with Students K.T. and A.P. as a consequence of his touching them and invading of their personal space. I find the same to be true as to his actions toward Student M.K.

In recognizing this distinction between sexual and non-sexual touching, I do not intend to convey that Respondent's established failings here are a minor matter. Indeed, they are not. Quite the opposite, they represent a serious deviation from the professional standards with which Respondent, as a teacher, was obligated to comply.

This distinction, however, does bear on the severity of the penalty to be imposed. Rather than compelling dismissal, Respondent's established transgressions call for a level of discipline that is sufficient to impress upon him the serious error of his ways, while

affording him an opportunity to reform his behavior and demonstrate his ability to function as a positive and productive teacher in service of the Board.

On the record before me, I am satisfied that Respondent is capable of doing so. Respondent should understand that any repetition of the proven misconduct will in all likelihood result in the termination of his employment.

Accordingly, for these reasons, I conclude that Respondent shall be issued a final written warning and suspended without pay for one-half school year. Such suspension will be reduced by such period, to date, that Respondent has been removed from the classroom without pay as consequence of these charges. In addition, within six months of the date of this Award or as soon thereafter as is reasonably practicable, Respondent, at his expense, shall attend and successfully complete eight hours of professional development classes regarding appropriate teacher-student interactions and classroom management through a program approved by the Board. The Board shall not unreasonably withhold approval of such programs proposed by Respondent for this purpose. Respondent will submit written documentation to the Board confirming his successful completion of such professional development.

AWARD

1. Respondent is culpable of Charge Nos. 1 – 4.

2. The appropriate penalty for Respondent's proven misconduct is a final written warning and suspension without pay for one-half school year. Such suspension will be reduced by such period, to date, that Respondent has been removed from the classroom without pay as consequence of these charges. In addition, within six months of the date of this Award or soon thereafter as is reasonably practicable, Respondent, at his expense, shall attend and successfully complete eight hours of professional development classes regarding appropriate teacher-student interactions and classroom management through a program approved by the Board. The Board shall not unreasonably withhold approval of such programs proposed by Respondent for this purpose. Respondent will submit written documentation to the Board confirming his successful completion of such professional development.

3. I will retain jurisdiction of this matter to resolve any dispute that arises as to the implementation of this award

Dated: January 28, 2021



David J. Reilly, Esq
Arbitrator

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, David J. Reilly, Esq., affirm that I am the individual described herein and who executed this instrument, which is my Opinion and Award.

Dated: January 21, 2021



David J. Reilly, Esq.
Arbitrator

25-21

Pursuant to Referral by the Commissioner of Education
State of New Jersey
Before Timothy J. Brown, Esquire

In the matter of:

The Tenure Hearing of Joseph Archible	:
and	: **Docket No. 281-1019**
Lenape Regional High School District Board of Education, Burlington County	:

Decision and Award

Appearances:

On behalf of Joseph Archible:
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Hop T. Wechsler, Esquire
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On behalf of Lenape Regional High School District Board of Education, Burlington County:
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I. Introduction

This matter arises from tenure charges of unbecoming conduct, incapacity and other just cause sufficient to warrant dismissal against Joseph Archible, (Respondent) certified by the Lenape Regional High School District Board of Education, (the District) and an October 10, 2019 referral of the tenure charges initially to Arbitrator Tia Schneider Denenberg and thereafter to

the undersigned by the New Jersey Department of Education, Office of Controversies and Disputes pursuant to *N.J.S.A. 18A:6-16.*

Days of hearing in the matter were conducted by Arbitrator Denenberg on February 3, 4, 5, 6, 7 and March 11, 12 and 13, 2020 and by the undersigned on October 29 and 30, 2020 in Shamong, New Jersey. All parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent was present for the entire hearing and testified on his own behalf. A transcript of the hearing was taken. At the close of the hearing on October 30, 2020, the parties elected to submit written closing argument, upon the receipt of which by the arbitrator on December 14, 2020 the matter was deemed submitted.

This Decision and Award is made following my careful consideration of the entire record in the matter, including the undersigned's observations of the demeanor of witnesses presented during the final two days of hearing.

II. Issues

The issues presented in this matter may be accurately stated as follows:

> Has the District met its burden of establishing the truth of its tenure charges against Respondent, and if so, what is the appropriate discipline, if any?

III. The Tenure Charges

The tenure charges in this matter were filed by Dr. Carol L. Birnbohm, Ed.D., Superintendent of the District on September 27, 2019. The Statement of Tenure Charges filed by the Board first presents some 66 numbered paragraphs of alleged "Relevant

Facts" and thereafter three Charges. The Charges (less their respective 66 paragraphs of included statements/allegations of fact and references to evidence exhibits submitted) provide:

CHARGE ONE
UNBECOMING CONDUCT

67. The Board incorporates by reference paragraphs 1-66, as fully set forth herein.
68. As set forth above, despite receiving progressive discipline and remediation measures, Archible continued to engage in questionable and unprofessional relationships with female students, specifically K.F., K.L., J. S. and R.T.
69. By continuing an abhorrent pattern of engaging in inappropriate relationships with minor female students, both inside and outside of school hours, Archible's (sic) continues to show a blatant disregard for authority and the emotional well-being of his students.
70. In fact, concerns that Archible "grooms" select female students due to "creepy" and "weird" conduct toward female students is reprehensible and must be stopped before it escalates.
71. As set forth above, Archible's gross lack of judgment in facilitating and leading a discussion regarding the use of the n-word in classic literature wholly disregards his obligation to facilitate an emotionally protective and culturally sensitive learning environment.
72. The overwhelming evidence demonstrates that during a class discussion, Archible advocated that teachers should be permitted to say the n-word during instruction; his opinion is in direct contradiction to the trainings he received, including most recently on August 30, 2018.
73. The overwhelming evidence demonstrates that Archible continued to direct this classroom discussion, despite the visible discomfort being exhibited by his students, including causing the only African American student in the class to begin crying when confronted about her views by Archible.
74. As the investigation into this incident continued, and public outrage mounted, yet another incident surfaced in which a photograph of Archible using the "N-word" in his classroom while apparently playing a game of "hangman," as well as a separate video of his stating the "N-word" during class instruction.
75. To that end, the April 9, 2019 classroom discussion showed a pattern and practice of Archible ignoring professional directives

regarding cultural sensitivity, instead relying on racially insensitive language on at least three known occasions during classroom instruction.
76. As such, Archible's employment with the Board should be terminated for unbecoming conduct, incapacity, and other just cause.
77. For all of the above reasons, the Charge of Unbecoming Conduct must be upheld and Archible's employment with the District must be terminated.

CHARGE TWO
INCAPACITY

78. The Board incorporates by reference paragraphs 1-77, as fully set forth herein.
79. As set forth above, Archible's repeated and flagrant breach of professional boundaries of the teacher/student relationship with female students, use of racially insensitive language on at least three known occasions, and complete disregard for this Administration's expectations of its educators, has no place in this community.
80. Archible's conduct the presence of students (sic) makes it impossible for him to effectively return to the District as a teacher. To allow Archible to return would cause acrimony with students, staff, and community.
81. As such, Archible will not be able to perform the duties of his job if he were to be returned to the District and, therefore, is incapable of continuing his employment with the District.
82. For all of the above reasons, the Charge of Incapacity must be upheld and Archible's employment with the District must be terminated.

CHARGE THREE
OTHER JUST CAUSE

83. The Board incorporates by reference paragraphs 1-82, as fully set forth herein.
84. Over the course of his employment, Archible violated the fundamental boundary between student and teacher, oftentimes relying upon minor female students for private emotional advantage, despite progressive discipline and remediation measures.
85. By leading a classroom discussion regarding the use of a racial slur, despite repeated objection from students to Archible's insensitivity, Archible can no longer be employed by the District because allowing him to do so would violate the public trust to

ensure the District students' care and well-being and that they are in a safe environment where they are not subjected to the use of a racial slur by their teachers.
86. As seen in the District's investigation in the April 9, 2019 incident, Archible's use of racial slur during classroom (sic) is not an isolated incident, despite receiving training to the contrary.
87. For all of the above reasons, the Charge of Other Just Cause must be upheld and Archible's employment with the District must be terminated.

IV. Summary of Facts

A. Introduction

The District provides high school education to approximately 7,000 students in four high schools. The District employs approximately 1,000, of which approximately 650 are certified staff. Dr. Carol L. Birnbohm, Ed.D. is the District's Superintendent. Respondent was hired by the District in September 2005 and became tenured in September 2008. At all times relevant, Respondent has taught English at Lenape High School. During the 2018-2019 school year Respondent taught, among others, two classes of AP English.

B. The Association of Black Women Lawyers Contest

Supervisor of English and History Larry Strittmatter testified that he handed out a pamphlet to all of his English teachers announcing the Association of Black Women Lawyers of New Jersey Law Day 2019 Competition. "This year's Law Day Theme," the flyer announced:

> ..is, "Free Speech, Free Press, Free Society." New Jersey Lawmakers want schools to stop teaching "Huckleberry Finn" : Two African American members of the State Assembly have introduced a non-binding resolution calling on school districts in New Jersey to remove

> "Adventures of Huckleberry Finn" – widely acclaimed as one of America's greatest literary works – from their curricula. There has been a decades-long debate over teaching the book, written by Mark Twain in the 1880s. Though filled with what many academics see as anti-racist and anti-slavery themes, "Huckleberry Finn" presents an unvarnished depiction of the antebellum South and includes use of the n-word more than 200 times. Take a position advocating either for the removing of "Huckleberry Finn" or against the removal of "Huckleberry Finn" from New Jersey schools, citing provisions of the New Jersey and/or United States Constitutions or laws.

The evidence establishes that the pamphlet was distributed to English teachers by Strittmatter in early April 2019.[1] After receiving the Law Day pamphlet Respondent assigned his students to write an essay on whether *Huckleberry Finn* and *Too Kill a Mocking Bird* should remain in the curriculum. As part of his AP-test preparation for his two AP English classes, Respondent sought to have students take a position and support the position. On April 9, the class was to have a first paragraph thesis statement prepared.

Strittmatter testified that the flyer was not meant to provide a topic of discussion for class and that, in any event, the discussion Respondent eventually had with his students in one of his AP classes on April 9 went beyond whether the books should remain in the curriculum and extended to the subject of the use of the N-word itself. The discussion on April 9, according to Strittmatter, was not in the curriculum and was not appropriate.

[1] All dates hereinafter are 2019 unless otherwise indicated.

C. Events of April 9-11, 2019

1. April 9, 2019

In the evening of April 9, Lenape High School principal Tony Cattani, received an email from the mother of a S.L.,[2] a student in one of Respondent's AP English classes. The email stated:

> My daughter had a disturbing incident in her AP English class today. The teacher, Mr. Archible (copied), had the students discuss the use of a derogatory African American term in the classroom. My Daughter S.L. was the only African American student in the class today and this discussion left her feeling hurt and humiliated. As an honor student at Lenape who has had a positive experience in this school and in this class, it was shocking to hear of this unacceptable event. My husband and I will be at school first thing in the morning to discuss this issue and how it will be resolved.

2. April 10, 2019

Principal Cattani and supervisor Strittmatter met with the parents of S.L. in the morning of April 10. S.L.'s mother reported that, according to her daughter, Respondent's AP class of the day before was largely focused upon the use of the "N-word" in literature and included an extended discussion during which Respondent expressed what the student believed was his opinion that he should be able to say the entire word in the context of teaching. The discussion was culturally insensitive, the parents reported. The parents told the principal that as the only African-American student in the class that day S.L., felt she had been singled out and she was upset and humiliated.

[2] Students herein are referred to by initials.

Cattani and Strittmatter testified that Respondent responded to the parent email seeking to meet with the parents also on the morning of April 10, but that the parents of S.L. declined the offer.

Following the parent meeting, Cattani contacted Assistant Superintendent Matthew Webb and informed him of the concerns expressed by S.L.'s parents. Cattani was directed to interview some of the students involved and get a grasp of what had occurred during the April 9 class. Cattani testified that the N-word topic was, to his knowledge, not part of the AP English curriculum. He also testified that his concern was not that Respondent was a racist, but that Respondent had tried to push his personal agenda onto his students and that he was effectively asking students for permission to use the N-word in the classroom; conduct prohibited by policy, and permission for which the students did not have the authority to give.

Following the early morning parent meeting, Cattani and Strittmatter began "calling down" students from the AP English class to discuss what had occurred in the class the day before. The two first met with S.L. and thereafter the two administrators split up the task of meeting with the three additional students S.L. had identified as, she believed, being aware of how upset S.L. was; A.R., M.H. and G.M. Strittmatter received written statements from each of the four students; statements dated either April 10 or 11. He did not attempt to interview or seek statements from students in the AP class not identified by S.L.

S.L. testified at the hearing. According to S.L., prior to April 9, Respondent had assigned the AP class to read two articles discussing whether or not *To Kill A Mockingbird* and *Huck Finn* should remain in the curriculum of schools nationwide. The

students were to have their introductory paragraph with their thesis statements ready by the April 9 class. On April 9, the class began with a discussion on the topic of the articles. A poll of students was taken and everyone in the class took the position that the books should stay in the curriculum. According to S.L. Respondent than asked the students to expand upon their views, and asked if the use of the n-word in the books played a role in the students' decisions. "A lot" of students, according to S.L., stated that the use of the n-word in the text was fine as that was the language of the times the books were written, "and took the position that the word itself did not need to be stated verbally in order to get the point across." According to S.L.'s statement of April 10, "others stated that as long as the word is only stated verbally in context with the book then it should not be an issue." S.L.'s written statement then continues:

> ...Mr. Archible seemed to agree with the side that the word can be stated for literary purposes only. A--- R--- and G---_ expressed their views that the word should not be stated at all, but Mr. Archible kept advocating for the word to be used. His rational was that the use of the word would demonstrate the ugliness and history with the word, He also said that if we don't verbalize the word when reading these texts would make people too sensitive and the history with the word would be lost. He also stated that he had friends that were African American and he discussed the issue with them and they said people have become too sensitive to talk about these issues. After mentioning this, I brought up the point that if the term is consented in the classroom, some may bring the term outside of the classroom. However, he still advocated for the use of the word. This discussion began to take a turn that was unneeded and the tone of the classroom changed. More people began to be more quiet and only A-- and C—were talking. M.H. mentioned that this conversation should not continue, but it did continue. As the conversation continued, I began to feel kind of overwhelmed considering I was the only African American person in the classroom at that time. I then raised my hand and said that family members like my mom have had the word said to them in a hateful manner and I began to cry while saying this. I ended by saying that the word should not be said in any

> context. After seeing my reaction, Mr. Archible began to ask me more about my views on the subject. I once again explained that the history that comes with the word would not be lost if it is not said verbally. Clearly uncomfortable, Mr. Archible changed the topic to the book on sexual harassment that me and my classmates would be reading next year. However, some people appeared to not be satisfied with how the conversation ended and continued to state their views. I believe that Mr. Archible did not intend for the conversation to go in that direction, but it did. There was really no closure to the subject and his personal views should not have been so clear, especially since he is not African American. I left the class feeling overwhelmed and sort of singled out.

Statements were also taken from AP English students A.R., M.H. and G.H., the first two of whom also gave testimony at the hearing. A.R. wrote that Respondent often brings up controversial topics to discuss in class, but that the conversation on April 9 "was different." A.R. wrote that when Respondent asked if teachers should be allowed to say the n-word in class, all agreed that teachers should not and that thereafter Respondent would not let it drop and spent the entire period arguing that teachers should be able to use the word. According to A.R., Respondent wrote an "N" on the board and asked how far he should be allowed to go and that despite the fact that some students protested, he continued and wrote, "NI R" on the board and said everyone knows what we are talking about but no one can say it. At one point a student asked why Respondent was so obsessed with saying the word. A.R. further wrote that:

> After almost an hour of the topic S.L. who is black raised her hand and told the class of her mothers experience with the word and began crying. The class was silent and filled with tension and rather than just admitting he was wrong, Archible asked S.L. how her mother felt about using the word. The entire class period Archible refused to let the topic go and he seemed to be arguing for more than just to be devils advocate....This should never have even been a topic of discussion because it had nothing to do with the AP Language and Composition curriculum. But when brought

> this up to him, there was not a clear answer as to why we were discussing this…

According to A.R., she was present when Respondent gave the class his apology. At that time, Respondent said how he hadn't eaten, he had few friends and family and how teaching was important to him. Respondent went on to say that he had tried to control the class but that it got out of hand. A.R. testified that she was not satisfied with Respondent's apology; that the apology was less about how sorry Respondent was and more about how important teaching was to him.

M.H. wrote in her statement that "…more than 50% of the students raised their hands when …Archible asked if it should be taken out or not be said in class." M.H. explained that Respondent had gone back and forth with students;

> Saying if it is part of the curriculum then we should be able to say it which started to make more students speak up. One student had told a personal story of how the word was hurtful to her mom and even began crying in class. Mr. Archible was understanding of her feelings but still was not sure why he shouldn't teach the history of the word in its entirety if it is included in the curriculum.

According to M.H., both the students in the class and Respondent were strong in their opinions, the discussion went until the class ended and the discussion; "never really got a full closure." At the hearing M.H. testified that in addition to the letter written on the board, Respondent also drew some of the lines of a swastika on the board. She also testified that she saw the connection between the thesis the class was asked to write and the Law Day flyer and recalled that at some point the competition was discussed in class. As for Respondent's addressing the events of the n-word class on April 11, M.H. testified that she felt it could have been more of an apology.

G.H. wrote her statement on April 11 and expressed that the feelings in the classroom became "rather hostile," that many students said they felt uncomfortable with the situation and that after she left the class she learned that one student had cried.

Later in the day of April 10, Cattani and Strittmatter met with Respondent. Respondent was apologetic, expressed that he did not intend the discussion to go as it had, took responsibility for his actions, and stated that he would do what he needed to do to resolve the situation with his students. According to Strittmatter, Respondent said he was not aware that S.L. had been upset or crying and that he was not aware that S.L. was African American. (Cattani testimony was less certain in this regard, as he testified "I don't recall him knowing that she was crying, but I believe he indicated that he didn't know that she was African-American at the time.") During the meeting a plan was made for Respondent to apologies to his class and give students the opportunity to voice their opinions about what had happened in the class. According to Strittmatter, Respondent was to first acknowledge what he and the administration had become aware of, allow students to process and have closure and apologize for the direction the conversation went and the level of student discomfort resulting from the conversation.

3. April 11, 2019 (am)

Supervisor Strittmatter was present for the first ten minutes of Respondent's involved AP English class on April 11. According to Strittmatter, the master objective written on the board for the lesson of the day was a W.H. Auden poem analysis. Respondent began the class by acknowledging that the direction of the previous class had not gone in the direction he had intended, spoke to the students about his love for teaching and that he was so upset that he was unable to eat.

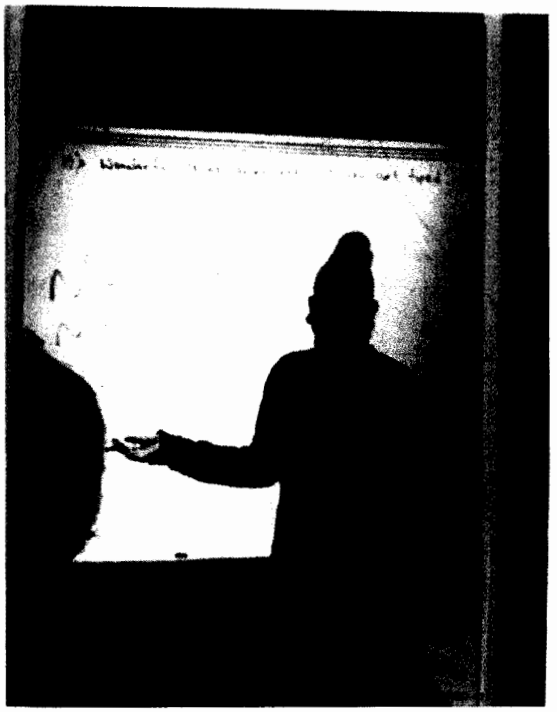
According to Strittmatter, Respondent came into his office toward the end of school that day and expressed his disappointment at Strittmatter attending his AP class; saying that the supervisor did not trust him. Strittmatter testified that in response; "I informed Mr. Archible that he should consider the fact that I was there to protect him, to ensure that what we had spoken to him about…and based on the conversations we had with the student and parents, that I was there to ensure that the students had a chance to process and have closure, and that ultimately at the end, that I was there to protect him." According to Strittmatter, Respondent acknowledged that he had not thought about that. Strittmatter did not tell Respondent that his apology had not been adequate or that Respondent had not done as he had been instructed. When asked on the witness stand why he had not done so, Strittmatter testified; "It was a short conversation."

Cattani testified that he is not the ultimate decision make on subjects of termination of tenured staff, but that at this point he was not considering termination of Respondent as an option. Cattani later received another email from the mother of S.L. expressing her concern that Respondent had not provided students an opportunity to speak or get closure with the subject.

4. April 11, 2019 (pm)

In the evening of April 11 Cattani attended a banquet celebrating accomplished academic students in the area. At the meeting a woman approached Cattani and said there was something causing a lot of concern in the Lenape community that Cattani should see.

The women the showed Cattani a video on her phone and the following picture:



The picture is of Respondent in front of a white board. Written on the top of two lines on the board is; "N_ G G E R", and on the bottom line; "N _ _ G A". In the video shared with Cattani one can hear Respondent saying: "It's basically saying look, there are black people, and then there are niggers."

According to Cattani, there was significant community response to the video and picture; he received numerous calls and communications from upset parents and the matter was a topic of conversation in the community for a year and a half. According to Birnbohm, people in the community were outraged and upset at the video. The District identified one individual who lived in the District, contacted the District, complained about the picture and video, described Respondent as playing hangman on the picture, and offered her consulting services on the matter.

5. Suspension of Respondent

Cattani thereafter reported the picture/video matter to District superintendent Birnbohm, who in turn discussed the matter with the Board of Education President. The decision was then made to suspend Respondent pending investigations. By letter dated April 11, 2019, Respondent was notified of his suspension until the outcome of "investigation(s) into possible conduct unbecoming a teacher…"

D. ***On The Road*** and R.T.

Cattani testified that on April 10, a female student of Respondent, **R.T.,** left a message with the principal's secretary that she wanted to speak with Cattani about her English class. The student attended Respondent's other AP English class. Cattani assumed the student wished to speak with him about the N-word matter of the day before, so he passed the message on to Supervisor Strittmatter and asked that the supervisor speak with the student. As it turned out, R.T had not reached out to speak about the N-word matter, but instead, expressed her discomfort with Respondent. She explained that she felt her grades from Respondent were higher than she deserved, that it was well known that Respondent gives out better grades to student who share Respondent's personal opinions, that Respondent had invited her to a poetry field trip that she had not expressed interest in going on, and that Respondent had given her a copy of a book (*On The Road,* by Jack Kerouac) that she had not requested. The copy of the book given to her by Respondent had handwritten notes and highlights, including highlighted text describing a young teenage girl with long dark hair (which R.T. has) having a relationship at a motel with an older man, and handwritten notes such as "do you ever

feel like that?" and other underlined text stating; "Oh man, she was only 15 and wearing jeans, just waiting for someone to pick her up… she was so sweet then, so *young*. Hmm, ahh!" At that time, in response to a request from Strittmatter, R.T. provided the following written statement:

> From the first day of school, Mr. Archible seemed somewhat creepy and weird to me. Throughout the year he gave me high grades on essays that were not deserving, It is well known that he tends to give poorer grades to essays that disagree with his own opinion, but an essay that I wrote that discouraged free healthcare. Which is very against his beliefs, received a high grade. Mr. Archible also invited me to the Dodge Poetry Trip without my volunteering. Last Friday, he found me during lunch and learn, out of the blue, to give me a book. Flipping through it, I realized he underlined some passages that seemed weird, such as a couple lines that mentioned a teenage with long, dark hair (which matches my description) going to a motel with the main character to have a relationship. Later in the book, a line that said something like, "she was 18, lost and confused" he wrote "do you ever feel like that?" in the margins I showed the book to my parents that night, and they both disliked it. That night he also sent an email to my mom saying I was an intelligent student, a talented writer, and that he was glad to have me in class. I know this has no solid evidence, but I feel very uncomfortable in his class.

R.T. testified that Respondent's AP English class that year did not discuss poems at all. (In contrast to Strittmatter's testimony that on April 11 a poem was the subject of that day in Respondent's AP classes.) Following his meeting with R.T., Strittmatter contacted R.T.'s mother, who came to school with the loaned book. The mother, like R.T., was uncomfortable with Respondent giving R.T. the book and the highlighted passages and handwritten comments in the book; comments that both R.T. and her mother believed were directed at R.T. The mother also expressed her view that an email she received from Respondent about R.T. was "stilted" and inappropriate. R.T. testified

that she did go on the poetry trip because there was a large group of students going and she felt comfortable doing so.

On the day he loaned his copy of *On The Road* to R.T., Respondent emailed the student's mother the following:

> I just wanted to send you a quick email to let you know how highly I have come to regard [R.T.] after meeting her and having her in my class this year. She is certainly one of my most intelligent students, and without question, one of my most talented writers. It is obvious that she has grown up in an environment in which literature is important. Today, I gave her a copy of On the Road, which is on a short list of books I consider to be genius (along with Catch-22, 1984, and The Picture of Dorian Gray). I felt she will appreciate it. Kerouac helped to open my eyes to how unpredictable and philosophical literature can be sometimes. I hope he does the same for her.
>
> Too often, we teachers email parents only when their children are misbehaving or falling behind in their coursework. I am trying to make a conscious effort this year to do the opposite. So.. thanks for raising a great kid. I know that, as cliché as it might sound, she is going to go on to do great things in life someday. But she is also doing them now, too.
>
> I hope you have a great weekend.

Strittmatter testified that *On The Road* has been part of the curriculum at the high school in the past, but was not in 2019.

E. **Meeting of July 25, 2019**

Respondent's next meeting with anyone from the District occurred on July 25, a meeting attended by District representatives, Respondent and Respondent's Union representative. According to the District and as explained to Respondent at the time of the July 25 meeting, the District's investigation into the R.T. - *On the Road* matter had been put on hold pending a criminal investigation into the matter by the Burlington

County Prosecutor. (Respondent had not previously been informed there was a matter involving R.T.). By letter dated June 28 the Prosecutor notified the District that he had found the matter did not warrant criminal charges and cleared the District "to commence an investigation and pursue any administrative actions that you deem appropriate."[3] At the meeting, Respondent's Union representative took the position that no questions would be answered by Respondent until Respondent had the opportunity to review the evidence gathered during the District's investigation and a copy of the Prosecutor's letter. The District provided the Prosecutor's letter but refused to provide the Union the other information the Union requested. After some back and forth, the District's Director of Personnel, Page MacGregor provided a copy of the picture of Respondent standing in front of a white board and a copy of the video during which Respondent made the statement "it's basically saying look, there are black people, and then there are niggers." During the July 25 meeting, Respondent admitted that he spoke the entire n-word on the video and according to MacGregor, explained he was probably giving a lesson on subliminal racism, and how it is possible to not be racist against all black people, and that sometimes it is the black people who are racist.

F. The Decision to File Tenure Charges

Cattani testified that he was concerned about the R.T. matter because of Respondent's "established pattern" of inappropriate conduct with female students. Respondent had a pattern of poor judgment, including particularly the N-word incident and now with R.T., another example of Respondent's poor judgment with a female student. Whether Respondent's "personal agendas," or "his potential pursuit of 15, 16,

[3] The letter was offered to show the criminal investigation was closed and not offered for the truth of its contents.

17-year-old girls in a grooming pattern," Cattani testified, he could not, in good conscious put Respondent back in the classroom.

The District presented two witnesses who took part in the District's consideration of whether to file Tenure charges; Director of Personnel MacGregor and Superintendent Birnbohm. According to MacGregor, tenure charges were filed because; (1) Respondent had lots of opportunities to correct his inappropriate behavior with young female students; (2) Respondent had lots of counseling in the appropriate steering of controversial topics, and (3) yet Respondent continued to do what he wanted to do. MacGregor testified that Respondent could not come back to teach in the District as '[t]he trust is gone." She went on to testify:

> The most important thing for a teacher is to have the trust of the students, and as an Administration, the safety and security of our students is our number one goal. There's no learning that can happen without the students feeling safe and secure. So, Mr. Archible has had discipline, reprimands, counseling, mentoring, numerous reminders of him to maintain appropriate interaction with students. In addition to that, this April 9th incident caused emotional harm to students. He was given instruction on how to form an appropriate apology to the class, and he failed to do so which caused community outrage and provided us with additional evidence to show that he may have been doing this for years unbeknownst to us. At the same time the community is outraged, we're finding out from R.T., you know, simultaneously, that here now is the fifth allegation of a young woman who feels that he's creepy and he's behaving inappropriately, and, you know, she fits the profile, the long brown hair, you know, giving her this book with the creepy underlined passages, and that's not even counting Mr. Archible's fiancée, who was a 2013 graduate of Lenape High School and a former student of his. You put all that together and so we can't put minority students in his class, because they might feel like they won't be fairly treated by him. We can't put, you know, young Republicans, because they are going to feel they are not fairly treated by him. We can't put young women in his class with a good conscious, because Mr. Archible is no dummy, you know, he's not – he's not failing to

> take direction. He's calculated, he's predatory. At that point, we basically eliminated every student in the high school. There's nobody that we can put in his classroom with a good conscious and feel that those students are safe and secure.

Superintendent Birnbaum testified that tenure charges were filed because;

> I couldn't put him in the classroom again. His credibility is gone. There's just distrust. We've given the employee opportunity, after opportunity, after opportunity to correct his behavior, to follow District rules and regulations. And he not only doesn't want to follow them, he brags about how he doesn't follow District rules and regulations. In his e-mail to L.B. he said he couldn't wait to get tenure, and he would do something outlandish – I don't even know what it is. But he couldn't wait to get tenure because he could almost do whatever he wants....He has shown us again and again and again that he's not going to change his behavior. And putting him back in the classroom is just reaffirming this inappropriate behavior in his classroom. It's about student safety.[4]

G. Testimony of other Students Attending the April 9 Class

1. I.A.

I.A. was a student in Respondent's AP English class on April 9. She was not interviewed by the District. She testified that the goal of the AP class was to prepare for the AP test in May. As she understood it, the essay topics on the test could be anything, but were usually controversial subjects. Throughout the year, Respondent would give the class controversial subjects and have the class discuss them as a way to learn how to form a thesis, have a discussion with classmates and how to craft an argument. Respondent told the class that if anyone was offended by subjects raised in the class, they could come and talk with him.

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[4] The L.B. email referenced by the superintendent was a subject of a 2008 discipline of Respondent. (Discussed below.)

She recalled that for the April 9 class Respondent had posted an assignment to write a thesis statement and be prepared to discuss the topic of whether the novel Huck Finn should be taken out of the national curriculum. In class, Respondent introduced the topic and let students engage in discussion. I.A. testified that most of her class mates were in agreement that the book should stay in the curriculum. Respondent then discussed how school districts had removed the book from their curriculum because of its frequent use of the n-word and asked if it was ever okay to use the word. After the class unanimously agreed that the word should never be said, Respondent played devil's advocate and pointed out the contrast between students saying the book should stay in the curriculum and their saying the word should never be spoken, even in an educational setting. I.A. testified that Respondent was trying to represent the other side of the issue as part of teaching how to craft an argument for the AP exam. The discussion, I.A. explained was mostly a one-sided conversation that Respondent tried to turn into more of a discussion, and at no point did Respondent imply that he was presenting his own perspective on the use of the word.

According to I.A. at one point a student got upset, said she was uncomfortable and explained that her mom who was African American had been called the n-word before and that the student didn't think it was right for anyone to say the word in any context. The student started to tear up and Respondent, according to I.A.'s written statement, "softened," acknowledged the mother's struggle and asked how she felt about it. The student did not want to discuss the subject further and Respondent moved the conversation to the general subject of the AP exam and how controversial subjects will be included in the exam. In her view, I.A. testified, the discussion on April 9 was not out of

line and was basically a repeat of a discussion she had in class with another teacher the year earlier when the class read the novel. On April 9, the discussion was in the context of preparing for the AP exam, an exam that, at the time, was three weeks away.

2. J.S.

J.S. was not interviewed by the District. He testified that the prompt for the discussion on April 9 was the question presented in the Law Day competition and that Respondent took the role of devil's advocate. When another student spoke of how the word had been used toward her mother and choked up while talking about it, Respondent allowed the student to finish, talked to her a little bit "like are you okay," treated her like an adult and kept the discussion moving. J.S. was also present on April 11 and that Respondent; "issued an apology to all students, the discussion had gone in a way that he didn't want, and it had gone on too long." In his view, J.S. testified, Respondent treated the student like adults and was sincere in his apology.

J.S. also testified that at the next class after April 11, Respondent was not present and Principal Cattani and Mr. Strittmatter came into the classroom. J.S. went on to testify:

> We were mostly all there. There were a few people absent. It felt sort of more like an interrogation, but they knew the answer that they wanted and that they were trying to get, like the fact that we all felt uncomfortable and that they tried – they were trying to paint Mr. Archible as sort of like this person with ulterior motives, and honestly, to me at least, it felt more uncomfortable than the actual discussion in class on that first – April 9.

The two men did not ask or for statements from any students, J.S. testified.[5]

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[5] Respondent called as witnesses a number of former students, parents of students and teachers who testified to Respondent's rhetorical teaching method, care for students and positive impact

H. Prior Discipline of Respondent

In October 2008, principal Cattani received a report from a father of a student of Respondent expressing suspicion that his daughter, **L.B.,** was involved in a relationship with a Lenape teacher, a teacher who turned out to be Respondent. After referring the matter to the office of the county prosecutor and local police and being cleared to investigate the matter, the District's investigation eventually revealed that Respondent had maintained an ongoing email conversation with the student using Respondent's private email account (a violation of District policy) and that a number of statements made in the emails were inappropriate and violated District policy. By letter dated November 12, 2008, from then-Superintendent Emily Capella Respondent was notified of the results of the District's investigation and provided:

> As you are aware, following our receipt of report(s) indicating you may have developed/maintained inappropriate relationship(s) with students; my office completed a thorough investigation related to the circumstances surrounding the report(s). Through the investigations, evidence was discovered to support the claims of inappropriate activity with students, which includes, using inappropriate language, undermining authority to a student and conduct unbecoming, such as personal use of alcohol and consuming alcohol with a female under the age of 21.

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upon students. One witness, former Lenape English teacher Linda Hammond testified that she taught a class on the Holocaust and invited Superintendent Birnbaum to observe her class. Hammond testified that during the class Birnbaum attended, Hammond said out loud every racial, ethnic, sexist slur there was and explained their origins and that after the class Birnbaum said the class was good and Hammond could continue to do what she was doing. Birnbaum was called on rebuttal and denied that she heard Hammond say the n-word out loud or that she ever gave Hammond permission to say the word in class.

Respondent also called retired Lenape English teacher Joseph Tortorelli, who testified that he taught To Kill a Mocking Bird and Huck Finn in his English classes at Lenape. He testified that a major theme of Huck Finn is against racism and that in the hands of a capable teacher, the use of the n-word in the book is "an extraordinary teachable moment." He further testified that he wrote the entire n-word on the board, but that when he did so there was no policy against doing so.

In addition, as you are aware, the Board requires staff to sign the "Staff Acceptable Use Policy for Computer and Network Use." You should not use your personal email account to communicate with students or parents. The evidence indicates that you utilized your personal email account to communicate with at least one student.

It is important for teachers to always be cognizant of how words and actions may be perceived, especially by students, and to respect the boundaries of the student-teacher relationship. As a result of your inappropriate behavior, the following steps will be taken to help you avoid making these mistakes in the future:

(1) You are mandated to complete a minimum of six district-paid counseling sessions by the end of February 2009 with Dr. William Matta, Counseling associates of Medford at 133 Jackson Road – Suite F, Medford, NJ ...Dr. Matta has worked with other staff and student successfully, and you should contact him immediately to schedule your sessions. The counseling will certainly remain confidential, but I will require proof of your attendance at six sessions over a three month period, beginning no later than December 2, 2008;
(2) You are to meet bi-weekly, for the remainder of the 2008-2009 school year with your Supervisor to receive monitoring on maintaining a professional demeanor and appropriate, respectful interactions with students;
(3) I will be recommending to the Board of Education that your increment be withheld. You will be notified at which time the Board of Education acts on the recommendation, and
(4) Effective immediately, you are no longer to be involved with any extracurricular activities or clubs. You are also to have no further contact with L-- B--. If these steps fail to correct your inappropriate behavior and similar incidents are reported, further disciplinary action, up to and including termination will be considered.

In your future interactions with students, parents, and staff either in person or via the internet, please exercise good judgement and follow district policy. Once again, should you have any questions or concerns, please contact me directly.

Respondent completed the required six counseling sessions. In May 2015 Respondent's increment was restored after a recommendation to do so was filed with the Board by of Education by Superintendent Birnbohm upon the recommendation of principal Cattani. Cattani testified that he made the recommendation after Respondent had completed seven years of teaching with no substantiated similar incidents by Respondent.

I. **Prior (Unfounded) Allegations Against Respondent**

At the hearing in the matter, the District offered evidence of a number of alleged incidents of conduct by Respondent with female students, none of which resulted in discipline, including the following:

1. On December 19, 2008, another Lenape teacher reported overhearing a female student, A.H., discussing that Respondent was having sexual relations with a student **(K.F.)** so that the student could salvage her grade. Respondent was suspended pending investigation of the matter by letter dated December 22, 2008. By letter from Superintendent Capella dates January 7, 2009, Respondent was notified:

> I have concluded my investigation regarding the report of an inappropriate teacher-student relationship. District administration spoke to several students, and met with you to provide you the opportunity to hear and respond to the allegations. Through the investigation, no evidence was found to support any claim of wrong-doing on your part.
>
> This letter is not one of reprimand, nor will it be placed in your personnel file. Please allow this letter to serve as a reminder to you of the boundaries of student-teacher relationships. It is important for

> teachers to always be cognizant of how words and actions may be perceived by students, and to maintain an atmosphere or respect in your classroom.
>
> In your future interactions with students, parents, and staff, please exercise good judgment and follow district policy. Once again, should you have any questions or concerns, please contact me directly.

2. In or about December 2009 Cattani received a report from two janitorial staff members that they had observed Respondent in his classroom after school hours with a female student **(K.L.)** in a casual setting. Cattani testified that someone had indicated at one point that Respondent had a guitar and he was playing guitar for the student in the classroom. On cross examination Cattani testified that there was no written record of a guitar being involved and that the two staff members did not report seeing a guitar or hearing anything; that they reported they just had suspicions. Cattani testified that he responded to the report by discussing appropriate practices with Respondent and that per instructions of Superintendent Birnbaum had Strittmatter surveil Respondent's classroom for a week thereafter. He also testified that neither the student nor Respondent knew of the surveillance and that the surveillance disclosed no inappropriate conduct. No discipline was issued as a result of the report and investigation.
3. On September 12, 2012 student K.R. reported that Respondent had provided student J.S. with alcohol at a concert venue where

Respondent's band was playing. The investigation disclosed that **J.S.** was a former Lenape student/graduate who worked at the venue and was working a different event than Respondent's concert; that the former student may have said hello to Respondent; that J.S. would not have been allowed into the concert portion of the venue due to her being under age 21; and that Respondent was there with his girlfriend and another Lenape teacher who is also in Respondent's band. The District did not interview the other teacher. The matter was concluded with an October 2, 2012 letter to Respondent identical with the January 9, 2009 letter quoted above, except that the October 2, 2012 letter is signed by Carol Birnbohm. Thus, the District informed Respondent that "no evidence was found to support any claim of wrongdoing," that "[t]his is not a reprimand" and the reminder relating to teacher-student boundaries.

J. Lenape High School Policy

As part of the August 30-September 2018, pre-school-year meeting of Lenape English and History staff, Strittmatter reviewed a number of policies, including the School's "Cultural Sensitivity/Controversial Content/Common Sense." That policy provides:

- At no time in class should the N-word (or any similar word describing any group of people), be used in its entirety – **not in discussion, not in question, and not in reading**. So for example, if your kids are reading Mockingbird or a current article aloud, that word is there; **you can't say it**. It's about

"cultural insensitivity". If you have any questions or misunderstand these parameters, see me directly.

- If you are using a model text or article that has any CONTROVERSIAL content, please see me and we will navigate through the content appropriately. There is a general expectation that we as teachers promote transparency with our students and parents on subject matter that may be graphic and/or divisive. See me if you have any concerns.
- There is to be NO videos/films shown in its entirely in a classroom that is not on a BOE approved curriculum. NO exceptions! I encourage videos/films/Youtube to be used as supplemental learning resources and "chunked" appropriately to support learning plans/mastery objectives. Preview all Internet content prior to using in your lessons.

K. **Lenape Regional Board of Education Policy**

Lenape Regional Board of Education Policy 2240– Controversial Issues, adopted 19 September 1989, provides:

> The Board of Education believes that the consideration of controversial issues has a legitimate place in the instructional program of the schools. Properly introduced and conducted, the consideration of such issues can help pupils learn to identify important issues, explore fully and fairly all sides of an issue, weigh carefully the values and factors involved, and develop techniques for formulating and evaluating positions.
>
> For purposes of this policy a controversial issue is a topic not expressly enumerated in the course guide as appropriate for the course of study.
>
> The Board will permit the introduction and proper educational use of controversial issues provided that their use in the instructional program is related to the instructional goals of the course of study and level of maturity of the pupils. The discussion of controversial issues must not tend to indoctrinate pupils or persuade them to a particular point of view. Instead, teachers must encourage fair presentation and open-mindedness and the free exchange of ideas in a spirit of scholarly inquiry, drawing upon information and insights from the widest feasible range of resources.

> The discussion of controversial issues in the classroom will be conducted in an unprejudiced and dispassionate manner and can not be allowed to disrupt the educational process. In the discussion of any issue, a teacher may express a personal opinion, provided the expression in characterized as personal opinion and does not attempt to persuade pupils to the teacher's point of view.
>
> The Superintendent shall assist teaching staff members in developing an alertness to the occurrence of controversial issues in the context of the curriculum and developing techniques for the management of controversial issues that do not stifle a spirit of free inquiry.

L. Curriculum

The Adventures of Huckleberry Finn and *To kill a Mockingbird* are both in the District's curriculum. *On the Road* has also been in the District's curriculum.

M. Respondent's Testimony

1. **2008 Discipline**

Respondent is certified to teach English grades 7 through 12. He testified in regard to his 2008 discipline that during the period he was emailing L.B. he was 27 or 28 years old, depending upon the month, and that at the time of the administration's investigation he admitted to the emails and acknowledged that it was inappropriate for him to exchange the emails with LB. Since that time, he testified, he has not done so with any other student. As for L.B., he explained, the student had told him that her father had cancer, that she had a fractured relationship with her father and that she was going through some serious issue with her boyfriend and he was trying to be a support system for the student. Respondent further testified that he never texted LB, that he did not give LB his phone number and did not have hers, and that during the investigation he offered

to open his phone and let the administration look through it. He complied with the requirements of his disciplinary notice and had no further contact with LB and attended his six counseling sessions. He took responsibility for his actions, Respondent testified.

2. **AH-KF-SF Matter**

As for the 2008 matter involving an accusation by AH of KF having sex with Respondent in order to save her sister SF from poor grades, Respondent testified that he did not know KF; that AH was in his sophomore English class and received poor grades and that her sister SF had been in his British Literature class the year before and received B grades throughout the year. He testified that he did not have SF in his class her senior year and that he had no contact whatsoever with her outside of class. After the District notified him that its investigation into the KF matter had concluded and that he was not being disciplined, he was never thereafter accused by the Board or any member of the administration of wrongdoing in regard to KF. Additionally, notwithstanding the dismissal letter's representation that the letter would not be placed in his personnel file, he first learned that the District retained the letter when he read the tenure charges involved here.

3. **KL Matter**

As for the 2009 claim that he was meeting with student KL after school hours, Respondent testified that he does not know KL and that the first time he learned there was such a claim was when he read of it in the tenure charges.

4. **JS Matter**

In regard to the allegation involving JS at the Mansion, Respondent testified that JS had been in either his poetry or creative writing class in either her junior or senior

year. On the evening in question his band was scheduled to play at a venue called "The Mansion." Another teacher from Lenape was also in the band. He was accompanied that evening by his girlfriend at the time and at some point, he heard a "hay, what-up Mr. Archible" from behind him, he and his girlfriend turned, and Respondent saw JS and said; "Oh hi JS." JS then sort of gave a wave and went back to her work for the catering event she was working. He did not see JS any other time that evening. He had not arranged to meet JS at the concert and did not know she would be there. Respondent testified that he again received an investigation-end letter relating to the matter.

5. **The April 9 Class**

The April 9 incident involved his Advanced Placement (AP) Language and Composition class. The discussion topic planned for April 9 was whether or not the novels *To Kill a Mocking Bird* and *The Adventures of Huckleberry Finn* should be kept or removed from the high school curriculum nationwide. The topic came to him from an essay contest announced in a flyer he received from Supervisor Strittmatter. Respondent testified that it was common practice in the department to use materials handed out by Strittmatter in class; that in regard to the Law Day flyer, he "took it as implicit that it was entirely acceptable to use in class because it had happened in the past," and that Strittmatter; "gave me an essay contest about texts that have the N-word in it. So, I feel that's only natural for me to assume that's what we – that's part of what we would be talking about." Respondent admitted that no administrator told him specifically to discuss use of the n-word in class or that he discussed the controversial and sensitive subject with either Cattani or Strittmatter prior to his April 9 class.

Respondent considered the subject of the flyer controversial and testified that he had discussed controversial subjects with students over the sixteen years he taught. He often discussed controversial subjects with his 2018-2019 AP Language and Composition classes, subjects including, as examples, LGBTQ-plus rights, gender identity, racial issues, the death penalty, pro-life vs pro-choice, stem cell research and whether Columbus Day should remain a national holiday. Making students uncomfortable about controversial subjects can be an element of the learning process, Respondent testified. He confirmed that he is aware of the Board's policy on controversial subjects. According to Respondent, for the April 9 AP English class he had previously given students a copy of the Law Day flyer and assigned them to compose a rough outline of how they were going to execute their essay and write a well-constructed introductory paragraph and thesis that stated their position. The purpose of the assignment was to have students write an argumentative essay as practice for their upcoming AP exam.

Respondent testified that in previous years the AP exam included an argumentative essay on social-conscious topics. In such an essay, students have to show that they can anticipate the opposition's side or sides, anticipate what the other side will say and refute the other argument; showing that you have considered the alternative to the side you are taking. The question raised by the Law Day contest offered such an opportunity. In preparation for the April 9 discussion, Respondent assigned articles to be read by students expressing views on both sides of the issue. One article by David Bradley argues that the books should remain; that the books uses the n-word which is offensive, and that the book has literary merit because of that. Respondent included *To Kill a Mockingbird* in the assignment to give students a choice.

In response to testimony of Superintendent Birnbohm that it is not a teacher's job to make students uncomfortable, Respondent testified that his job is not to deliberately make students uncomfortable. But, Respondent continued:

> ...when you are assigned text like To Kill a Mockingbird and Huckleberry Finn and as I referenced in that class that students would take AP Literature the next year, they would be encountering bestiality and sexual violence towards children, those are required texts, I don't know how to teach those things without discomfort materializing somehow.

On April 9 Respondent polled the class and learned that it was unanimous; everyone said the books should remain in the curriculum. Unanimity was unusual when issues were raised for discussion in the class. The discussion turned to when, if ever, the word should be used, with some students saying it shouldn't be used ever and others saying it shouldn't be used in conversation. So, Respondent explained, some of the same students who took the position that the books should remain in the curriculum also took the position that the word should never be used. The students discussed the use of the n-word ending in "-er" and ending in "-a." When Respondent asked who had heard the n-word spoke in the school's hallways that day, everyone raised their hand.

Respondent testified that he has given his personal opinion in class in the past, and that students are always permitted to express their personal opinions. Student class participation grades are not based upon the opinion the students express. Respondent testified that he often has to play devil's advocate to move the discussion along and that sometimes students do not know if he is expressing his true positions or playing devil's advocate. In regard to the April 9 assignment, if students were going to receive a passing grade on the essay, they had to address the use of the N-word in the books. Had the question been in the AP exam, and had they not addressed the subject in their essay, they

would fail. Because of the unanimity of the position taken by the class on April 9, - something he was surprised by - he played devil's advocate to get the students to address the N-word issue. He admitted that he did not specifically say he was being devil's advocate on April 9, but that he did repeatedly say that the questions he was asking had nothing to do with his own beliefs whatsoever.

Respondent testified that he did write "N _ _ _ _ r" on the board, that he did not write the full n-word and had no intention of writing the entire word. He was addressing the observation in one of the assigned articles that for some people just seeing the word in writing is offensive. So, the object of his doing so was to get students to think at what point their offense starts and to analyze why. Respondent testified that he has used the same exercise a hundred times over his years of teaching. Respondent also drew an "X" on the board with one diagonal mark and asked if he drew the whole thing what would it make students think of. Students answered the Holocaust or Nazism, and one student said that it is an ancient symbol of peace. Words are symbols that don't have any inherent meaning; they have whatever meaning we ascribe to them, Respondent testified he explained to his class.

Respondent recalled that at one point on April 9 at least one or two students asked; "why are we still talking about this?" Students do not decide when a discussion in class is complete, Respondent testified, and the reason the conversation continued was that Respondent did not feel the students were prepared to address the inclusion of the ugly words in literature and their societal implications.

Respondent testified that at one point S.L. began to cry. "I was standing closest to the white board," Respondent testified, and:

> When I noticed that she was crying. She said again: My mother has been called that word. I don't think anyone should say it. I noticed that she was crying. So, I went physically closer to her in proximity, and I just, I stopped, and I said: I'm very sorry that your mother experienced that. The I said -- I tried to use it as a teachable moment. I said: Well, given her experience, how do you think she would feel about what we are talking about? And she didn't want to answer. So rather than -- I told her, you know, I'm sorry that she went through that. I am trying to remember chronologically. Yeah. I'm sorry she went through that. How do you think she would feel about it? But then when I realized she wasn't interested, you know, in using her mother's experience in the context of our conversation. I didn't want to make that or her any more of a spectacle. I didn't want her to be a source of attention to the rest of the class. So at this point, there was not much time left in the class at all. Maybe five-ish minutes at this point. And so I said: Okay. Just so you know – I tried to put things – I tried to show them a bigger picture, a broader perspective. I said: This class, these works, this is not the only time you are going to encounter controversial literature, not even at your time at Lenape. I said: Next year, those of you that take AP Literature are going to read Hamlet which has the theme of suicide and regicide and others. You're going to read Beloved, which has sexual violence and bestiality and things like that. I said: if you are going to take that course and sign up for it, then just be prepared. These are the works that you will encounter in it.

According to Respondent, he spoke with S.L, for maybe thirty seconds after the class asking along the lines of "are you okay?" And saying it wasn't his intention to get the class to say the N-word. He does not recall S.L. saying anything in response; "She just kind of shrugged," he testified.

Respondent denied that he told Cattani that he did not know S.L. was African American. He also testified that he told S.L. in class; "Listen, me as a white person, I...could never understand what it's like to go through that experience like that."

6. **April 10**

Respondent, he met with Cattani and Strittmatter in the afternoon of April 10. Cattani told Respondent they wanted him to apologize to his AP class for upsetting everyone and to tell them it had not been his intention. When Cattani suggested he wanted to be present for the apology, Respondent said he did not think it was a good idea to have an administrator present as students would believe Respondent's apology was disingenuous, that he was doing so only because he had gotten in trouble. Respondent testified that Cattani agreed and said there would be no administrator present for the apology. As it turned out, Respondent testified, Strittmatter was present when Respondent made his apology. According to Respondent he met all of Cattani's instructions. He said he was sorry several times and gave his students several opportunities to express their opinions about the matter – although no students accepted the offer. He testified that he did tell the students how much teaching meant to him and that he was so upset about the matter that it had affected his ability to eat properly. After he made his apology, Strittmatter left the classroom and as the supervisor was exiting through the door he looked Respondent in the eyes and gave an affirmative nod of the head.

7. **R.T and *On The Road***

As for the R.T. matter, Respondent testified that R.T. was in his other AP English class, was probably his best writer and his most avid reader. He denied that he has ever given poorer grades to students who do not agree with his opinions; repeating that students often are mistaken as to his beliefs on a number of issues. He graded based upon whether the student met the criteria established for their success on the AP exam. He

gave R.T. good grades on her essays because she deserved them. Respondent has chaperoned students attending the Dodge Poetry Festival and the Seneca Poetry Festival since 2014. The two festivals are held in alternate years. The Seneca is held at the Seneca High School – another of the high schools in the District. For a period both Respondent and another teacher taught poetry classes at Lenape. Respondent no longer teaches the class, but if the other poetry teacher has left-over permission slips/tickets for the school's field trip to a poetry festival, he will give them to Respondent to give to students who he knows will appreciate poetry or literature. Typically, 15 to 20 Lenape students go on the annual field trip. In 2019 Respondent was given two or three slips and handed them out to students he believed would enjoy the trip; one of whom was R.T.

Respondent testified that he has read the novel *On The Road* at least 15 times; including twenty years ago when he read it in his college Secondary Education Department seminar on understanding and teaching literature, and most recently when he taught the book at Lenape five or six years ago. In his college seminar class, he was part of a group assigned to identify and discuss themes of madness and beauty in the novel and relate them back to the Beat Generation. He testified that the copy of *On The Road* he loaned to R.T. had been the copy he used in his college Seminar as well as the last time he taught the book. He testified that he has not written in, or highlighted portions of, the book since the last time he taught it.

Respondent testified that he and R.T. had had a number of brief conversations asking if the other had read different novels. One day Respondent asked R.T. if she had read *On The Road*, to which R.T. responded; no, but my mom said I should because I would like it. Respondent testified that as he was leaving for work the next morning he

grabbed one of his five copies of the book and gave it to R.T. later that day. He testified that he has lent books to several students, both male and female. He testified that the highlighting and handwritten notes in the copy of the novel given to R.T. were made in his college seminar or when he taught the book in his sophomore honors class at Lenape. He testified that he emailed R.T. mother to let her know he lent the student the book and to let her know that her child was doing well in his class. He testified that between phone calls and emails, he has made over a hundred such communications with parents of students, and that the second paragraph of his email to R.T.'s mother is sort of a template he uses for his emails.

Respondent characterized his selecting a book with his notes and highlights to give to R.T. as "an oversight" and that he later realized – after giving it some thought – that, as the book had been in the curriculum, there would be a copy of the book in the school library.

Respondent testified that he was never questioned by the District about allegations concerning R.T. and that he did not learn of the allegations until he read them in the tenure charges. He did not know he was the subject of a Burlington County Prosecutor investigation until he was told at the beginning of his July meeting with administrators and his Union representative that the Prosecutor had cleared the District to investigate.

8. **The Picture and Video**

Grievant testified that he does not know when the picture of him teaching in front of a white board with "N _ _ G E R" and "N_ _ GA" was taken, but he is sure it was in relation to his teaching, (something he has done many times, perhaps a hundred, in his

career) and; " illustrating the different contextual meanings and uses, how it is said by whom and its consequences, et cetera." He has never previously had a student complain about the lesson and to his knowledge no parent has ever complained. He absolutely was not playing "hangman." There has never been a formal or informal District or Lenape high school policy prohibiting his writing such on the board, Respondent testified. Similarly, he does not know when the short video recording of him teaching was made, but he believes he was teaching about use of the word in *To Kill a Mocking Bird* or *Huck Finn*. He doesn't believe the video was made in recent years because of his hair style and his use of the n-word; "it has been so long since he and his colleagues have used the word in its entirety in the classroom."

V. Arguments of the Parties

The parties submitted lengthy and detailed post hearing briefs presenting factual and legal arguments on the Tenure Charges; briefs that have been fully and carefully considered by the undersigned and will only be summarized herein.

A. Position of the School District

The District asserts that the evidence supports its tenure charges. In considering tenure charges, the Arbitrator is required to determine whether the conduct, as alleged, occurred; whether the proven conduct amounts to unbecoming conduct, and what remedy is appropriate considering the conduct proven. The District has established the truth of its tenure charges against Respondent.

The District has proven many acts of unbecoming conduct by Respondent. Unbecoming conduct is broadly defined, and may include conduct that destroys public

respect for government, behavior that is not in accord with propriety, modesty, good taste or good manners or behavior that violates the implicit standard of good behavior. Here, the District has shown that Respondent engaged in multiple acts of unbecoming conduct, including: Leading an inappropriate class discussion about use of the N-word; on numerous occasions writing a variation of "N---ER" and "N—GA" on the board; failing to follow directives regarding the handling of controversial topics in the classroom; stating to students that; "its saying there are black people and there are niggers"; and engaging in inappropriate interaction with R.T., a female student.

Respondent has been counseled numerous times about appropriate conduct toward female students, but the testimony offered by the District has shown that Respondent is calculated and predatory. The evidence establishes that Respondent wrote N—ER and drew part of a swastika on the white board. Common sense dictates that such is inappropriate. Administration witnesses established that such is not permitted and that notwithstanding Respondent's testimony that he has done so for many, many years, school administration did not know such. Moreover, there was no reason for Respondent to be discussing the use of the N-word; it was not part of the AP English curriculum, the subject of continuing Huckleberry Finn was not part of his classes' curriculum and was not suggested by Strittmatter. Even if the subject of continuation of the book(s) in the curriculum was a permissible subject of the class, such does not amount to permission to additionally discuss the spoken use of the N-word. Respondent, having engaged in the unbecoming initiation of the discussion, also violated policy by attempting to force his opinion upon the students in the class that the word should be spoken out loud.

Respondent's excessive advocacy for his personal views caused one student to be driven to tears and another to Ask; "why are we still talking about this?"

In directing his class on April 9, Respondent failed to follow District policy on controversial subjects, he did not forewarn his students as he was required to do, nor inquire whether the subject would cause discomfort. It is not enough that Respondent believes the subject he teachers requires the presentation of controversial issues, he is nevertheless required to comply with District policy and here he did not.

Respondent's conduct in writing on the whiteboard, as memorialized in the photograph and video, outraged the community and caused parents to communicate that they did not want their children to be in Respondent's classroom. Moreover, in regard to the video, Principal Cattani credibly testified that since he was hired by the District in 2007 there has been no time when saying the n-word in its entirety in a classroom has been permitted. There is simply no circumstance where such is permitted. Both Cattani and Superintendent Birnbohm credibly testified that they were not aware that district teacher-witnesses called by Respondent, Hammond and Tortorelli, ever used the entire N-word in their classrooms. Uttering a single racial, sexual or ethnic epithet in the presence of students has been sufficient in the past to support tenure charges. (Citations omitted).

Respondent has previously received serious discipline in the form of a written warning and withholding of increment for his inappropriate conduct with a female student – a female student with long dark hair. His former fiancé was a former female Lenape student with long dark hair. He has been accused of inappropriate conduct with other female students or former students with long dark hair on at least three occasions

and on each such occasion was counseled about inappropriate contact with female students. Yet, in April Respondent again engaged in inappropriate conduct with R.T. a female student with long dark hair in one of his AP English classes.

Contrary to the testimony of Respondent, R.T. credibly testified that she did not have prior discussion with Respondent about novels, had not told Respondent that R.T.'s mother had recommended that she read "*On The Road*", did not like poetry and had not studied poetry in Respondent's class. R.T. credibly testified that Respondent gave her a slip to attend the Seneca Poetry Festival without her ever expressing interest in such and that "out of the blue" Respondent handed her a copy of *On the Road* with hand-written notes/annotations and highlights that made her very uncomfortable; highlights that included:

- Her hair was long and lustrous black; and her eyes were great big blue things with timidities inside. I wish I was on her bus. A pain stabbed my heart, as it did every time I saw a girl I loved that was going in the opposite direction in this too-big world.
- The prettiest, shyest one hid far back in the field to watch, and she had good reason because she was absolutely and finally the most beautiful girl Dean and I had ever saw in our lives. She was about 16 and had the most Plains complexion like wild roses...
- [O]h, man, she was only 15 and wearing jeans, just waiting for someone to pick her up. And then...she was so sweet, so young.
- She was 18, most lovely, and lost

And Respondent's handwritten annotations in the book included:

- The most BEAUTIFUL girl in the WORLD
- What do you want most out of life?

The book caused R.T. such discomfort that she attempted to report the matter to the principal, and eventually reported the matter to Strittmatter. And then, to cover up his

grooming effort, Respondent sent an unusual, stilted email to R.T.'s mother, testifying he did so; "to maintain as much transparency as possible to avoid any misconceptions about his intent in giving her the book."

Respondent's testimony and conduct begs the question:

> Why would an adult male teacher who has had his increment withheld for an inappropriate relationship with a female student with long, dark hair; had several allegations of inappropriate relationships with female students with long, dark, hair; was engaged to a former student with long, dark, hair;[6] give a book to a female student with long, dark hair after highlighting a passage about a girl with long, dark hair; send an email to the parents of the female student with long dark hair in order to avoid any misconception after the student was surprised by the adult teacher giving her the book?

The District is charged with provide a safe environment for its students. A school with Respondent present is not a safe environment for female students. In his inappropriate conduct toward R.T. Respondent unequivocally engaged in unbecoming conduct. There can be no question that such conduct by Respondent is not in accord with propriety, modesty, good taste or good manners. His behavior is unsuitable, indecorous or improper under any circumstances. When his conduct toward R.T. in considered within the context of Respondent's unbecoming conduct in teaching a class where he advocated for the use of the N-word, previously used the n-word in the classroom, caused a public outcry, and showed throughout the District's investigation and the tenure hearing that he is not credible, termination of Respondent is warranted based upon his unbecoming conduct.

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[6] The evidence establishes that Respondent's former fiancé was a former student, that as a result of his family's friendship with her family he knew her for years prior to her attending Lenape. He testified she had "dirty blond" hair. At the time she attended Lenape she had long dark hair.

Respondent should also be terminated due to his incapacity. Determining a teacher's fitness to teach is not only focused upon his or her ability to perform the function in the classroom, but also takes into account whether the teacher's presence poses a danger to students not related to academic proficiency. Respondent's conduct has created a circumstance where the District cannot use him in the classroom with students of color or female. To put him in the classroom would condone his preying upon young girls and advocating for and saying the N-word. Respondent's lack of credibility means the District cannot trust him.

Finally, the District has other just cause to terminate Respondent. Respondent's lack of credibility and the distrust he has created, have resulted in a good faith concern on the part of the District, as well as parents of student in the District, for the safety of students. Respondent has previously received significant discipline of an increment withholding. He has engaged in further inappropriate conduct toward a female student, has violated District and school policy; has caused discomfort to students in his classroom, and has placed his own opinion over the mandates of his employer. Respondent cannot be placed in a classroom with students of color, Respondent cannot be placed in a classroom with female students. Respondent cannot be trusted to comply with District and School policies. Respondent can no longer effectively perform his job duties. There is cause to terminate Respondent.

B. Position of Respondent

The District has the burden of proving the truth of its Tenure Charges against Respondent by a preponderance of the evidence. The District has failed to do so.

The District's investigation of the allegations relating to the class of April 9 was procedurally defective and failed to disclose the whole truth of what took place during the class period and what the purpose of the discussion was and how the lesson related to the goals of the AP English class. Contrary to the conclusion of the District, a conclusion made prior to it hearing any evidence form any student not selected by S.L., Respondent did not advocate his own view nor attempt to get the class to agree that he could say the N-word out loud. In this regard, S.L. admitted, and other students testified, that the AP class often required that students take a position, supporting the position, anticipate the other side's argument, and refute the other side's argument, and that is what took place on April 9. S.L. also admitted that Respondent often took the position of devil's advocate and did not always use the exact words "devil's advocate" when he did so.

Respondent may have been seen as taking a stronger position than usual on April 9, but it should be remembered that he was presented with a class that unanimously took the position that the N-word should only be used in literature and never otherwise. In such a circumstance, and to meet the objectives of the class in preparing students for the AP exam, the students had to anticipate a strong argument against their unanimous view and then refute that argument. The few students interviewed by the District who had been identified by S.L. may have interpreted Respondent's effort as being too strong. But, had the District engaged in a fair investigation and interviewed other students in the class, it would have learned that other students believed Respondent was playing devil's advocate and that the class was consistent with its rhetorical nature. Had those other students been interviewed, the District would also have learned that Respondent did acknowledge S.L.

was crying and said a few words of comfort, and then directed the focus of the class away from S.L.

Had the District considered S.L.'s view closely, it would not have come to the wrong conclusion that S.L. cried because of the position taken by Respondent. S.L. testified that Respondent acted professional during the class, and that she began to tear up when she raised her hand and; "started to say, like, my mom and…other family members have been [called] the 'N' word, out of hate. And…when I mentioned my mom, I started choking up because I was so overwhelmed by the feelings…"

The charges also allege Respondent's conduct violated school's English Department policy on Cultural Sensitivity/Controversial Content/Common Sense which states that "at no time in class should the N-word be used in its entirety - not in discussion, not in a question, and not in reading." Strittmatter testified that he distributed the policy and that his "mind has always been to avoid posing any beliefs about or controversial topics that make students uncomfortable." Superintendent Birnbohm also testified that teachers should not make student uncomfortable. But, in contrast to the claim that controversial subjects are prohibited, the District's Policy 2240 provides that "consideration of controversial issues has a legitimate place in the instructional program" and that the "Board will permit the introduction and proper educational use of controversial issues provided their use in the instructional program is related to the goals of the course of study and level of maturity of the pupils." In this regard, the evidence shows that other teachers have used the N-Word in their classes with the knowledge of administrators and that Respondent was writing a portion of the word on the board and

discussing the use of the N-Word with an educational purpose, and has done so for many years.

As for the video in which Respondent spoke the N-Word, the District was unable to establish when the video was taken and Respondent credibly testified that it must have been a significant time ago and that the statement was made with an educational purpose. He did not direct the word as a slur toward someone; he was teaching.

Contrary to the District's assertion, the record establishes that Respondent can change when counseled to do so. He has not written emails to students on his private email since he was instructed not to do so in 2008 and on his own accord he changed his teaching from the prior accepted standard of saying the entire "N" when such was acceptable within an educational context to referencing the word as the "N-Word" as teaching literature norms have evolved and changed.

As with its conduct involving Respondent's April 9 AP class, the District failed to provide Respondent due process in the R.T. matter. At no time prior to its decision to terminate Respondent did the District give Respondent the opportunity to explain his conduct. The District's Director of Personnel McGregor, notwithstanding her testimony that the July meeting was to give Respondent an opportunity to be heard, memorialized the District's July meeting with Respondent and his Union representative in a written memorandum, written within a week of that meeting. In her memorandum, McGregor wrote that even before stating that the District would not share its information about the matter with the Union, she told the Union that if Respondent did not resign, the District was "willing to proceed with tenure charges[,] as there is no way we would willingly put him back in the classroom..." The District just assumed that Respondent had given the

copy of *On The Road* to the student so he could communicate to the student through his handwritten annotations and his highlights in the book. In fact, had the District given Respondent the opportunity to explain, the District would have learned that the notes and highlights were at the most 20 years old and at the least and five or six years old. They plainly could not have been directed toward R.T., and R.T.'s assumption that they were, as was the District's, was plainly mistaken. Additionally, although there was a credibility dispute about whether or not R.T. told Respondent that her mother had read *On The Road* and recommended that R.T. read the book, when R.T. testified at the Tenure hearing, her mother was in the room with her. Yet the District did not call the mother to testify in support of her daughter's testimony that her mother had never read or recommended the novel.

Similarly, the District further jumped to the conclusion that because the student had described Respondent as "creepy and weird" that such related to conduct of Grievant directed specifically toward the student. Rather, as the student plainly wrote in her statement presented to the District in April that; "[f]rom the first day of school. Mr. Archible seemed somewhat creepy and weird to me," and that; "I know this had no solid [basis in] evidence, but I feel very uncomfortable in his class." It is also evident that R.T.'s recollection of events is not reliable. She testified that she never spoke to Respondent about novels whereas Respondent testified that his occasional conversations with the student were brief. R.T. testified that poems were never a subject in the AP class, yet Respondent testified about various specific poems discussed and that poems may be a subject of an essay in the AP exam, and supervisor Strittmatter testified that when he

went into Respondent's classroom on April 11, Respondent had written a white board prompt to his two AP classes about a poem.

Additionally, the testimony of Birnbohm, McGregor and Cattani that Respondent is a predator and "grooms" female students with long dark hair is wholly based on assumptions, not facts. The facts are, that Respondent has never engaged in such conduct and that notwithstanding the District and county prosecutor have investigated allegations of conduct by Respondent a number of times, no evidence has ever been established to support District's assumptions. The District witnesses wildly mischaracterized their prior findings related to Respondent.

The District has also failed to support its claim of community outrage at Respondent. The only evidence of community outrage the District offered was limited to two members of the community; the mother of S.L. and Daria Torres. The first incorrectly perceived Respondent's discussion of the N-Word on April 9 as a "racial incident," and the second contacted the District to offer her consulting services.

The District has failed to prove its allegations against Respondent.

VI. Discussion

A. Introduction

The foundational narratives about Respondent, and upon which the District largely bases its charges, are two: First, that the events of April 9 to 11, as well as Respondent's prior classroom conduct relating to the N-word, had no educational basis and reflected racial animus or insensitivity on Respondent's part and, second, that Respondent is a predator and has an established history of "grooming" female students,

with long black hair, so he might engage with them in inappropriate relationships. Neither foundational narrative is established by the evidence.

B. Unbecoming Conduct

1. The Claim That Respondent "Grooms" and Engages in Abhorrent Conduct with Female Students

The District's first Charge against Respondent begins by presenting bold-faced claims relating to Respondent's past conduct toward female students. Thus, the first three substantive paragraphs of Charge One allege:

> 68. As set forth above, despite receiving progressive discipline and remediation measures, Archible continued to engage in questionable and unprofessional relationships with female students, specifically K.F., K.L., J. S. and R.T.
> 69. By continuing an abhorrent pattern of engaging in inappropriate relationships with minor female students, both inside and outside of school hours, Archible's (sic) continues to show a blatant disregard for authority and the emotional well-being of his students.
> 70. In fact, concerns that Archible "grooms" select female students due to "creepy" and "weird" conduct toward female students is reprehensible and must be stopped before it escalates.

The evidence establishes that Respondent received a single discipline in his 14 years at Lenape; a written warning and withholding of increment in 2008. In 2008, the District did not find that Respondent engaged in a physical or otherwise in-person relationship with a student. The discipline focused upon Respondent's email-based relationship with a female student, use of private email in communicating with the female student, and the content of those email communications. The District's findings[7] were limited to:

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[7] The reference to use of alcohol and consuming alcohol with a female under the age of 21, did not relate to a Lenape student, and was a reference to email discussion about Respondent meeting a female at a bar who had used a fake I.D. to gain entrance.

> evidence ...of inappropriate activity with students, which includes, using inappropriate language, undermining authority to a student and conduct unbecoming, such as personal use of alcohol and consuming alcohol with a female under the age of 21...The evidence indicates that you utilized your personal email account to communicate with at least one student.

2. Paragraph 68; K.F, K.L. & J.S. and the Meaning of "No Evidence"

The evidence offered by the District was insufficient to support its allegations that Respondent "continued to engage in questionable and unprofessional relationships with female students, specifically K.F., K.L., J. S...."[8] To the contrary, the record establishes that notwithstanding allegations against Respondent, the District (in some cases following consideration by the Office of the County Prosecutor) conducted its own investigations and concluded that; "no evidence was found to support any claim of wrongdoing" by Respondent. Contrary to the suggestions by the District and its witnesses that the prior allegations against Respondent were dismissed by the District because there was inconclusive evidence, insufficient evidence or too little evidence, the allegations were dismissed because there was "no evidence" of the inappropriate conduct alleged. "No" means: no; none; zero. Where there is "no evidence" of a prior conduct, there can be no finding of a continuation of such conduct. Leaving aside the allegations relating to R.T., the District failed to prove the allegations contained in numbered paragraph 68 in Charge One.

3. Paragraph 69

Similarly, for the same reasons as stated above, I find there was no "pattern of conduct" of Respondent engaging in inappropriate conduct with female students

[8] I address the R.T. matter below.

established by the evidence. As a consequence, I further find the District has failed to prove the allegations contained in numbered paragraph 69 in Charge One that Respondent has continued "an abhorrent pattern of engaging in inappropriate relationships with minor female students, both inside and outside of school hours..."

4. "Creepy" and "Weird" Conduct, Paragraph 70

The District and its witnesses repeatedly raised student R.T's reference to Respondent as being "creepy" and "weird." However, the District never asked R.T. what she meant by her description. Neither the definition of the word "creepy" or the definition of the word "weird" suggests, as the District asserts, that Respondent must therefore have been attempting to establish inappropriate relationships with female students. R.T. did not report that Respondent was creepy in his conduct toward anyone. Instead, she began her statement, written at the request of Strittmatter in April, that; "[f]rom the first day of school, Mr. Archible seemed somewhat creepy and weird to me." Failing to inquire as to what R.T. meant by the term creepy in describing Respondent is particularly curious where, as here, the individual described by the seventeen-year-old is a man with a "Mohawk" haircut and plug earrings. Considering the arguably unusual presentation of Respondent, a fair assumption could be made that the student was reacting to that presentation. In any event, it is not known what R.T. meant by writing that Respondent "seemed" creepy to her as she was not asked during the investigation or during either of the two times she testified at the hearing.

Again, the District has failed to prove its allegations contained in numbered paragraph 70 in Charge One. District witnesses expressed their "concerns that Archible 'grooms' select female students due to "creepy" and "weird" conduct toward female

students." But concerns and assumptions do not establish either that Respondent engaged in such conduct or that any conduct engaged in by Respondent; "is reprehensible and must be stopped before it escalates."

5. The April 9 Class and History of Lessons Relating to the N-Word

I find there is no evidence of race-based animus on the part of Respondent. Nor do I find that the lesson of April 9 was some rouge activity by Respondent, unrelated to his AP English curriculum. Notwithstanding supervisor Strittmatter's testimony that the Law Day flyer was handed out to Respondent's AP classes on April 11, I find based upon the testimony of student witnesses, the testimony of Respondent and the course of the April 9 discussion itself, that the flyer was distributed by Strittmatter to English department teachers prior to April 9 and that the subject of the essay described in the flyer provided the concept of the April 9 lesson. Additionally, I credit Respondent's testimony that the subject of the April 9 lesson was consistent with the AP-test preparation goals of his AP English classes, including; (a) the use of the underlying question of whether the two books at issue should remain in the curriculum and (b) his rhetorical exercise of addressing how students could unanimously agree that the books should remain in the curriculum and that the word should never be said out loud, but not have developed an rhetorical response to an anticipated counter position that the word should be spoken out loud for educational purposes.

Respondent's process was consistent with portions of the Board's policy 2240 stating that controversial subjects were permissible and, "can help pupils learn to identify important issues, explore fully and fairly all sides of an issue, weigh carefully the values and factors involved, and develop techniques for formulating and evaluating positions."

Although I am persuaded by the testimony of students in attendance and by Respondent that Respondent did not express or advocate his personal opinion on the subject of use of the N-word in class, contrary to the District's argument, Board policy 2240 allows teachers to express their personal opinions when so characterized.

I do, however, find that Respondent violated the portion of the Board policy providing that the discussion of controversial issues in the classroom, "can not be allowed to disrupt the educational process." In this regard, I find that the evidence establishes that on April 9 Respondent allowed the N-word discussion to go on too long, unnecessarily upsetting students and that, as a consequence, the educational process was disrupted for a number of students for a period toward the scheduled end of the class on that day.

As for the claim that Respondent failed to forewarn his class of the sensitive and controversial nature of the planned April 9 class, the evidence establishes that at the start of the class on April 9 Respondent did not specifically caution students about the potentially sensitive nature of the discussion planned for that day. But the record establishes that the topic of discussion for April 9 had been previously described in his assignment to students and in a Law Day flyer distributed to the students as background for the assignment. In regard to any question of pre-class notice of sensitive or disturbing subject matter, I find it would be hard to miss the sensitive nature of the planned class discussion as the flyer presented the issue of whether – because of the author's use of the N-Word and slave references the book - *Huckleberry Finn* should be removed from the national curriculum, and specifically provided: "[t]hough filled with what many academics see as anti-racist and anti-slavery themes, 'Huckleberry Finn' presents an unvarnished depiction of the antebellum south ***and include[s] use of the n-word more***

than 200 times." (Emphasis added) Thus, the sensitive topic of use of the N-word was communicated prior to the class.

In addition, Respondent did orient his class at the beginning of the schoolyear warning them that controversial subjects would be discussed. I also find that Respondent did not review the details of his discussion with Strittmatter prior to the class. However, I find that the record does not establish that the school has strictly enforced the Strittmatter policy. The evidence establishes that Respondent's AP English classes have often discussed controversial subjects over a period of many years and I find it wholly unreasonable to assume that Strittmatter has been such an absent supervisor over such an extended time as to not have knowledge of the nature of the class.

Additionally, evidence establishes that Respondent's raising a controversial subject for discussion in class on April 9 without clearance and advice from the supervisor was not perceived as a violation of policy by school administration when the subject was first presented. In this regard, both principal Cattani and supervisor Strittmatter met with Respondent on April 10 and made no mention of the fact that Respondent had not reviewed the raising of a controversial subject in his class with his supervisor. (Strittmatter also did not raise the controversial subject issue on April 11 when he met with Respondent at the end of the school day.) Instead, the administrator's focused upon the teacher pushing the subject and his personal opinion too hard, allegedly causing some students to be uncomfortable and one student to cry and the request of a student's parents to meet with the principal. Respondent admitted that he had let the class discussion go too far and took responsibility for his conduct. The administrators then determined that the remedy to the situation was for Respondent to apologies to the class -

the remedy was not to discipline Respondent. As Cattani testified, he was not considering tenure charges. I find that Respondent fully complied with the remedy decided upon by the two administrators.

Based upon such considerations, with the exception of Respondent's allowing the class discussion to go too far and causing the educational process to be disrupted during the April 9 class, I find the District has failed to prove the truthfulness of the remaining allegation of paragraphs 71, 72, 73 & 75.

6. "Public Outrage" and the "Hangman"

Paragraph 74 of the District's Tenure Charge One alleges:

> 74. As the investigation into this incident continued, and public outrage mounted, yet another incident surfaced in which a photograph of Archible using the "N-word" in his classroom while apparently playing a game of "hangman," as well as a separate video of his stating the "N-word" during class instruction.

The evidence offered of "public outrage" included statements of S.L.'s mother - who I find had reason to express concern - and a statement by a single member of the District's community who characterized the picture of Respondent in front of a white-board as playing hangman and offered to sell her consulting services to the District. In their testimony, Supervisor Birnbohm, Director McGregor and Principal Cattani referred generally to public outrage or growing outrage in the community. Cattani testified that he received many telephone calls from parents who said they did not want their children in Respondent's class. But, such testimony, although relevant to explain the origin and reason for an investigation, was hearsay and the District offered no specifics; no identifying information of any such parents; no copies of social media posts, emails, texts or other communications, or contemporaneous notes of any such conversations or phone

calls to establish the nature and breadth of any community concern. I find there was insufficient evidence in the record to establish the community outrage alleged in the District's Tenure Charges.

Additionally, I find troubling the District's inclusion in its Tenure Charges of the assertion that Respondent was; "using the 'N-word' in his classroom while apparently playing a game of "hangman…" Contrary to the District's arguments at the hearing and afterward, the District's charges here do not assert that Respondent's writing a portion of the N-word on the board violated policy. It alleges narrowly that Respondent was apparently playing a game of hangman. Nooses and hangings are permeated with particularly vulgar and hateful race-based messages. A simple glance at the picture referenced by the Board in this paragraph, or a brief review of the referenced video, shows that no game of hangman was being played. There is no evidence whatsoever of Respondent playing hangman in the record. By giving voice to such an obviously false and potentially inflammatory allegation - to broadcast that it is true when such has no support whatsoever in fact - the District – while trying to enforce a line of racial sensitivity– may have itself crossed such a line.

In its puffery and exaggerations of its allegations, I find the District has effectively admitted that the facts that can be proven are likely insufficient to support the termination of Respondent. Such puffery and exaggeration includes District assertions that: 1) Respondent "continued to engage in questionable and unprofessional relationships with [three] female students;" 2) that Respondent continued "an abhorrent pattern of engaging in inappropriate relationships with minor female students;" 3) that Respondent "grooms" select female students by engaging in "reprehensible" and "creepy

and weird conduct toward female students"; and, now, 4) that Respondent used the "N-word in his classroom while apparently playing a game of 'hangman'..." Considering it is the District's burden to prove the allegations it chose to allege and describe in its Tenure Charges, I give weight to such an implied admission against interest.

I also do not find, under the circumstances established by the record, that the video in which Respondent says the N-word word out loud supports a finding of conduct unbecoming. Respondent openly taught his N-word-related lesson for many years; some one hundred times according to his testimony. The lesson evolved with the times and he admitted that there was a time years ago when he and his colleagues would say the full N-word in class in the manner recorded by the video when teaching about books wherein the word was used, such as *To Kill a Mocking Bird* and *Huckleberry Finn*. As the mere utterance of the word became culturally unacceptable, he adjusted and began referring to the word as the N-word. I find that the video supports Respondent's testimony that he was likely talking about a passage in a novel when he referenced in the video; "it's basically saying...."

I also find in this regard, that Respondent did not say the word in the context of directing a slur toward any individual person or any group of people. The video at issue is of Respondent teaching, and the word was uttered by Respondent in the context of teaching students about the use of the word in American literature. Contrary to the argument of the District, I do not find the cases relied upon by the District support the tenure charges here. This is not a case where the teacher could be heard mumbling the N-

word to describe his students,[9] or in an outburst saying the words "nigger, nigger, nigger," "fuck you" and "suck my dick" to his students.[10]

7. Paragraph 75

As discussed above, I am not persuaded by the evidence that Respondent engaged in a pattern or practice of "ignoring professional directives regarding cultural sensitivity" by having class discussions over his 14 years of teaching about use of the N-word in American literature and by saying the N-word or writing part of the N-word on the board during his classes. Respondent was hired in 2005. The written policy against saying or writing the entire N-word in class offered into the record is dated August 2018. Strittmatter testified that he authored the policy in or about 2014. The record does not establish when the video was taken and the District did not present the individual who took the video as a witness. Considering all of the evidence on the matter, I find the District failed to establish that the video was recorded at any time when either the school or the District had a policy against utterance of the complete word by teachers in the performance of lessons related to novels using the word.

The District also failed to prove that Respondent's writing part of the N-word on the board violated any policy. Respondent did not write the entire word as is prohibited by supervisor Strittmatter's policy, and there was no District Policy offered addressing such a subject. It is well established in matters of discipline or discharge for cause that rules and policies must be clear and must reasonably put employees on notice of the conduct prohibited and the potential discipline that could result from violation of the

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[9] See *I/M/O/ Bruce Bassetti and Penns-Grove –Carney Point School District Board of Education*, DOE Docket No. 75-4/19 (Susan Wood Osborn, July 17, 2020).
[10] See *I/M/O/ Vincent Serpico and School District of the Township of Piscataway*, DOE Docket No. 144-6/18 (John E. Sands November 4, 2018)

policy. The policy provides that "at no time should the N-word...be used ***in its entirety***." (Emphasis added). There is no evidence that Respondent ever wrote the entire N-word on the board. Again, I credit the Respondent's explanation as to the educational purpose of his conduct.

8. Charge of Unbecoming Conduct Relating to R.T.

I find that Respondent did not make the handwritten notations or highlights in the copy of *On The Road* he loaned to R.T. with R.T. in mind. I am persuaded that the handwritten notations and highlights were made by Respondent when he was in a college seminar some twenty years ago and five or six years ago when he taught the book in a class at Lenape.

Regardless of whether or not Respondent and R.T. had conversations about *On The Road* or other novels, or a conversation about R.T.'s mother's interest in the book, I find that the *On The Road*-related conduct of Respondent with R.T. was outside of the ordinary course of the AP English class in which R.T. was enrolled and Respondent taught. The invitation to the poetry festival and the lending of the book should be viewed from such a context and from the perspective of the student.

Although. (1) as discussed above, the record fails to establish that Respondent had a pattern of inappropriate conduct toward female students or engaged in efforts to "groom" female students, and (2) I do not find that Respondent engaged in any such conduct toward R.T.; I nevertheless find that Respondent should be held accountable for the discomfort and potentially inappropriate, albeit mistaken, message communicated to R.T. that resulted from his conduct. I am not at all persuaded that Respondent's lending of the particular copy of *On The Road* to R.T. can fairly be characterized as "an

oversight," as Respondent described it. Respondent knew that there were highlights and notations in his book. His choosing the copy of the book he gave R.T., whether intentionally or by an unthinking grabbing of one of his copies, had very real consequences to the student.

There is no evidence of animus on the part of R.T. toward Respondent. The content of the book she received from Respondent disturbed R.T. enough that she took deliberate and intentional steps to report the matter to her school's principal. That R.T. was disturbed by some of the highlights and handwritten notations in the book is understandable; particularly where, as here, the book was given without prior explanation of, or warning about, the notations and highlights. When considered in combination; (1) that the book was not requested by R.T. and was handed to her by Respondent unexpectedly; (2) the book was not in the curriculum in the class R.T. was taking from Respondent; (3) the out-of-context, disturbing nature of some of the highlighted passages and handwritten notations in the book; and (4) R.T.'s unexpected invitation from Respondent to a poetry festival for which she had not expressed interest, I find that R.T.'s expressed discomfort, as well as her assumption that the highlights and notations were directed at her, were reasonable.

Respondent had been disciplined in 2008 for his interaction with a female student and had been further reminded by District superintendents on at least two occasions, to:

> Please allow this letter to serve as a reminder to you of the boundaries of student-teacher relationships. It is important for teachers to always be cognizant of how words and actions may be perceived by students, and to maintain an atmosphere or respect in your classroom.
>
> In your future interactions with students, parents, and staff, please exercise good judgment and follow district policy.

Although the two investigation-closed letters were not disciplinary warnings and did not specifically state that discipline would result should Respondent fail to heed the advice contained therein, they served the function of placing Respondent on notice of the conduct expected of him. This is particularly so of the guidance; "[i]t is always important for teachers to always be cognizant of how words and actions may be perceived by students…" and "to exercise good judgment."

Based upon such considerations, I find that the District has shown that Respondent exercised bad judgment and failed to be cognizant of how his words and actions would reasonably be perceived by R.T. At least to such extent, the District has met its burden of proving that Respondent engaged in unbecoming conduct by giving R.T. the copy of *On The Road.*

C. Incapacity

As the District's claim of incapacity is primarily based upon its unproven allegation that Respondent engaged in a pattern of inappropriate conduct with female students and allegations that Respondent has used racially insensitive language, allegations I have found not supported by the record, I am not persuaded that the District has proven its Charge of Incapacity.

D. The Appropriate Discipline Considering *Fulcomer* and Just Cause

As discussed above, I find that Respondent engaged in conduct alleged in Tenure Charge One relating to a violation of the Board's Policy 2240 on Controversial Issues and a portion of the conduct alleged relating to R.T. In determining appropriateness of

discharge or alternatively the degree of discipline of Respondent warranted, I make the following conclusions based upon the *Fulcomer* and Just Cause standards.

1. *Fulcomer*

Applying the well-recognized test for determining the appropriateness of termination of a tenured teacher's employment for unbecoming conduct articulated in *In re Fulcomer*, 93 N.J. Super. 404 (App. Div. 1967), and cases citing *Fulcomer*, the undersigned is required to consider a number of factors, including: the potential impact on Respondent's teaching career; the longevity of Respondent's teaching career; Respondent's overall teaching record; Respondent's teaching ability; Respondent's attitude and whether the acts at issue were premeditated, cruel or done with an intent to punish; Respondent's disciplinary record; the nature and gravity of the offenses under all of the circumstances; evidence of provocation, extenuation or aggravation; any harm or injuries Respondent's conduct may have had on maintenance of discipline and the proper administration of the school system; the likelihood of such behavior recurring and whether the discipline is generally fair and proportional to discipline imposed for similar offenses by other public employees. It is also well established that where an incident of conduct unbecoming is found to have occurred, in most cases progressive discipline should be used.

I find that Respondent has a significantly long teaching career of at least fourteen years, and that he has a very good overall teaching record. Respondent has one prior discipline of which he fully complied and the record well establishes that Respondent has very good teaching ability. The potential impact of termination on Respondent's teaching career would be substantial.

As for the nature and gravity of the Respondent's offenses under all of the circumstances, I find that the violation of policy found relating to the April 9 class are relatively minor and were to a large degree addressed by Respondent's immediately taking responsibility for his conduct and compliance with the remedy to the situation directed by his principal and supervisor; to apologies to his class and give the students the opportunity for closure. In this regard, the conduct of individuals speaks loudly in the resolution of credibility issues, and in finding that Respondent apologized as directed, I rely primarily upon the conduct of Supervisor Strittmatter that reflected the supervisor's approval of the apology. In this regard; (1) Strittmatter was present when the terms of the apology were described to Respondent by principal Cattani, (2) Strittmatter was present when the apology was given, looked Respondent in the eye and gave him a nod when the supervisor left the class and, (3) importantly, notwithstanding that the supervisor explained to Respondent on the afternoon of April 11 that he attended the class that morning to ensure that the teacher did as he was directed, the supervisor did not suggest that the apology had been inadequate. If the supervisor believed at that time that the teacher had failed his directive, it would have been illogical for him to (a) give the assurance he gave Respondent, and (b) not tell the teacher he had failed to do as directed.

Respondent's conduct toward R.T. was more significant. Respondent's conduct was an exercise in poor judgment and lack of forethought. However, the evidence does not establish that Respondent intentionally premeditated the misunderstanding that was created by his giving R.T. the book. Nor do I find that the conduct of Respondent toward R.T. was cruel, done with an intent to punish the student or done for some other nefarious purpose.

I find there is no significant likelihood of harm or injury that Respondent's conduct may have on maintenance of discipline and the proper administration of the school system. In this regard, the fears expressed by District administrators about Respondent being in the classroom were largely based upon the claims that Respondent "grooms" female students and habitually fails to comply with policy, and as discussed above, those claims have not been established. Finally, I am persuaded that, considering the very significant discipline of Respondent ordered herein, it is unlikely that Respondent will repeat the unbecoming behavior found here.

Applying the *Fulcomer* considerations, I find that termination is not warranted in this matter.

2. Just Cause

The TEACHNJ Act incorporates the just cause standard wherein it provides that a school district shall not dismiss or reduce the compensation of a tenured teachers except for "inefficiency, incapacity, or conduct unbecoming *...or other just cause,*" (emphasis added). An analysis of whether or not Respondent's discharge was for just cause under generally recognized standards requires consideration of all of the circumstances in determining whether the issuance of discipline was "fair." Some of the several factors often considered when applying the just cause standard include whether or not: (1) the rule or policy being enforced is reasonable; (2) there was prior notice to the employee of the rule and the consequences for its violation; (3) the disciplinary investigation was adequately and fairly conducted and the employee was afforded an appropriate level of due process under the circumstances; (4) the employer was justified in concluding that the employee engaged in the conduct as charged; (5) the rule has been consistently and

fairly enforced and (6) whether or not the discipline issued was appropriate given the relative gravity of the offense, the employee's disciplinary record and considerations of progressive discipline and due process.

For the reasons stated above, I have found that the District has failed to prove many of its allegations against Respondent. As a consequence of such findings, I also find that the District failed to show just cause for discipline relating to those allegations. As to the allegations I have found the District has established, I find that under the standard of just cause, the discipline of discharge was too harsh given the relative gravity of the offense, Respondent's disciplinary record and considerations of progressive discipline and due process.

a. Progressive Discipline

The fact that Respondent had his increment withheld once does not require that any discipline that may be issued to the teacher in the future – no matter how many years may pass – must be termination. The disciplinary notice issued to Respondent in 2008 does not state that if further conduct warranting discipline occurs Respondent will be terminated. Instead, the notice provides that if Respondent engages in similar conduct "further disciplinary action, up to and including termination will be considered." Just Cause requires the corrective action of progressive discipline in all but the most egregious circumstances. As a consequence, just cause requires that management exercise judgment-under-the-specific-circumstances to determine whether discipline could reasonable be relied upon to correct an employee's conduct or performance.

I find insufficient evidence to support the District's claim that Respondent will not reform his conduct in the future. Respondent has a long record of good performance

and Respondent expressed strong interest in continuing his teaching position. Respondent has shown through his full compliance with his 2008 discipline that he can reform his conduct; compliance on Respondent's part that eventually resulted in his increment being restored by the Board.

b. Appropriate Discipline

As discussed above, termination of Respondent is not required by the *Fulcomer* considerations and termination is also contrary to the Just Cause requirement of progressive discipline. I additionally find that termination is disproportionately harsh relative to the conduct found.

Respondent took responsibility for his conduct relating to the April 9 class and immediately complied with the apology remedy directed by the principal. As for Respondent's R.T.-related conduct, considering all of the circumstances, I find termination to be disproportional to the offenses found herein. Contrary to the District's charges, Respondent did not engage in a pattern and practice of "grooming" or a premeditated scheme to initiate an inappropriate relationship with the R.T.; the conduct the District argued warranting termination. The misunderstanding caused by Respondent's lending the student a book with the teacher's handwritten notations and highlights and the ill effect it wrought upon the student were real; but not intentional. Respondent should have exercised more care and better judgment and his failure to do so under the circumstances presented here amounts to conduct warranting significant discipline, but does not, standing alone or in combination with the violations of policy found, amount to cause for termination of a tenured teacher.

VII. Conclusion

The Tenure Charges are sustained in part and dismissed in part.

VIII. Remedy

I will order that Respondent be promptly reinstated; that Respondent serve a suspension without pay of 60 calendar days beginning with the date of his initial suspension, April 11, 2019; that Respondent be made whole for lost pay, benefits and seniority, less such related to his 60-day suspension; and that Respondent be warned in writing that he must exercise good judgment when interacting with students, particularly when such interaction is outside of the classroom and/or curriculum of his classes, and to comply with Board policies relating to discussions of controversial topics.

IX. Award

IMO Tenure Charges of Joseph Archible
Agency Docket Case No. 281-9019

The subject tenure charges against Respondent are sustained in part and dismissed in part.

The District is ordered to:

1. Promptly offer Respondent reinstatement to his former position;

2. Reduce Respondents termination to a written warning and suspension without pay for a period of 60 calendar days from the date of his original April 11, 2020; and

3. Make Respondent whole for lost wages, benefits and seniority for the period from the date of his suspension to the date he is reinstated or declines reinstatement, less pay and benefits related to his suspension.

Dated: January 29, 2021

Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Award in Agency Docket Case No. 281-1019 relating to tenure charges against Joseph Archible on Friday, January 29, 2021.

Timothy J Brown

26-21

OAL Dkt. No. EDU 14184-18
Agency Dkt. No. 235-9/18

New Jersey Commissioner of Education

Final Decision

Stephen Geller,

Petitioner,

v.

Board of Education of the Township of Union, Union County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 1, 2021
Date of Mailing: February 2, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 14184-18
AGENCY DKT. NO. 253-9/18

STEPHEN M. GELLER,

Petitioner,

v.

TOWNSHIP OF UNION BOARD OF EDUCATION, UNION COUNTY,

Respondent.

Richard Friedman, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Afshan Ajmiri Giner, Esq., for respondent (Florio, Perrucci, Steinhardt, Cappelli, Tipton & Taylor, LLC, attorneys)

Record Closed: December 18, 2020 Decided: December 18, 2020

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

On September 28, 2018, the Commissioner of the Department of Education transmitted this case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A.

52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

A copy of their settlement agreement is attached to this decision. Having reviewed the terms of the settlement agreement, I **FIND** that the parties have entered into their settlement voluntarily, as evidenced by their signatures, the signatures of their representatives, or both.

Moreover, I **CONCLUDE** that the settlement agreement is consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Therefore, given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of their settlement and that these proceedings are now closed.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this case. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days, and unless such time limit is otherwise extended, this recommended decision shall become a final decision under N.J.S.A. 52:14B-10.

December 18, 2020
DATE

BARRY E. MOSCOIWTZ, ALJ

Date Received at Agency: December 18, 2020

Date Mailed to Parties: December 18, 2020

dr

SETTLEMENT AGREEMENT AND GENERAL RELEASE BETWEEN THE UNION TOWNSHIP BOARD OF EDUCATION AND STEPHEN GELLER

Stephen Geller v. Board of Education of the Township of Union, Union County
OAL Dkt. No. EDU 14184-2018N; Agency Ref. No. 253-9/18

This **SETTLEMENT AGREEMENT and GENERAL RELEASE** ("Agreement") is entered into this _____ day of _____, 2020, by and between Petitioner, Stephen Geller ("Petitioner" and "Geller") and Respondent, Union Township Board of Education ("Board"), referred to collectively herein as the "Parties."

RECITALS

WHEREAS, the Board is a body politic and corporate, organized and existing under the laws of the State of New Jersey, N.J.S.A. 18A: 11-1, which is entrusted with maintaining and governing the public schools of the Union Township School District ("District"); and

WHEREAS, the Board has its administrative offices located at 2369 Morris Avenue, Union, New Jersey 07083; and

WHEREAS, Geller is a former tenured employee of the Board, currently residing at 880 North McKnight Road, Apt. 1-S, St. Louis, Missouri, 63132.; and

WHEREAS, on or about June 30, 2011, Petitioner was subject to a reduction in force; and

WHEREAS, on or about September 11, 2018, Petitioner filed a petition with the Commissioner of Education, captioned: Stephen Geller v. Board of Education of the Township of Union, Union County, OAL Dkt. No. EDU 14184-2018N; Agency Ref. No. 253-9/18 ("Petition"), alleging violation of his tenure and seniority rights, and seeking reinstatement to his

teaching position in the Union Township School District ("District"), with back pay, benefits and emoluments; and

WHEREAS, the Parties have reached a settlement relating to the requested relief in the Petition; and

WHEREAS, the Parties intend by this Settlement Agreement and General Release ("Agreement") to fully and finally resolve all outstanding matters:

TERMS AND CONDITIONS

NOW THEREFORE, intending to be legally bound hereby and in consideration of the mutual covenants, conditions, obligations, and promises contained herein, the parties agree as follows:

1. The Board will pay Geller a gross amount of $96,927.00[1], minus usual and customary withholdings, including FICA, State and Federal taxes, union membership fee contributions, pensions contributions, credit for unemployment benefits, and other legally required deductions for the period between the commencement of the 2016-2017 school year through to the conclusion of the 2018-2019 school year.

2. The Board will pay Geller an additional $4,950 for accumulated sick leave, minus usual and customary withholdings and other legally required deductions, for the period from the commencement of his employment within the District through September 1, 2016, the date of the Boards reduction in force (RIF).

3. Upon execution of this Agreement by the Parties, Geller agrees to withdraw the above-captioned matter with prejudice and without costs. Geller shall take no further action

[1] This sum constitutes a total amount of the full salaries and backpay that Geller would have earned for the 2016-17, 2017-18, and 2018-19 school years i.e. $69,245.00, $70,976.00 and $72,715.00, minus mitigation for salary, as a result of other employment, during the 2016-17, 2017-18, and 2018-19 school years i.e. $37,253.00, $38,553.00, and $40,203.00.

against the Board based upon the matters set forth within Geller's pleadings and/or based upon any other cause of action that Geller may have in connection with his employment with the Board.

4. Geller further agrees that he will not seek future employment or reinstatement with the Board, or pursue any claims for reinstatement of employment, backpay, benefits and emoluments, and violation of tenure and seniority rights.

5. Upon the fulfillment by the Board of the terms and conditions of the Agreement, Geller, his heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any and all claims or rights, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively, its past and present Board members, all officers and administrators, its attorneys, agents and employees, as well as their successors, and assigns, including, but not limited to any and all claims for attorneys' fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this Agreement, and any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 6, et seq. ("ADEA"); Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §§ 2000e, et seq., ("Title VII"); the Reconstruction Era Civil Rights Act, as amended, 42 U.S.C. §§ 1981, § 1983, et seq. ("Civil Rights Act"); the Civil Rights Act of 1991, as amended, 42 U.S.C. § 1981a, et seq. ("CRA of 1991"); the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq. ("ADA"); the Family and Medical Leave Act, 29 U.S.C. §§ 2601, et seq. ("FMLA"); the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. ("FLSA"); the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq. ("ERISA"); the Equal Pay Act, 29 U.S.C. § 201, et seq.,

(EPA"); the Rehabilitation Act, 29 U.S.C. §§ 701, et seq. ("RA"); the Pregnancy Discrimination Act, 42 U.S.C. §§ 2000, et seq. ("PDA"); the Whistleblower Protection Statutes, 10 U.S.C. § 2409, 12 U.S.C. § 1831j, 31 U.S.C. § 5328, 41 U.S.C. § 265, (collectively as "WPS"); the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, et seq.; the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq. ("LAD"), the New Jersey Family Leave Act, N.J.S.A. 34:11B-1, et seq. ("FLA"); the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq. ("CEPA"); New Jersey Worker Freedom from Intimidation Act, N.J.S.A. 34:19-9 et seq.; the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a, et seq. ("WHL"); the New Jersey SAFE Act, N.J.S.A. 34:11C-1, et seq.; the New Jersey Discrimination in Wages Law, N.J.S.A. 34:11-56.1, et seq. ("DWL"); and the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, et seq. ("WPL); any collective negotiations agreement; any common law claim and any and all other claims, that could be initiated in any venue, for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim, up to the date of this Agreement. Petitioner expressly understands and acknowledges that it is possible that unknown losses or claims exist or that present losses may have been underestimated in amount or severity. Petitioner expressly accepts and assumes the risk of such unknown or underestimated losses or claims and acknowledges and agrees that the benefits to be provided to him pursuant to this Agreement fully compensate her for such risks.

6. The Board will deduct pension contributions from its payment to Geller and remit them to the Division of Pensions and Benefits in the amount determined by the Division of Pensions and Benefits. The pension contributions shall be made for the 2016-2017, 2017-2018 and 2018-2019 school years based upon the salaries set forth herein. Geller will receive pension

credit for those contributions in each of those school years either in the Teachers' Pension & Annuity Fund or the Public Employees' Retirement System, as determined by the Division of Pensions and Benefits, the Teachers' Pension & Annuity Fund or the Public Employees' Retirement System, with the appropriate Pension Fund in which credit is provided to be determined by the Boards of Trustees of those Pension Funds or the Division of Pensions and Benefits. The Board will make any employer pension contributions as may be required by the Division of Pensions and Benefits, the Teachers' Pension & Annuity Fund or the Public Employees' Retirement System for Geller to receive pension credit for the 2016-2017, 2017-2018 and 2018-2019 school years in the appropriate Pension Fund, and Geller's pension allowance will be adjusted to include those pension contributions and the salaries upon which they are based.

7. The parties acknowledge and understand that the ultimate decision as to Geller's eligibility for pension credit and benefits is made by the New Jersey Division of Pensions and Benefits.

8. Pursuant to the Older Workers Benefit Protection Act, Geller has twenty-one (21) calendar days from delivery hereof to consider this Agreement. Geller may accept this Agreement before expiration of the twenty-one (21) days, in which case Geller shall waive the remainder of the consideration period. Geller has a period of seven (7) calendar days after delivering the executed Agreement to revoke acceptance of the Agreement. To revoke, Geller must deliver timely written notice revoking his acceptance of this Agreement to the Superintendent of Schools. This Agreement shall become effective on the eighth (8th) day after delivery of this executed Agreement by the Parties, provided that Geller has not revoked acceptance or rescinded the Agreement.

9. It is expressly understood that the arrangement herein is predicated exclusively upon the special circumstances of this matter and shall not be construed to represent any policy or procedure of the Board

10. This Agreement does not in any way constitute an admission of liability or wrongdoing by the Board concerning the allegations raised in the above-captioned litigation.

11. This Agreement shall bind the parties and their respective heirs, successors, assigns, officers, employees, officials, and agents.

12. Both Parties represent that this Agreement has been voluntarily executed by the persons with the legal authority to do so. This Agreement must be formally approved by the Board as this Agreement will be deemed null and void without said approval. All reasonable efforts will be made to timely obtain approval from the Board.

13. Should any part of this Agreement be invalidated by a court of competent jurisdiction, that part shall be severed, and the balance of the Agreement shall remain in full force and effect.

14. This Agreement may be signed in counterparts and shall be binding as if all Parties executed the original thereof. A facsimile or electronically-transmitted signature shall have the same effect as an original signature.

15. The Parties hereto acknowledge that this Agreement constitutes a full, final, and complete settlement of their differences and supersedes and replaces any and all other written or oral exchanges, agreements, understandings, arrangements, or negotiations between or among them relating to the subject matter hereof, and affirmatively state that there are no other prior or contemporaneous agreements, exchanges, representations, arrangements, or understandings, written or oral, between or among them relating to the subject matter hereof other than that as set

forth herein, and that this Agreement contains the sole and entire Agreement between them with respect to the subject matter hereof.

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date shown below.

Stephen Geller — Date: 12/11/2020

Richard Friedman, Esq. — Date: 12/11/20

Union Township Board of Education — Date: 12/16/20

Board Attorney — Date: 12/16/2020

P-10. APPROVE SETTLEMENT AGREEMENT – S.G.

Approve Settlement Agreement and General Release Between the Board of Education and S.G., in accordance with the non-public information appended to the minutes.

I certify that the foregoing resolution was adopted by the Township of Union Board of Education at its regular meeting on December 15, 2020

Yolanda Koon
Board Secretary

27-21
OAL Dkt. No. EDU 01406-20
Agency Dkt. No. 320-12/19

New Jersey Commissioner of Education

Final Decision

T.L., on behalf of minor child, C.B.,

Petitioner,

v.

Board of Education of the South Orange-Maplewood School District, Essex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that no issues remain in dispute and that the petition of appeal should be dismissed. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 1, 2021
Date of Mailing: February 2, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 01406-20
AGENCY DKT. NO. 320-12/19

T.L. ON BEHALF OF MINOR CHILD C.B.,
Petitioner,
v.
SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT BOARD OF EDUCATION, ESSEX COUNTY,
Respondent.

T.L., petitioner, pro se

Joanne L. Butler, Esq. for respondent (Schenck, Price, Smith & King, LLP)

Record Closed: December 1, 2020 Decided: December 18, 2020

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

STATEMENT OF THE CASE

On November 18, 2019, South Orange-Maplewood Board of Education's (respondent or Board) determined that minor child C.B. is not entitled to a free and public education in its district. Petitioner, T.L., appealed the determination on

December 13, 2019. The matter was transmitted to the Office of Administrative Law (OAL) on January 29, 2020, for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. A hearing was scheduled for April 1, 2020. However, on March 17, 2020 petitioner submitted an email stating:

> "I no longer reside in the district. I am withdrawing the petition."
> (Said email chain is attached hereto for reference.)

It was requested that petitioner submit a letter with her signature stating same. Petitioner responded, "Sure. As soon as I get a moment." On May 13, 2020 a follow up email was sent inquiring about the withdrawal letter. On July 1, 2020, my secretary inquired whether or not the Board would be seeking tuition. On July 2, 2020 petitioner submitted a signed letter stating that she is withdrawing her request for a hearing.

Under my direction, my secretary continued to inquire if the Board would be seeking tuition in this matter. On August 31, 2020 the Board's counsel advised that she has not been able to finalize and asked for the Court's indulgence. Another inquiry was made on November 23, 2020, again requesting whether respondent advise whether or not the Board will be seeking tuition by December 1, 2020. To date, the Board has not responded. (the email chain is attached hereto for reference).

Based on the foregoing, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is therefore **ORDERED** that this matter be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



December 18, 2020

DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: December 18, 2020

Date Mailed to Parties: December 18, 2020

ljb

28-21

OAL Dkt. No. EDU 06615-20
Agency Dkt. No. 133-6/20

New Jersey Commissioner of Education

Final Decision

Sean Altis,

Petitioner,

v.

Board of Education of the Township of Randolph, Morris County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 1, 2021
Date of Mailing: February 2, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 06615-20
AGENCY DKT. NO. 133-6/20

SEAN ALTIS,
Petitioner,
v.
RANDOLPH TOWNSHIP,
BOARD OF EDUCATION,
MORRIS COUNTY.
Respondent.

Randi D. April, Esq., for petitioner (Oxfeld Cohen, LLC, attorneys)

Marc Zitomer, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: December 16, 2020 Decided: December 21, 2020

BEFORE **JULIO C. MOREJON**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 23, 2020, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. Petitioner has agreed to withdraw this appeal.

3. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

December 21, 2020
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: December 21, 2020

Date E-Mailed to Parties: December 21, 2020

lr
Attachment

SETTLEMENT AGREEMENT & RELEASE

This Agreement and Release ("the Agreement") is entered into and effective this 15th day of Dec., 2020 ("the Effective Date"), by and between Sean Altis and the Randolph Township Board of Education ("Board ").

WHEREAS, the Board is a body public and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1; and

WHEREAS, Mr. Altis is employed by the Board as a teaching staff member; and

WHEREAS, the parties desire to resolve and settle all employment issues between them pursuant to the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and conditions set forth in this Agreement, the Parties agree as follows:

1. **Consideration.**

   a. Mr. Altis will be placed on a paid administrative leave commencing on December 16, 2020 through February 28, 2021. Mr. Altis will continue receiving his health benefits during this time at Board expense, subject to his C.78 contributions, payments of deductibles, co-pays, etc. Mr. Altis's spouse will be permitted to enroll in the District's health benefits plan effective March 1, 2021.

   b. The Board will not contest unemployment.

   c. The parties acknowledge that Mr. Altis is not entitled to any further consideration, compensation, emoluments of employment or fringe benefits of any kind.

   d. Mr. Altis acknowledges that the aforesaid constitutes good and valuable consideration.

2. **Resignation.** Mr. Altis's execution of this Agreement shall constitute his irrevocable resignation from employment effective at the close of business on February 28, 2021. Mr. Altis agrees that he will not seek any future employment and/or a consultant relationship with the Board and that the Board has no obligation, contractual or otherwise, to re-hire or re-employ him.

3. **Release.** In exchange for the above consideration, Mr. Altis, and his heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any claims, rights, demands, judgments, suits, causes of action or liabilities (hereinafter "claims") whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively, its past and present Board members, officers, administrators, its Superintendent of Schools, agents, employees, attorneys, and their successors, heirs and assigns, including, but not limited to any claims for attorneys' fees, back pay or front pay, any claims for emotional distress or pain and suffering, any claims involving tax liability stemming from this settlement, and any claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil

S.A. SA

T.M. TM

Rights Acts of 1871 and 1991, Title IX, the Americans with Disabilities Act, the Age Discrimination in Employment Act, The Old Workers Benefit Protection Act, as amended, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retraining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, New Jersey Title 18A, 6& 6A, any collective negotiations agreement, any common law claim and any other claims for harassment, sexual harassment, hostile work environment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim which arises directly or indirectly or in any way out of Mr. Altis's employment relationship with the Board. Upon the execution of this Agreement, Mr. Altis also agrees to withdraw, with prejudice, the litigation currently pending before Commissioner of Education, captioned Altis v. Randolph Bd. of Ed., Agency Dkt. No. 133-6/20. Specifically, exempted from the release are any claims for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA"), worker's compensation claims any rights associated with any pension earned in the retirement system (TPAF), any claim to unemployment benefits as well as any other claims or rights that cannot be waived as a matter of law even if mistakenly identified in this provision.

4. **Older Workers Benefit Protection Act of 1990 and Revocation Procedure.** To comply with the Older Workers' Benefit Protection Act of 1990 (the "Act"), this Agreement advises Mr. Altis of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement as follows: (i) Mr. Altis fully understands the terms and conditions of this Agreement; (ii) Mr. Altis has been advised to consult with an attorney to review this Agreement; (iii) Mr. Altis specifically waives his right to pursue any claims under the Age Discrimination in Employment Act; (iv) Mr. Altis does not waive any rights or claims under the Age Discrimination in Employment Act that may arise after the date the waiver is executed; (v) Mr. Altis is receiving consideration above and beyond anything of value to which he already is entitled; and (vi) Mr. Altis has been given at least twenty-one days within which to consider this Agreement and Mr. Altis has seven (7) calendar days from the date of the execution of this Agreement to revoke it. The written notice of the decision to revoke must be provided to the Board Secretary with a copy to the Board attorney. The written notice may be provided by electronic mail. The written notice must be received by the Board Secretary on or before the seventh day following Mr. Altis's signing of this Agreement. If the Agreement is revoked within the seven-day period, this Agreement will have no effect, the Parties will not be bound by its terms. If Mr. Altis does not revoke this Agreement within this seven-day period he cannot withdraw or rescind his resignation or his execution of this Agreement.

5. **No Admissions.** This Agreement is entered into solely for the purpose of resolving disputed claims, and neither the execution, delivery, nor performance of this Agreement, nor Mr. Altis's resignation, shall constitute or be construed at any time or for any purpose to be an admission of fact or liability by either party to this agreement, and the parties further agree that neither this Agreement and Release nor Mr. Altis's resignation shall be used as evidence in any judicial, administrative, or quasi-judicial proceeding, except to enforce the terms of the Agreement.

S.A. SA

T.M. TM

6. **References & Non-Disparagement:** The Board its Central Office Administration agrees not to make any disparaging remarks about Mr. Altis and in response to any future employment inquiries it will limit any statements made, either orally or in writing, to confirming the dates of Ms. Altis's employment within the District, compensation, his assignments and that he left the District for personal reasons on February 28, 2021. Mr. Altis agrees not to disparage the Board, the Central Office Administration and District employees and he shall also refrain from soliciting or encouraging any third party to disparage the aforesaid parties.

7. Authority. This Agreement is subject to Board approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

8. Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

9. Amendment; Severability; No Waiver. This Agreement shall not be amended, changed or modified except in a writing signed by all parties. The provisions of this Agreement are severable. If any term or portion thereof of this Agreement shall be held to be invalid or unenforceable to any extent, the remainder of this Agreement shall not be affected thereby, and each remaining term or portion thereof shall be valid and enforced to the fullest extent permitted by law. Any failure to enforce any provision of this Agreement shall not operate as a waiver of such provision or of any other provision.

10. Personal Belongings. Upon his execution of this Agreement, Ms. Gatzke will schedule an appointment with Mr. Altis for him to retrieve his personal belongings at a mutually convenient date and time before or after school hours.

11. District Property. At the time Mr. Altis retrieves his personal belongings he shall immediately be responsible for returning all District property in his possession to the District including, but not limited to computers, computer files, keys, books, flash drives, curriculum and student records.

12. Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. Each party acknowledges that neither the other party, nor any agent or attorney of the other party, has made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

13. Construction. The terms of this Agreement are not to be construed against any one party but are to be construed as if all parties prepared it equally.

14. Law Governing. This Agreement is governed by the laws of New Jersey.

IN WITNESS WHEREOF, the parties have executed this agreement consisting of four (4) pages as of the effective date.

Witness:

S.A. SA

T.M. TM

Sean Altis

Dated: 12/7/20

Dated 12/1/2

Randolph Board of Education

By: Tammy MacKay
Tammy MacKay, President

Witness

Dated: 12/16/20

Dated. 12/16/20

31-21

New Jersey Commissioner of Education

Decision

B.K., on behalf of minor child, L.P.,

Petitioner,

v.

Board of Education of the Borough of Tenafly, Bergen County,

Respondent.

Synopsis

Pro se petitioner alleged that the respondent Board violated her child's rights through a series of interactions between L.P. and the principal of Tenafly Middle School, which L.P. attends; petitioner filed the within appeal challenging the Board's failure to discipline the principal for these alleged improper interactions and demanding that tenure charges be filed against the principal to suspend him, reduce his pay, and/or terminate his employment. The Board denied all allegations and asserted that by law, there is no mechanism available to require the Commissioner of Education to order a local board of education to discipline or terminate a principal, nor to require that he apologize based on allegations made by a parent. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner challenged the Board's failure to discipline the Tenafly Middle School principal following three incidents in which she alleged violation of her child's rights, including one in which L.P. was brought to the school nurse's office for suspected marijuana or vaping use during school hours on school property; in each of the incidents, the Board investigated and found that there was no inappropriate conduct by the principal toward L.P., and no basis for disciplinary action; such determinations are appropriately made at the discretion of local boards of education; a board of education is vested entirely with the authority to discipline its employees, including a principal, based on the board's sole judgment of whether the employee's conduct was appropriate considering the facts and circumstances surrounding the incident; here, the petitioner does not argue that the Board abused its discretion, but rather asks that the Commissioner or the Office of Administrative Law (OAL) substitute its judgement for that of the Board. The ALJ concluded that the petitioner failed to state a claim upon which relief can be granted. Accordingly, as petitioner set forth no cause of action against respondent, the Board's motion for summary decision was granted, and petitioner's cross motion was dismissed.

Upon review, the Commissioner concurred with the ALJ that the Commissioner does not have the authority to compel a board of education to file tenure charges against an employee. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

31-21
OAL Dkt. No. EDU 02392-20
Agency Dkt. No. 25-1/20

New Jersey Commissioner of Education

Decision

B.K., on behalf of minor child, L.P.,

Petitioner,

v.

Board of Education of the Borough of Tenafly, Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

In this matter, petitioner challenged the Board's failure to discipline the principal of the middle school, alleging that he violated her child's rights in a series of interactions. The Board determined that the principal had not acted in an improper manner and found no basis for disciplinary action. Thereafter, petitioner filed a petition of appeal, seeking that the Board file tenure charges against the principal so that he may be suspended, reduced in pay, or terminated. The Administrative Law Judge (ALJ) found that petitioner does not have a cognizable right to request that the Board or Commissioner impose disciplinary action on a school principal. As such, the ALJ dismissed the matter for failure to state a claim upon which relief can be granted.

Upon review, the Commissioner agrees with the ALJ that the Commissioner does not have the authority to compel a board of education to file tenure charges against an employee.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 1, 2021
Date of Mailing: February 4, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENT'S
MOTION TO DISMISS
OAL DKT. NO. EDU 02392-20
AGENCY DKT. NO. 25-1/20

B.K. ON BEHALF OF MINOR CHILD L.P.,
Petitioner,
v.
BOARD OF EDUCATION OF TENAFLY
BERGEN COUNTY,
Respondent.

Birgitta Karlen, pro se, petitioner

Stephen R. Fogarty, Esq., (Fogarty and Hara, attorneys) for respondent

Record closed: August 21, 2020 Decided: December 18, 2020

BEFORE **ERNEST M. BONGIOVANNI**, ALJ:

STATEMENT OF THE CASE

Petitioner, B.K. on behalf of minor child, L.P., (petitioner or B.K.) has alleged that respondent, the Board of Education of Tenafly, Bergen County (BOE), violated her child's rights by a series of interactions between L.P. and the Principal, John Fabbo (Principal/Fabbo), of the Tenafly Middle School which L.P. attends. Respondent denies

all the allegations, claims there are no real factual disputes, and filed electronically a Motion for Summary Decision on July 20, 2020. Petitioner also filed a motion for Summary Decision (Cross Motion) on July 23, 2020.

Petitioner claims that the current Superintendent of the BOE, Ms. DeMarco, wrongfully failed to discipline Principal Fabbo and seeks to overturn her decision. Respondent answers that all the charges made against Principal Fabbo were thoroughly investigated and properly addressed. Notwithstanding that, however, they argue by law, there is no mechanism available to require the State Commissioner of Education to Order a local BOE of discipline or terminate a principal or require that he apologize based on allegations made by an aggrieved parent. I agree with the BOE and grant summary decision in its favor and dismiss the complaint.

BACKGROUND AND PROCEDURAL HISTORY

On or about January 27, 2020, petitioner filed a petition of appeal with the Commissioner of Education seeking to overturn the decision of the Tenafly Board of Education not to discipline Principal John Fabbo of the Tenafly Middle School regarding incidents involving interaction between Principal Fabbo and petitioner's son L.P. Petitioner had made essentially three allegations to the BOE concerning Fabbo.

Allegation One alleged that Fabbo lied about his knowledge and input into a change in L.P.'s schedule when L.P. was removed for distractive behavior from a drama class. Petitioner argued Fabbo was discriminating inappropriately against her son who has a reading deficiency qualifying him for Special Education. However the BOE found that Fabbo committed no inappropriate conduct toward L.P. Allegation Two involved an incident where Fabbo grabbed the heads of two student's one of them L.P. and pretended he was going to knock their two heads. Petitioner contended such behavior was an unacceptable offensive touching of L.P. and conduct not becoming of a teacher (or Administrator). However, the board concluded there was no inappropriate or offensive touching. The third incident concerned L.P. having being brought to the school's physician's office for suspected vaping or marijuana use during school hours on school property. Petitioner argued Fabbo did not follow State Law in dealing with students

suspected drug use, specifically N.J.SA. 18A:40A-14 and N.J.A.C. 6A16-4.2. Further she claimed Fabbo failed to follow Tenafly's BOE policies in the way he conducted his meetings with the parent concerning this incident. However, the Board found there was just cause for having a physical examination of L.P. concerning his conduct in class, where he appeared to be unsteady after discussing marijuana and using the colloquial phrase "4/20" which refers to a holiday to celebrate marijuana use. Further they found the examination was conducted by the nurse with the principal present. While during the exam, at one point, Fabbo touched L.P.'s jacket he didn't touch L.P. Further the examination was done in accordance with School Policy. They declined to take any action against Principal Fabbo. B.K. filed an appeal with the New Jersey Department of Education (DOE). She requested that Principal Fabbo be disciplined with tenure charges initiated to include suspension decrease of pay and/or dismissal. She also requested the BOE issue an apology to her over their handling of the matter.

On or about February 11, 2020, the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on February 19, 2020, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A telephone prehearing scheduled for March 25, 2020 was rescheduled owing to the COVID-19 emergency. A prehearing conference was held on June 18, 2020.

Respondent filed electronically a Motion for Summary Decision on July 20, 2020. Petitioner also filed a motion for Summary Decision (Cross Motion) on July 23, 2020. On August 21, petitioner filed a reply to respondent's motion. No oral argument was requested.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Based upon the petitioner's filing, respondents motion for summary decision, brief and certification in support of summary dismissal, on petitioner's motion for summary decision certification and argument, and respondents brief in opposition to petitioner's motion, and for the purpose of deciding the motion for summary decision, I **FIND** the following:

1. Petitioner, B.K. is the mother of L.P., a student in the school district of the Borough of Tenafly, and is representing his interests in this matter.

2. The respondent, BOE operates the public schools serving children from pre-kindergarten through 12th grade high school, including the Tenafly Middle school, which L.P. attended during the time relevant to this matter.

3. On January 31, 2019, B.K. sent a letter to the Superintendent for the BOE complaining of certain actions she claimed Principal Fabbo took against L.P. First, after the theatre teacher had removed L.P. from her class owing to what she called his disruptive behavior, B.K. met with Fabbo who refused to change the teacher's decision. The letter also said that Fabbo was disrespectful and dismissive to her. According to B.K. she then met with the district superintendent who reversed the theatre teacher's decision to remove L.P from her class. B.K. insisted also that Principal Fabbo lied to her regarding the extent of his role in this incident. The Superintendent assured B.K. that Fabbo would be disciplined. However, months went by and no discipline was imposed on Fabbo. Further, the Superintendent had resigned, replaced by an acting Superintendent.

4. In April 2020 another two incidents involving Fabbo and L.P. occurred. In one, Principal Fabbo had mockingly pretended to "clunk" together L.P.'s head with another student's head. In another L.P.'s behavior was reported to Fabbo by staff members. L.P. was acting "strange." He had been in a bathroom for an unusual amount of time and emerged looking nervous and unsteady. It was reported to him that a little earlier L.P. had been joking with other students about "4-20," a mock "holiday" celebrating using marijuana. Fabbo had brought L.P. to the nurse's office partly to have a witness when he asked L.P. to empty his pockets. While in the nurse's office, the nurse performed a cursory exam, including shining a light into L.P's eyes, while Fabbo watched. L.P.'s

parent's had not been informed before the search took place and exigent circumstances to justify a search were lacking. However, two teachers had independently told L.P's guidance counselor on the date of the marijuana incident that they noticed L.P. acting unusually in class and verified the "4-20" reference that occurred before the search. Nevertheless, B.K. that Principal Fabbo lied to the BOE regarding the extent of his role in this incident and the reason for the search.

5. Because of continual dissatisfaction with the BOE and Superintendent DeMarco, the Board directed its Affirmative Action Officer, Dr. Mamman to investigate B.K.'s complaints against Demarco to determine 1) if Fabbo discriminated against L.P. on the basis of his disability; 2) if Fabbo have inappropriate physical contact with L.P. and 3) if Fabbo subjected L.P. to an improper, unauthorized search.

6. Dr. Mamman interviewed eight employees, including the school nurse, guidance counselor, the theater teacher and others having personal knowledge of the incidents, plus Fabbo and L.P. Mamman determined that: Regarding possible discrimination in the removal of Fabbo had no role in changing L.P.'s schedule with the theatre class. Regarding inappropriate conduct toward L.P. Fabbo had only responded regarding the possible vaping or marijuana complaint to concerns expressed to him by the guidance counselor and two teachers. The search by the nurse checked L.P.'s eyes, tried to detect the odor of marijuana and assess his level of consciousness. Fabbo never touched L.P. although he touched his jacket. Accordingly, Dr. Mamman found no impropriety in any of Fabbo's conduct. After B.K. reviewed a summary of the investigation and complained it was not completely accurate, Superintendent DeMarco amended the report but did not modify the essential findings of no inappropriate behavior by Fabbo.

7. B.K. appealed Superintendent Demarco's findings and specifically complained on four counts: 1) Fabbo had L.P. removed from the drama class based on a false claim that L.P. had been a behavior problem for

years. 2) Fabbo inappropriately touched L.P. when he pretended to that he was going to "clunk" his head together with another student's. 3. The search incident was conducted in violation of various school policies. 4. The BOE erred in not disciplining Fabbo for his infractions; specifically B.K. Contended tenure charges should be preferred and Fabbo removed as principal. Like Superintendent DeMarco, the BOE disagreed with all of B.K.'s contention. They found Fabbo had nothing to do with L.P.'s removal from the theatre class and it was irrelevant he believed L.P. had a greater behavioral history than he in fact did. The BOE believed the incident of the pantomiming knocking the heads together was an attempt to engage the students and had to malicious notice. Finally Fabbo's conduct during the marijuana check at the nurse's office was completely appropriate and within his authority as principal. Also, much of B.K.'s evidence didn't complain so much as to what Fabbo did, but what Fabbo had said about his actions which was not always accurate.

8. The BOE could find no basis for any action against Principal Fabbo. They summarized that B.K.'s allegations "reflect a misunderstanding of a school principal and the broad discretion to act in what he/she considers, in their professional opinion to be the best interests of an individual student or the school as a whole..."

9. The current appeal to the State Commissioner repeats the same allegations against Fabbo, noting that the pantomime striking of the two student's heads together was an offensive touching of a student even though no harm was intended, citing BOE policy 3217. Further, Fabbo's conduct during the marijuana investigation did not comply with NJSA 18A:40A-12 and N.J.A.C.6A:16-4.3. She again seeks Fabbo's discipline including possible removal and asks that the BOE issue an apology for its conduct in these proceedings.

10. The overwhelming evidence based on the investigation conducted under the auspices of the school BOE and their Superintendent's report

is that: Fabbo did not interfere with the decision to remove L.P. from theatre class. Further, no harm was intended or done to L.P. with the pantomime incident; whether his behavior was appropriate on that point is a determination to be made at the sound discretion of the NJBOE. Similarly, the BOE is vested entirely with the authority to discipline its employees including a school principal over whether his conduct in investigating a possible drug incident based entirely on their judgment of whether his conduct was appropriate based on the circumstances. There certainly was no offensive touching by Fabbo when the nurse conducted the check for possible marijuana use and there is no evidence of any ill motive in Fabbo's behavior.

11. The BOE is vested entirely with the authority to discipline its employees including a school principal over whether his conduct in investigating a possible drug incident or similar incidents, and can be based entirely on the BOE's sole judgment of whether his conduct was appropriate based on the facts and circumstances as they determine. The petitioner does not argue the BOE abused its discretion. Rather, the petitioner asks that the Commissioner or the OAL substitute its judgement for the judgement of the BOE.

LEGAL ANALYSIS AND CONCLUSION OF LAW

The issue is whether petitioner has any cognizable right to seek from the BOE, the Commissioner of Education, or the Office of Administrative Law to discipline a school principal for perceived misdeeds. The answer must be a resounding "No!" Although I find that petitioner has not met its burden to withstand the motion for dismissal, in its allegations against respondent, in any event, the petitioner has failed to file a claim upon which relief may be lawfully granted.

As correctly stated by respondent, the local Board of Education is vested with the discretion to accept or reject tenure charges. Galante v. Board of Education of the City of North Arlington, Bergen County, OAL Docket No. 11479-06 (Final Decision August 21,

2008.) Further the Commissioner of Education may not impose other discipline such as suspension, or decrease of pay of a principal as demanded by petitioner. The legislature has vested that authority to make and enforce rules governing tenure terms of employment dismissal and discipline of its employees. It is untenable, if not impossible to accept as a working principal of governing school board business that an aggrieved parent could compel a Board of Education to discipline one of its principles or other employees. N.J.S.A. 18A:27-4 et. seq.

Petitioner also asks that the BOE be compelled to issue an apology for its actions. Quite apart that petitioner has not, and cannot, meet its burden of proof to warrant any such apology based on the manner in which it conducted the investigation that the petitioner herself demanded, such a decision to apologize is at the sound discretion of the BOE. There has not been given an iota of proof that the Boards actions in its failure to issue an apology was "patently arbitrary, without rational basis or induced by improper motives." Parsippany-Troy Hills Education Assoc. v. BOE of Parsippany-Troy Hills Twp., 188 N.J. Super, 161, 167 (App. Div. 1983).

Summary decision may be granted when the papers and discovery that have been filed show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). No evidentiary hearing need be held if there are no disputed issues of material fact. Frank v. Ivy Club, 120 N.J. 73, 98, cert. denied, 498 U.S. 1073 (1991). "When the evidence is so one-sided that one party must prevail as a matter of law, the [tribunal] should not hesitate to grant summary [decision]." Della Vella v. Bureau of Homeowner Prot., New Home Warranty Program, CAF 17020-13, Initial Decision (March 31, 2014), adopted, Comm'r (May 12, 2014), http://njlaw.rutgers.edu/collections/oal/ (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)).

Further, the non-moving party has the burden "to make an affirmative demonstration . . . that the facts are not as the movant alleges." Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App. Div. 1962). This requirement, however, does not relieve the moving party from having to initially establish in its moving papers that there was no genuine issue of fact and that they were entitled to prevail as a matter of

law. It is the "movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of fact." Conti v. Board of Education, 286 N.J. Super. 106 (App. Div. 1995) (quoting Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954)). Here the respondent has demonstrated there is no reasonable doubt as to the existence of any genuine issue of fact.

Accordingly, I **FIND** that petitioner has failed to state a claim upon which relief can be granted. This is sufficient to hold that respondent's motion to dismiss must be granted.

Accordingly, as petitioner has set forth no cause of action against respondent, this matter is ripe for summary decision.

ORDER

I hereby **ORDER** that respondent's motion to dismiss is **GRANTED**, and this matter is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Ernest M. Bongiovanni

December 18, 2020
DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: 12/18/20

Date Mailed to Parties: 12/18/20

EMB/id

APPENDIX

EXHIBITS

For Petitioner:

1. Petitioner's Verified Petition, dated January 26, 2019

For Respondent:

1. Motion for Summary Decision and brief, dated March 27, 2018
2. Brief, dated November 30, 2018

33-21E
OAL Dkt. No. EDU 00306-21
Agency Dkt. No. 2-1/21

New Jersey Commissioner of Education

Order on Emergent Relief

A.T., on behalf of minor children, K.T. and P.T.,

Petitioner,

v.

Board of Education of the Township of Sparta, Sussex County,

Respondent.

The record of this emergent matter, the sound recording of the proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner finds that the petitioner is entitled to emergent relief allowing the minor children to attend school in the Sparta Township School District during the pendency of the proceedings to preserve the continuity of their education as envisioned by *N.J.S.A.* 18A:38-1b(2).[1] If, however, it is determined that the petitioner is not domiciled in the District, she will be assessed tuition for the time period during which the minor children were ineligible to attend school in the District.

[1] This Order is limited to a determination that the minor children should be able to attend school in the District during the pendency of the proceedings. The Commissioner makes no determination as to the merits of the petition of appeal.

Accordingly, the recommended Order of the OAL, granting the petitioner's application for emergent relief, is adopted. This case shall continue at the OAL on an expedited basis in order to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 5, 2021
Date of Mailing: February 5, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF
OAL DKT. NO. EDU 00306-21
AGENCY DKT. NO. 2-1/21

A.T. ON BEHALF OF K.T. AND P.T.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA,
Respondent.

George T. Daggett, Esq., for petitioner A.T. (Law Offices of George T. Daggett, attorneys)

Marc H. Zitomer, Esq., for respondent Board of Education of the Township of Sparta (Schenck, Price Smith & King, attorneys)

BEFORE **GAIL M. COOKSON**, ALJ:

Petitioner A.T. filed and perfected a Petition of Appeal with the Department of Education on or about January 6, 2021, from the determination of the Board of Education of the Township of Sparta (Sparta or District) dated November 20, 2020, that she and her family are not domiciled in the District and that her children cannot continue to attend its schools. The District also demanded tuition repayment for the period since January 3,

2020, in the amount of $31,124.54. On or about January 11, 2021, counsel for petitioner filed a Request for Emergent Relief.

The Department of Education Office of Controversies and Disputes transmitted the Petition and a Request for Emergent Relief to the Office of Administrative Law (OAL) on or about January 12, 2021. The matter was assigned to the undersigned for oral argument on the emergency request, which was held through Zoom technology, consistent with the OAL Covid-19 Emergency provisions, on January 15, 2021.

UNDISPUTED FACTS ON EMERGENT PETITION

1. Petitioner has two children of young ages both of whom were enrolled in Sparta school in September 2019. They remained in the District until on or about January 3, 2021.

2. P.T. is presently in first grade but is a child entitled to special education as diagnosed on the severe end of the autism spectrum. P.T. has an IEP issued by Sparta, that is not the subject of this dispute.

3. K.T. has been in preschool for last school year and the current one. He has had open heart surgery in the past but has not been designated as a child in need of special education, nor does it appear that there is a 504 Plan in place for him.

4. Petitioner and her husband purchased a home located in Sparta Township in or about August 2018. It appears that neither child was registered for school during the 2018-2019 school year.

5. The Sparta home has never been occupied by the family because it needed substantial improvements, some of which are to accommodate P.T.'s disabilities.

6. On or about September 19, 2019, the District granted petitioner's request to send her children to Sparta school until January 3, 2020, in accordance with its published policies:

> A nonresident student otherwise eligible for attendance whose parent or guardian anticipates school district residency and has entered a contract to buy, build, or rent a residence in this school district may be enrolled 120 days without payment of tuition for a period of time not greater than 120 days prior to the anticipated date of residency. If any such student does not become a resident of the school district within 120 days after admission to school, tuition will be charged for attendance commencing the beginning of the 121st day and until such time as the student becomes a resident or withdraws from school.
>
> [Certification of Patrick McQueeney, ¶¶ 5 and 6, Exhibits A and B (emphasis added).]

7. On November 20, 2020, the District determined, after an investigation and an opportunity for petitioner to be heard, that the family were not residents of Sparta entitled to a free education for their children. [Certification of Patrick McQueeney, ¶¶ 10-16, Exhibit F.]

8. Petitioner's counsel acknowledged receipt of the District's decision on November 23, 2020. [Certification of Patrick McQueeney, ¶ 18, Exhibit G.]

9. A Petition of Appeal was filed with the Office of Controversies and Disputes on January 6, 2021, and perfected for a small deficiency on January 8, 2021.

10. The Application for Emergent Relief with supporting Certification of petitioner was filed on January 11, 2021.

11. Petitioner and her family were not residing in the Sparta home on January 3, 2020, or since. They have continued to complete the renovations, which have been allegedly delayed due construction problems and "primarily, with the pandemic."[1] [Certification of A.T., ¶ 12.]

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[1] There is no evidence at this point on the state of the home, the renovations, or the reasons for the two-year delay. With no one in the home, it does not make sense to say that Covid is the basis of the slowdown, but that issue will have to abide the plenary hearing.

12. To the extent petitioner has withdrawn her children from the District this month, it has been represented to be solely in response to the District's decision on residency, which she still appeals herein.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

For the reasons set forth on the record and after due consideration of the written submissions and oral argument received, I **CONCLUDE** that petitioner's request for emergent relief must be **GRANTED** but with conditions.

As a threshold matter, respondent raises the argument that petitioner has lost the right to "stay put" in the District pending the final determination of this case because she failed to file her Petition within twenty-one (21) days of the Board's decision on residency. Petitioner argues that even if that were true, which she denies based upon a letter advising the Department of her intent to file a Petition, she retains the right to seek emergent relief.

> Where the petition of appeal is filed within 21 days following a notice of ineligibility, the student may continue to attend school while the appeal is pending. After the 21-day period, the petitioner shall file a petition in accordance with N.J.A.C. 6A:3-1.3 and a motion for emergent relief pursuant to N.J.A.C. 6A:3-1.6. The petitioner must prevail on the motion for emergent relief in order for the student to continue to attend school while the appeal is pending.
>
> [N.J.A.C. 6A:3-8.1(f).]

Petitioner's counsel only sent an acknowledgement of receipt of the decision and failed to file any paperwork with the Office of Controversies and Disputes until well past the 21-day "stay put" deadline. Accordingly, I **CONCLUDE** that petitioner has lost the automatic stay put and can only remain in District if she carries her burden on this application of satisfying the requisite emergent relief standards. N.J.A.C. 6A:3-1.6(b). As set forth therein with reference to Crowe v. DeGoia, 90 N.J. 126 (1986), an

application for emergent relief will be granted only if it meets all four of the following and the judge determines that the balance of equities favors granting relief, to wit:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying the petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 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.

The touchstone of emergent relief is whether irreparable harm will befall the petitioning party prior to the ability of the forum to hear the underlying merits of the due process petition. In residency disputes, the OAL is obligated to expedite the hearing on the merits so the delay between now and an Initial Decision shall not be long here. Petitioner asserts in her application that her sons will suffer irreparable harm if forced to leave the Sparta school system, and that she has a substantial likelihood of proving domicile in that District.

Respondent argues that petitioner cannot be granted this extraordinary relief in the form of a mandatory, unilateral out-of-district placement because the relief sought is not likely to succeed at a hearing on the merits, and at this emergency stage, cannot be supported. The District claims that petitioner cannot establish domicile in Sparta because the family has never lived in the still-uninhabitable house and certainly was not living there as of January 3, 2020, when the 120-day grace period expired.

I start with the factor of irreparable harm and am of the opinion that it might weigh in favor of the relief sought by petitioner on behalf of her two sons. Being removed from the District facilities in which they have participated might, on the basis of common sense, immediately impact the mental and/or emotional well-being of these children; however, they are not being deprived of an education but merely the geographic location of that education. Moreover, they are both very young and

presumably not deeply attached to this particular setting. Certainly, at this stage, I have no record evidence on the detrimental impact withdrawal from the District would have on either child.

Nevertheless, the right to a thorough and free education in the district of one's New Jersey domicile is well settled. A.M.S. ex rel. A.D.S. v. Bd. of Educ. of City of Margate, 409 N.J. Super. 149, 160-61 (App. Div. 2009). Therein, the court stated:

> N.J.A.C. 6A:22-2.1(b) requires school districts to adopt written policies and procedures related to student residency and to incorporate Department of Education (DOE) regulations pertaining to student residency into each district's policies and procedures. Moreover, in doing so, "a district board of education shall construe the provisions" of DOE regulations governing student residency "liberally so as to effectuate the right of students to a free public education." Ibid.

I also consider that the countervailing interest of the District is mostly monetary, as set forth in its Notice of Residency Hearing, wherein it expressed its opinion of the remittance due and owing in the amount of $31,124.54. Accordingly, if petitioner is incorrect on the law of domicile creating the right to have a free public education in Sparta from on and after January 3, 2020, this case will merely become one of an accruing debt to the District. Nevertheless, this factor cuts both ways insofar as petitioner is also free to pay the per diem cost for each child which would be reimbursed if they succeed on the merits case. Moreover, the Crowe factor of irreparable harm blends with the likelihood of success on the merits in this matter.

The factor of likelihood of success on the merits favors the District on the issue of domicile; but it favors petitioner on the issue of the District policy and its earlier position. With respect to the latter, I note that the policy referenced in the September 19, 2019, letter does not state that the affected child must be removed but only that tuition continues to accrue "commencing the beginning of the 121st day and until such time as the student becomes a resident or withdraws from school."

On the legal concept of domicile, I note preliminarily that the pleadings do not assert that petitioner has ever lived in her Sparta house and counsel conceded as much during oral argument. While much is made of the fact that "domicile" is not defined in the education laws, the applicable regulation does set forth in relevant part --

> A student is eligible to attend a school district if he or she is domiciled within the school district. . . A student is domiciled in the school district when his or her parent or guardian resides within the school district on an all-year-round basis for one year or more, notwithstanding the existence of a domicile elsewhere.
>
> [N.J.A.C. 6A:22-3.1(a)(4) (as amended 2013.]

As cited by respondent, the regulations had provided at the time of earlier decisions, e.g., K.L. v. Bd. of Educ., No. A-5671-07T1, 2010 N.J. Super. Unpub. LEXIS 11, at *9 (Super. Ct. App. Div. Jan. 4, 2010):

> A student is domiciled in the school district when he or she is living with a parent . . . whose permanent home is located within the school district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.
>
> [N.J.A.C. 6A:22-3.1(a)(1).]

Petitioner has asserted that they intend to return to this home and have no present intent to move from it. Yet, neither party has apparently reviewed that regulation recently insofar as it has been amended and no longer encompasses the concept of "intent." 45 N.J.R. 1209(a) (May 20, 2013).

At this early stage, it would appear that petitioner will have difficulty meeting this definition. The home construction has apparently continued without completion for some large part of the two and one-half years since it was purchased by petitioner and her husband. This is not the case of temporary relocation away from one's abode due

to fire, storms or other natural disasters; although, her son's disability is certainly a legitimate factor. In fact, little is revealed as to what shape the house was in at the time of purchase, what plans are underway, and the progress on same. Accordingly, on this central concept, petitioner does not have a strong likelihood of success on the merits.

The other Crowe factors require the balance of equities and public interest. These must include the parent's interest in the continuity of her children's education, as well as her rights as a homeowner and taxpayer of Sparta; and also, the District's interest in consistently adhering to stated policies. As set forth above, however, those stated policies actually do not mandate an involuntary removal of the children. I **CONCLUDE** that the choice is up to the parents whether to withdraw or to incur continuing tuitions if it turns out that they cannot satisfy the requirements for a free public education in the District.

Accordingly, I **CONCLUDE** that petitioner's application for emergent relief must be granted, but conditioned upon the continued accrual of non-residential per diem charges pending the hearing on the merits. Those charges would be dismissed if she ultimately prevails. Until then, the choice and the assumption of that risk is up to her.

ORDER

It is hereby **ORDERED** that petitioner's application for emergent relief is and the same is hereby **GRANTED**, consistent with the decision above.

It is further **ORDERED** that the remaining issues in this matter will proceed to a plenary hearing, to be scheduled.

This order on application for emergency relief may be adopted, modified or rejected by the **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 the **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.

Gail M. Cookson

January 19, 2021
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency 1/19/21

Date Mailed to Parties: 1/19/21

id

34-21

New Jersey Commissioner of Education

Decision

Board of Education of the Borough of Lebanon, Hunterdon County,

Petitioner,

v.

Board of Education of the Township of Clinton, Hunterdon County,

Respondent.

Synopsis

Petitioner Lebanon Borough Board of Education filed a petition seeking a severance of the sending-receiving relationship with respondent Clinton Township Board of Education that provides for Lebanon's seventh and eighth grade students to be educated in Clinton Township. After the matter was transmitted to the Office of Administrative Law (OAL) as a contested case, the parties proposed a consent order in which Clinton Township agreed not to oppose the severance of the sending-receiving relationship. Specifically, the parties agreed that (1) for the 2021-22 school year, the rising seventh grade students would attend the Clinton-Glen Gardner School District, while the rising eighth grade students would remain in Clinton Township, and (2) for the 2022-23 school year, all Lebanon students in the seventh and eighth grades would attend the Clinton-Glen Gardner School District.

Upon review of the record, the Commissioner found, *inter alia*, that: *N.J.S.A.* 18A:38-8 allows for school districts at the elementary school level that do not have sufficient accommodations to send students to another school district as part of a sending-receiving relationship; pursuant to previous case law, the standards for evaluating requests for withdrawals from an elementary level sending-receiving contract are the same standards that are applicable at the high school level, set forth at *N.J.S.A.* 18A:38-13; prior to severance of a relationship, the Commissioner must consider public comment regarding the proposed severance and make an equitable determination that the proposed severance will have no substantial negative impact on the educational programs, finances, and racial composition of the districts. The Commissioner determined that the record establishes that there will be no substantial negative impact on the districts involved. Accordingly, the petitioning Board's application for severance of its sending-receiving relationship with Clinton Township was granted, subject to the establishment of a sending-receiving relationship with the Clinton-Glen Gardner School District for a minimum duration of five years.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Date of Mailing: February 5, 2021

34-21

Agency Dkt. No. 216-8/19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Borough of Lebanon, Hunterdon County,

Petitioner,

v.

Board of Education of the Township of Clinton, Hunterdon County,

Respondent.

In this matter, petitioner Lebanon Borough Board of Education filed a petition seeking a severance of the sending-receiving relationship with respondent Clinton Township Board of Education that provides for Lebanon's seventh and eighth grade students to be educated in Clinton Township.[1] After the matter was transmitted to the Office of Administrative Law (OAL) as a contested case, the parties proposed a consent order in which Clinton Township agreed not to oppose the severance of the sending-receiving relationship. Specifically, the parties agreed that (1) for the 2021-22 school year, the rising seventh grade students would attend the Clinton-Glen Gardner School District, while the rising eighth grade students would remain in Clinton Township, and (2) for the 2022-23 school year, all Lebanon students in the seventh and eighth grades would attend the Clinton-Glen Gardner School. The file was returned

[1] Lebanon proposes to enter into a sending-receiving relationship with the Clinton-Glen Gardner School District for its seventh and eighth grade students.

to the Commissioner so that it could proceed as an uncontested case and in compliance with the procedural requirements set forth in *N.J.A.C.* 6A:3-6.1.

The Commissioner received one comment opposing the severance of the sending-receiving relationship. The commenter argued that the caliber of education is better in Clinton Township than Clinton-Glen Gardner due to the depth of academic programming, social outreach, and sports opportunities. Furthermore, according to the commenter, Clinton-Glen Gardner will be unable to handle the surge of additional students that will result from two new housing units approved in the Town of Clinton and a new housing development in Lebanon. Financially, the commenter contends that severance will have no financial benefit to Lebanon residents, and there are concerns that the property value will decrease. Finally, the commenter argues that severance will have a racial impact because Clinton-Glen Gardner is less diverse than Clinton Township, which will have a detrimental effect on Lebanon's students.

In response, Lebanon maintains that there is no substantial negative educational, financial or racial impact resulting from severance of the sending-receiving relationship. The feasibility study found that both Clinton Township and Clinton-Glen Gardner offer full and appropriate academic programs for middle school students.[2] Additionally, the building has the capacity to accommodate the current and projected future seventh and eighth grade students from Lebanon. Lebanon argues that financially, the feasibility study demonstrates that severance would have a positive tax and property value impact on Lebanon, as it stands to save more than $600,000 over five years. Finally, Lebanon contends that any racial impact is *de minimis* as removing Lebanon students from Clinton would only decrease the minority population by .1%.

[2] Clinton Township submitted a response indicating that, although it has not opposed the petition for severance of the sending-receiving relationship, it objects to any suggestion that the quality of its middle school program is less than Clinton-Glen Gardner's.

Furthermore, Clinton-Glen Gardner is more diverse than Clinton Township, with a 26.1% minority population compared to Clinton Township's 17.5%.

The record of this matter has been reviewed, including the public comment, the feasibility study, and the parties' submissions. Pursuant to *N.J.S.A.* 18A:38-8, school districts at the elementary school level that do not have sufficient accommodations may send students to another school district as part of a sending-receiving relationship. In order to withdraw from a sending-receiving relationship, the Commissioner has determined that "the appropriate standards for evaluating requests for withdrawals at the elementary school level are the same standards which are applicable at the high school level." *Board of Education of the Township of Mine Hill, Morris County v. Board of Education of the Town of Dover, Morris County,* Commissioner's Decision No. 510-04, decided December 15, 2004, at 9, *aff'd* State Board May 4, 2005. The criteria for withdrawal from a sending-receiving relationship at the high school level is set forth at *N.J.S.A.* 18A:38-13, and establishes that prior to severance of a relationship, the Commissioner will make an equitable determination based on the circumstances, "including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts." If there is no substantial negative impact, the Commissioner will grant the requested severance. *N.J.S.A.* 18A:38-13.

Upon review, the Commissioner is satisfied that the record establishes that there will be no substantial negative impact upon severing the sending-receiving relationship between Lebanon and Clinton Township, and does not find the comment to be persuasive. The withdrawal of Lebanon students will save Lebanon significant funds, and the Clinton Township Board of Education – the party in the best position to demonstrate any potential negative impacts

on its district – does not oppose the severance. While Clinton-Glen Gardner has a smaller student population than Clinton Township, the Commissioner is convinced that the educational programs and opportunities offered at Clinton-Glen Gardner are appropriate for Lebanon's seventh and eighth grade students, and any racial impact will be *de minimis*. As such, the Commissioner finds that severance of the sending-receiving relationship will have no substantial, negative educational, financial, or racial impact on any of the three school districts.

Accordingly, Lebanon's application for severance of its sending-receiving relationship with Clinton Township is hereby granted, subject to the establishment of a sending-receiving relationship with the Clinton-Glen Gardner School District for a minimum duration of five years.[3]

IT IS SO ORDERED.[4]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 5, 2021
Date of Mailing: February 5, 2021

[3] See *N.J.S.A.* 18A:38-13.1.

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

35-21

OAL Dkt. No. EDU 01215-20
Agency Dkt. No. 13-1/20

New Jersey Commissioner of Education

Decision

M.B., on behalf of minor children, M.B., J.B. and A.B.

Petitioner,

v.

Board of Education of the Borough of Clementon, Camden County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon review, the Commissioner agrees with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that no issues remain in dispute and that the petition of appeal should be dismissed. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 5, 2021
Date of Mailing: February 5, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 01215-20
AGENCY DKT. NO. 13-1/20

M.B., ON BEHALF OF M.B., J.B. and A.B.,
Petitioner,
v.
BOROUGH OF CLEMENTON BOARD OF EDUCATION, CAMDEN COUNTY,
Respondent.

M.B. on behalf of minor children M.B., J.B. and A.B., petitioner, pro se

Emily E. Strawbridge, Esq., for respondent (Parker McCay, P.C., attorneys)

Record Closed: October 21, 2020 Decided: December 24, 2020

BEFORE **KATHLEEN M. CALEMMO,** ALJ:

STATEMENT OF THE CASE

Petitioner, M.B., on behalf of his minor children, M.B., J.B., and A.B., filed an appeal challenging the residency determination of respondent, Clementon Board of Education (Board), resulting in the removal of the children from the school district. In lieu of an Answer, the Board filed a motion to dismiss.

PROCEDURAL HISTORY

On December 4, 2019, respondent advised petitioner that his children were no longer authorized to attend school in the Clementon School District because of non-residency. On January 10, 2020, Petitioner filed his appeal with the Department of Education Bureau of Controversies and Disputes. On January 17, 2020, respondent filed a Motion to Dismiss in Lieu of Answer. Thereafter, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) where it was filed on January 23, 2020, for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14 F-1 et seq.

The first telephone conference was scheduled for February 13, 2020, but petitioner never confirmed receipt of notification. Another conference was scheduled for February 20, 2020, and petitioner did not dial in to participate in the telephone call. After the telephone call ended, petitioner's daughter contacted my assistant and provided an email address for her father. Using the new email address, a telephone conference was scheduled for February 28, 2020. M.B. participated and requested that his adult son, A.B., act as his translator. On behalf of his father, A.B. advised this tribunal that M.B. filed the appeal because his youngest daughter was in eighth grade and she did not want to leave her school in Clementon. However, now that the three children are attending school in Winslow Township, M.B. wanted to withdraw this appeal.

Immediately following the telephone conference, I sent a confirming email to the parties and invited M.B. to submit a letter withdrawing the appeal within ten days. When no withdraw or response to the monthly reminders were received, I scheduled the matter for a telephonic hearing on October 21, 2020. The petitioner failed to participate.

FACTUAL DISCUSSION

In his residency appeal, M.B. stated he purchased a home in Winslow Township in 2017 and relocated there with his children. For continuity, M.B wanted his children to continue to attend school in the Clementon School District. The information provided to

this tribunal during the February 28, 2020 telephone conference confirmed that M.B. enrolled his three children in Winslow Township School District.

Respondent confirmed that petitioner's children left the school district after the December 4, 2019, letter disenrolling the students. Respondent is seeking no further relief other than dismissal.

Accordingly, I **FIND** that petitioner received notice of his right to a hearing and participated in one telephone conference. I **FURTHER FIND** that Petitioner verbally notified this tribunal that his children were enrolled in Winslow Township School District and he no longer wished to pursue this appeal. Due to petitioner's failure to submit a letter of withdraw despite repeated reminders and notifications, I scheduled this matter for a telephonic hearing on October 21, 2020. In the notice, petitioner was advised that if he did not participate the file would be returned to the transmitting agency and the dismissal of the appeal requested by respondent would be granted. Therefore, I **FIND** that despite ample opportunity, petitioner failed to participate in the October 21, 2020, telephonic hearing.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Public schools are required to provide a free education to individuals between the ages of five and twenty years who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is that of her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001).

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the

> decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

Petitioner notified this tribunal that he withdrew the petition because his three children were now attending Winslow Township School District. Thereafter, despite numerous opportunities, petitioner failed to send a written withdrawal and failed to participate in a telephonic hearing scheduled for October 21, 2020. In accordance with N.J.A.C. 1:1-14.4, if a party does not appear at any scheduled proceeding without explanation, the matter may be returned to the transmitting agency for appropriate disposition. Therefore, I **CONCLUDE** that this appeal is dismissed.

ORDER

It is hereby **ORDERED** that this appeal be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Kathleen M. Calemmo

December 24, 2020
DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

KMC/tat

36-21

Agency Dkt. No. 5-1/21

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Nicole Jacobsen Mesloh, Board of Trustees of Empowerment Academy Charter School, Inc., Hudson County.

The record of this matter has been reviewed. The Board of Trustees of Empowerment Academy Charter School filed a petition seeking the suspension of respondent Nicole Jacobsen Mesloh's teaching certificates pursuant to *N.J.S.A.* 18A:28-8 because she resigned without providing the Board with the requisite statutory notice. The Commissioner issued an Order to Show Cause on January 13, 2021, which the Board served on respondent on the same date. Respondent did not respond to the Order to Show Cause, other than to email the Department of Education on January 13, 2021 to state that she does not dispute the suspension of her teaching certificates. Accordingly, the Commissioner finds that the respondent's certificates should be suspended pursuant to *N.J.S.A.* 18A:28-8, and further finds that a one-year suspension of the respondent's certificates is the appropriate penalty.

Accordingly, the respondent's teaching certificates are suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 12, 2021
Date of Mailing: February 12, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

40-21

40-21E

OAL Dkt. No. EDU 00307-21
Agency Dkt. No. 4-1/21

New Jersey Commissioner of Education

Order on Emergent Relief

Francis Gavin,

Petitioner,

v.

Board of Education of the Township of Allamuchy, Warren County and Lisa Strutin,

Respondents.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to each of the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL, denying petitioner's application for emergent relief, is adopted. This case shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 16, 2021
Date of Mailing: February 16, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON
EMERGENT RELIEF
OAL DKT. NO. EDU 00307-21
AGENCY DKT. NO. 4-1/21

FRANCIS GAVIN,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF ALLAMUCHY, WARREN COUNTY AND LISA STRUTIN,

Respondents.

Francis Gavin, petitioner, pro se,

Eric L. Harrison, Esq., for respondents (Methfessel & Werbel, attorneys)

Record Closed: January 19, 2021 Decided: January 22, 2021

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

Petitioner, Francis Gavin (Gavin) seeks an order by way of emergent relief, to vacate Respondent, Board of Education of the Township of Allamuchy's (Board), decision to appoint Respondent, Lisa Strutin (Strutin), to a vacant seat on the Board.

PROCEDURAL HISTORY

On January 13, 2021, Gavin filed a petition with the Commissioner of Education of the State of New Jersey (Commissioner), challenging the decision of the Board appointing Strutin to a vacant board position as ultra-virus. Along with the petition, Gavin simultaneously filed with the Commissioner an application for emergent relief seeking emergent relief pursuant to N.J.A.C. 6A-3-1.6. The matter was transferred to the Office of Administrative Law (OAL) and received at the OAL on January 13, 2021, as an emergent and contested matter.

On January 15, 2021, the Board and Strutin filed their opposition to Gavin's application for emergent relief. On January 19, 2021, the parties appeared remotely for oral argument. [1]

FACTUAL SUMMARY

The Board is a type II board of education pursuant to NJSA 18A:10-1 with nine members and governs the Allamuchy Township School District in Allamuchy Township, County of Warren and State of New Jersey. On September 9, 2020, William Cramer (Cramer) resigned as a member of the Board and a vacancy on the Board was created.

The Board then advertised on their district website the existence of the vacancy. The Board required anyone interested in being appointed to the vacant seat to file a written expression of interest and a resume by October 16, 2020. Gavin submitted to the Board Secretary a written expression of interest and resume on September 28, 2020.

On October 26, 2020, in a public session of a regular board meeting, the Board interviewed Gavin. After conducting the interview, the Board moved into a closed session. When the Board returned to public session, Strutin, the Board president, announced that the Board would not be filling the vacancy at that time. The Board did

[1] In accordance with Executive Order No. 103, signed by Governor Murphy on March 9, 2020, the OAL is conducting all its operations remotely, including, remote plenary, fair hearings, and emergency hearings.

not identify any other individuals who had expressed an interest in filling the vacant seat nor did the Board interview any other candidates for the seat.

Gavin argues, which the Board does not refute, that pursuant to NJSA 18A:12-15f, the Board by a majority vote of the remaining members of the board after a vacancy, is authorized to fill said vacancy. Gavin also argues without Board opposition that pursuant to NJSA 18A:12- 15a, the authority to fill a board vacancy shifts to the Warren County Executive Superintendent Rosalie Lamonte (Lamonte) if the vacancy has not been filled by the local board within 65 days following the occurrence of the vacancy. Gavin argues further that since the Board failed to fill the vacancy by November 13, 2020, a period of 65 days since the occurrence of the vacancy, the county superintendent is authorized by NJSA 18A:12- 15a to appoint a board member.

On November 14, 2020, Gavin wrote to Lamonte advising her that the 65-day time period within which the Board was authorized to fill the vacancy had elapsed and that he continued to be interested in the vacant seat. On November 17, 2020, Lamonte responded to Gavin in an email informing him that she had "... extended the timeline for the board to interview interested candidates and appoint someone until their December 21, 2020 meeting." Gavin argues that the Board records do not show that it discussed the extension to fill the vacant seat on the Board with Lamonte to after the December 21, 2020, Board meeting, or that Lamonte granted the Board said extension.

On November 20, 2020, in response to another inquiry from Gavin, Lamonte reversed her prior decision granting the Board until at least the December 21, 2020, Board meeting to fill the vacant Board position and informed Gavin that she would ask the Board to forward to her the resumes of individuals who had expressed an interest in the vacant board position. Lamont's email was copied to James Schlesinger, the Secretary of the Board regarding her decision of November 20, 2020.

On November 23, 2020, the Board convened remotely for a regularly scheduled board meeting. At this meeting Strutin resigned from her position as a member of the Board and President and expressed interest in the vacant position created by Cramer's

resignation. Strutin was a candidate for reelection at the November 2020 election but did not win reelection, and her term would conclude at the end of 2020.

The remaining Board members then went into executive session. When the Board returned to the public session the Board voted to appoint Strutin to fill Cramer's vacant board seat. Strutin was then sworn in as the replacement for Cramer and then the Board elected her as President of the Board.

Gavin argues that the Board's action was taken without public notice, as the agenda did not provide that the Board would consider Strutin to fill Cramer's vacant seat position, and before public comment was allowed regarding the same.

Following the Board's decision, on December 3, 2020, Lamonte, directed the Board to rescind the appointment of Strutin to the Board not later than the Board's next regularly scheduled board meeting. On December 10, 2020, the Board convened for a special meeting with an agenda of executive session to discuss potential litigation with the Department of Education and a personnel matter. The only action taken by the Board on December 10, 2020 was to appoint an acting superintendent. The regularly scheduled meeting noticed for December 21, 2020 was cancelled.

Gavin seeks a stay of the Board's appointment of Strutin to the Board pending resolution of this controversy. Gavin argues that such applications are governed by N.J.A.C. 6A:3-1.6 which requires an examination of the application in the context of the standards set forth in Crowe v. DeGioia, 90 N.J. 126 (1982).

The Board argues that Gavin's application does not seek a "stay" of the Board's decision, as the term "stay" is the delay of a proposed action. See Bouvier Law Dictionary (Desk Edition) (defining "stay" as "[a] halt to proceedings for a time or until a further order"). Instead, the Board argues, Gavin's emergent relief application requests an order affirmatively undoing the Board's prior action to approve Strutin to fill Cramer's board vacancy and appoint her as Board President. The Board further argues that Gavin has failed to satisfy the Crowe V. DeGioia standards needed to show entitlement to an emergent stay.

DISCUSSION

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

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards 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;
> 2. The legal right underlying petitioner's claim is settled;
> 3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and
> 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.
>
> [N.J.A.C. 6A:3-1.6(b).]

Turning to the first criteria, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). See New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief is a "clear showing of immediate irreparable injury," or a "'presently existing actual threat; (an injunction) 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 common law.'" Ibid. (citation omitted.)

In the instant matter, Gavin has not presented proof of "immediate irreparable injury" or a "presently existing actual threat". Gavin argues that since this matter does not involve monetary damages, the sole issue "is the integrity of a governmental process, a matter that is not reducible to monetary assessment." However, he fails to address how the Board's decision in appointing Strutin would result in irreparable harm to him or the public. Gavin's argument is insufficient to meet the standard for irreparable harm, particularly where it does not affect him personally. Further, by defining the "irreparable harm" he seeks to prevent as a threat to "the integrity of a governmental process," Gavin is reminded that this argument is alleged in his petition to have the Commissioner order the Board remove Strutin from her Board position, and forms the basis for the merits of his claim.

In the absence of compelling evidence that Board has not fulfilled its statutory obligations, or that Strutin is not satisfying her statutory obligations as a Board member then permitting her to remain on the Board to continue her work as a Board member would not cause irreparable harm to either Mr. Gavin or the students attending the Allamuchy School District.

CONCLUSION

I CONCLUDE that since Petitioner Gavin has failed to establish that he will suffer irreparable harm a discussion concerning the remaining criteria set forth in Crowe, 90 N.J. at 132, is not necessary.

For the foregoing reasons, I **CONCLUDE** that Petitioner Gavin has not demonstrated that he will suffer irreparable harm if the requested relief is not granted. Therefore, I **CONCLUDE** that Petitioner Gavin has not met the burden of proof that he is entitled to such relief in this emergent application.

ORDER

It is hereby **ORDERED** that Petitioner's request for a stay under N.J.A.C. 6A:3-1.6(b) of the Board's action appointing Strutin as a Board member is **DENIED.**

It is further **ORDERED** that this matter will proceed to a plenary hearing, to be scheduled.

This order on application for emergency relief may be adopted, modified or rejected by the **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 the **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.

January 22, 2021
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: January 22, 2021

Date Mailed to Parties: January 22, 2021

lr

41-21

New Jersey Commissioner of Education

Final Decision

Stephen Kubricki,

Petitioner,

v.

Rachel Harper and Board of Education of the Township of Little Egg Harbor, Ocean County,

Respondent.

Synopsis

Pro se petitioner filed an appeal alleging that respondent, who serves as the Intervention and Referral Services Coordinator for the Little Egg Harbor Board of Education (LEHBOE), violated the Code of Ethics for School Board Members because she is also a member of the Board of the Pinelands Regional School District (PRSD), which shares a superintendent with LEHBOE. Petitioner asserted that respondent's position as a board member of PRSD while employed by LEHBOE represents a conflict of interest in violation of the School Ethics Act, *N.J.S.A.* 18A:12-24 (Act). Respondent filed a motion for summary decision, asserting that the Commissioner lacks jurisdiction over disputes of alleged violations of the Act, which are within the sole jurisdiction of the School Ethics Commission (SEC).

Upon review, the ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner argued that because of respondent Harper's employment with the LEHBOE, she cannot be permitted to serve as a board member of the PRSD since allowing her to hold both positions would be a violation of conflict of interest provisions of *N.J.S.A.* 18A:12-24; petitioner's filing alleged no other wrongdoings or improprieties on the part of Harper; while petitioner filed the within appeal with the New Jersey Department of Education, Office of Controversies and Disputes, violations of the Act are solely within the jurisdiction of the SEC, *N.J.A.C.* 6A:28-1.4(a); and any person seeking to have a school board member disciplined for misconduct under the Act must use the statutory mechanism set forth in *N.J.S.A.* 18A:12-29. Accordingly, the ALJ granted the respondent's motion for summary decision, and the matter was dismissed for lack of jurisdiction.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ that the petition must be dismissed for lack of subject matter jurisdiction, for the reasons detailed in the Initial Decision. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

41-21

OAL Dkt. No. EDU 04613-20
Agency Dkt. No. 41-2/20

New Jersey Commissioner of Education

Final Decision

Stephen Kubricki,

Petitioner,

v.

Rachel Harper and Board of Education of the Township of Little Egg Harbor, Ocean County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.[1]

Respondent Rachel Harper is employed by respondent Little Egg Harbor Board of Education as its Intervention and Referral Services Coordinator. Petitioner in this matter alleges that it was a conflict of interest in violation of the School Ethics Act (Act) for Harper to be elected to and assume the duties of a member of the Pinelands Regional Board of Education, which shares a superintendent with Little Egg Harbor. The Administrative Law Judge granted respondents' motion for summary decision, concluding that violations of the Act are within the sole jurisdiction of the School Ethics Commission (Commission), and petitioner had not filed a complaint with the Commission.

[1] Respondents did not file a reply to petitioner's exceptions.

Petitioner filed exceptions to the portion of the Initial Decision stating that petitioner had failed to appear for a scheduled oral argument and argued that he had not received notice of this scheduled proceeding.

Upon review, the Commissioner concurs with the ALJ that the petition must be dismissed for lack of subject matter jurisdiction, for the reasons thoroughly detailed in the Initial Decision. Petitioner's exceptions do not contest any of the conclusions of the ALJ, and the question of whether petitioner received notice of the oral argument has no bearing on the legal conclusion that sole jurisdiction over alleged violations of the Act lies with the Commission.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 16, 2021
Date of Mailing: February 16, 2021

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION FOR
SUMMARY DECISION
OAL DKT. NO. EDU 04613-20
AGENCY REF. NO. 41-2/20

STEPHEN KUBRICKI,
Petitioner,
v.
RACHEL HARPER, TOWNSHIP OF LITTLE EGG HARBOR BOARD OF EDUCATION, OCEAN COUNTY,
Respondent.

Stephen Kubricki, petitioner, pro se

Jared S. Schure, Esq., for respondent (Methfessel & Werbel, PC, attorneys)

Record Closed: December 9, 2020 Decided: December 30, 2020

BEFORE **DAVID M. FRITCH, ALJ**:

STATEMENT OF THE CASE

Petitioner filed a complaint with the New Jersey Department of Education's (NJDOE) Office of Controversies and Disputes (OCD) against respondent alleging violations of the School Ethics Code. Petitioner alleges that respondent, who serves as the Intervention & Referral Services Coordinator for the Little Egg Harbor School District (LEHSD) violated the Code of Ethics for School Board Members when she was elected to and assumed duties as a member of the Pinelands Regional Board of Education (PRBOE). Petitioner asserts that, because the Pinelands Regional School District (PRSD) and LEHSD share a superintendent, respondent's position on the Board of the PRBOE while being an employee of the LEHSD represents a conflict of interest in violation of the School Ethics Act (SEA), N.J.S.A. 18A:12-24. Respondent seeks dismissal of petitioner's action because OCD lacks jurisdiction over disputes of alleged violations of the SEA.

PROCEDURAL HISTORY

The matter stems from a complaint petitioner filed with the OCD on February 18, 2020. OCD transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on May 11, 2020, for determination as a contested case. A prehearing conference was held with the parties on October 14, 2020. At that conference, counsel for respondent indicated they wished to file a motion for summary decision to dismiss petitioner's complaint. Pursuant to a briefing schedule established with the parties, respondent's motion was received on October 22, 2020. Petitioner's response to respondent's motion was received on November 16, 2020. As petitioner requested oral argument on the motion, oral argument was scheduled to be held via teleconference on December 9, 2020. Notice of this oral argument was sent to the parties via email on December 1, 2020. At the scheduled date and time, respondent was on the teleconference bridge for the scheduled appearance, but petitioner failed to dial into the teleconference bridge. Following petitioner's non-appearance at the scheduled oral argument, the record closed.

FACTUAL DISCUSSION

As the following facts are undisputed, I **FIND** the following **FACTS**:

1. On or about February 18, 2020, petitioner filed a Pro Se Petition of Appeal with OCD. (Schure Cert. at Ex. A.)

2. Petitioner's petition set forth the following allegations:

   a. Respondent, Rachel Harper, serves as the Intervention and Referral Services Coordinator for the LEHSD.

   b. In November 2019, Harper was elected to the PRBOE and assumed her duties with the PRBOE in January 2020.

   c. Both the PRSD and LEHSD share a common superintendent.

3. The basis of petitioner's petition to OCD was that, because of Harper's employment with the LEHSD, she could not be permitted to serve as a board member of the PRBOE because allowing her to hold both positions would "be inconsistent with the 'Conflict of Interest' provisions of N.J.S.A. 18A:12-24."

4. Petitioner alleges that Harper cannot serve as an employee of the LEHSD, reporting to the shared superintendent of LEHSD and PRSD, while also serving as a board member of the PRBOE who exercises supervision over the shared superintendent in their capacity as superintendent of the PRSD.

5. Petitioner avers that Harper's serving as both an employee of the LEHSD and a board member of the PRBOE violates the provisions of N.J.S.A. 18A:12-24.

6. Petitioner's petition to OCD does not allege any other wrongdoing or improprieties regarding respondent.

LEGAL DISCUSSION

N.J.A.C. 1:1-15.5 provides that summary decision should be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This language is substantially similar to summary judgment under New Jersey Court Rule 4:46-2(c). Though not required to do so, the OAL uses the standards for summary judgment, as set forth by the New Jersey Supreme Court, as our standards for summary decision. "[S]ince there are pronounced similarities in the exercise of judicial and 'quasi-judicial' powers, . . . court fashioned doctrines for the handling of litigation do in fact have some genuine utility and relevance in administrative proceedings." City of Hackensack v. Winner, 82 N.J. 1, 29 (1980). It is recognized that the OAL performs many "quasi-judicial" or adjudicative functions and that, in doing so, "[j]udicial rules of procedure and practice are transferable to [the OAL] when these are conducive to ensuring fairness, independence, integrity, and efficiency in administrative adjudications." Matter of Tenure Hearing of Onorevole, 103 N.J. 548, 554-55 (1986).

Summary decision is granted if, after considering the evidence presented in the light most favorable to the non-moving party, there exists no genuine issue of material fact. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995). The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." Id. at 533. The Brill Court recognized that this necessarily involves the judge in the process of weighing the evidence presented. Id. When determining whether a genuine issue of material fact exists, "the court should be guided by the same evidentiary standard of proof . . . that would apply" at a hearing. Id. This weighing differs from the weighing the judge would perform after a hearing in that "on a motion for summary [decision] the court must grant all the favorable inferences to the non-movant." Id. at 536.

"When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). "If an adverse party does not so respond, a summary decision, if appropriate, shall be entered." Id. I **CONCLUDE** that, under the Brill standards, this matter is appropriate for summary disposition. The material facts, as set forth by the parties in their filings, are undisputed as they relate to respondent's challenge to OCD's jurisdiction over the allegations as stated in petitioners' petition of appeal. Accordingly, as there are no disputed material facts, the matter is ripe to be determined for summary decision.

Respondent seeks dismissal of petitioner's petition with the OCD because it alleges a violation of the SEA, and OCD lacks jurisdiction over disputes involving alleged violations of the SEA. (Resp. Br. at 7.) The SEA (N.J.S.A. 12:21 et seq.) is intended to ensure that the conduct of school officials holds the respect and confidence of the people. SEA defines "school officials" as school board members, school administrators, charter school trustees, charter school administrators, and New Jersey School Boards Association officers and professional staff. N.J.S.A. 18A:12-23 and 23.1. Through the SEA, the Legislature declared that school officials must avoid conduct which is in violation of their public trust or which creates a justifiable impression that the public trust is being violated. Fisher v. Hamilton, 2013 N.J. Super. Unpub. LEXIS at *11-12 (App. Div. July 12, 2013). Additionally, the Legislature determined that school administrators should "have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards among them." N.J.S.A. 18A:12-22(b). To accomplish its objectives, the Legislature established standards for conflicts of interest, N.J.S.A. 18A:12-24, and of ethical conduct, N.J.S.A. 18A:12-24.1, by which all school officials must abide. Among these standards, the SEA sets forth a Code of Ethics (N.J.S.A. 18A:12-24.1(a) through (j)), which applies to school board members and charter school trustees.

Because the OAL is not a court, but a tribunal designated to hear disputes transmitted from state agencies, it derives its jurisdiction from the transmitting agency.

Although "[t]he judge may render any ruling or order necessary to decide any matter presented to him or her which is within the jurisdiction of the transmitting agency conducting the hearing" N.J.A.C. 1:1-14.6, the OAL shall not "receive, hear or consider any pleadings, motion papers, or documents of any kind" relating to matters beyond its limited jurisdiction. N.J.A.C. 1:1-3.2.

Petitioner in this matter is contending that respondent's continued service as a member of the PRBOE is in violation of the SEA. (See Schure Cert. at Ex. A.) Petitioner, in his briefing, cited to numerous SEC advisory opinions in support of his position that respondent's conduct violates the SEA. (Pet. Br. at ¶¶ 2–4.) See also State of New Jersey, Department of Education, School Ethics Commission, Advisory Opinion A11-13, July 31, 2013 (advising school board member in joint services agreement with regional school district cannot be employed by regional school district sharing services or superintendent with a board of education where they are a member without violating N.J.A.C. 18A:12-24(c)). The basis of respondent's motion, however, is not on the merits of petitioner's claims under the SEA but rather whether this tribunal possesses jurisdiction to adjudicate them.

While this matter was filed with OCD, violations of the SEA are solely within the jurisdiction of the School Ethics Commission (SEC). N.J.A.C. 6A:28-1.4(a). Any person who seeks to have a school board member disciplined for misconduct under the SEA must use the statutory mechanism set forth in N.J.S.A. 18A:12-29. This includes submission of the complaint on a prescribed form; review of the complaint by the SEC which must decide whether probable cause exists to credit the allegations. N.J.S.A. 18A:12-29, N.J.A.C. 6A:28-6.2(a). If probable cause is found, the SEC refers the matter to the OAL for a hearing. N.J.S.A. 18A:12-29(b). In this case, the SEC has not had the opportunity to decide whether probable cause exists to credit petitioner's allegations and has not referred a case to the OAL because the matter was not filed with the SEC.

Petitioner filed this matter with OCD, and OCD referred the matter to the OAL. (See Schure Cert. at Ex. E.) Because violations of the SEA are solely within the

jurisdiction of the SEC, OCD lacks the subject matter jurisdiction to adjudicate petitioner's claims in this matter alleging Code of Ethics violations by respondent. Thomas Taylor v. Bd. of Educ. of the Borough of Washington, Warren County and Lance Rozsa, Superintendent, EDU 04803-12, Final Decision, (March 19, 2013) http://lawlibrary.rutgers.edu/oal/search.html. See also Bd. of Educ. v. Twp. Council of E. Brunswick, 48 N.J. 94, 102 (1966) ("Where the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel"); Ciripompa v. Bd. Of Educ. of the Borough of Bound Brook, EDU 00121-16, Final Decision, (November 7, 2016) http://lawlibrary.rutgers.edu/oal/search.html (allegations of violations of SEA by school board member is beyond jurisdiction of Commissioner of Education and must be filed with SEC).

Since this tribunal's jurisdiction is derived from the transmitting agency, the lack of jurisdiction of OCD to decide matters involving alleged violations of the SEA precludes this tribunal from exercising such jurisdiction in a case transmitted by OCD and not the SEC. Accordingly, I **CONCLUDE** that this tribunal lacks jurisdiction to determine whether Harper's alleged conduct as set forth in petitioner's appeal to OCD violates the SEA. Accordingly, I **CONCLUDE** that this matter, as filed with OCD, must be dismissed for lack of subject matter jurisdiction and respondent's motion for summary decision seeking to dismiss petitioner's pleading due to lack of subject matter jurisdiction should be **GRANTED**.

ORDER

It is therefore **ORDERED** that respondent's motion for summary decision is hereby **GRANTED**.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES**, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 30, 2020
DATE

DAVID M. FRITCH/ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/dw

42-21

New Jersey Commissioner of Education

Final Decision

Stephen Kubricki,

Petitioner,

v.

John Bellone and Board of Education
of the Pinelands Regional School District,
Ocean County,

Respondent.

Synopsis

Pro se petitioner filed an appeal alleging that respondent, who serves as the Facilities Manager for the Pinelands Regional School District (PRSD), violated the Code of Ethics for School Board Members because he is also a member of the Board of the Little Egg Harbor Board of Education (LEHBOE), which shares a superintendent with PRSD. Petitioner asserted that respondent's position as a board member of LEHBOE while employed by PRSD represents a conflict of interest in violation of the School Ethics Act, *N.J.S.A.* 18A:12-24 (Act). Respondent filed a motion for summary decision, asserting that the Commissioner lacks jurisdiction over disputes of alleged violations of the Act, which are within the sole jurisdiction of the School Ethics Commission (SEC).

Upon review, the ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner argued that because of respondent Bellone's employment with the PRSD, he cannot be permitted to serve as a board member of the LEHBOE since allowing him to hold both positions would be a violation of conflict of interest provisions of *N.J.S.A.* 18A:12-24; petitioner's filing alleged no other wrongdoings or improprieties on the part of Bellone; while petitioner filed the within appeal with the New Jersey Department of Education, Office of Controversies and Disputes, violations of the Act are solely within the jurisdiction of the SEC, *N.J.A.C.* 6A:28-1.4(a); and any person seeking to have a school board member disciplined for misconduct under the Act must use the statutory mechanism set forth in *N.J.S.A.* 18A:12-29. Accordingly, the ALJ granted the respondent's motion for summary decision, and the matter was dismissed for lack of jurisdiction.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ that the petition must be dismissed for lack of subject matter jurisdiction, for the reasons detailed in the Initial Decision. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

42-21

OAL Dkt. No. EDU 04612-20
Agency Dkt. No. 42-2/20

New Jersey Commissioner of Education

Final Decision

Stephen Kubricki,

Petitioner,

v.

John Bellone and Board of Education
of the Pinelands Regional School District,
Ocean County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.[1]

Respondent John Bellone is employed by respondent Pinelands Regional Board of Education as its Facilities Manager. Petitioner in this matter alleges that it was a conflict of interest in violation of the School Ethics Act (Act) for Bellone to be elected to and assume the duties of a member of the Little Egg Harbor Board of Education, which shares a superintendent with Pinelands Regional. The Administrative Law Judge granted respondents' motion for summary decision, concluding that violations of the Act are within the sole jurisdiction of the School Ethics Commission (Commission), and petitioner had not filed a complaint with the Commission.

Petitioner filed exceptions to the portion of the Initial Decision stating that petitioner had failed to appear for a scheduled oral argument and argued that he had not received notice of this scheduled proceeding.

[1] Respondents did not file a reply to petitioner's exceptions.

Upon review, the Commissioner concurs with the ALJ that the petition must be dismissed for lack of subject matter jurisdiction, for the reasons thoroughly detailed in the Initial Decision. Petitioner's exceptions do not contest any of the conclusions of the ALJ, and the question of whether petitioner received notice of the oral argument has no bearing on the legal conclusion that sole jurisdiction over alleged violations of the Act lies with the Commission.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.d.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 16, 2021
Date of Mailing: February 16, 2021

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION FOR
SUMMARY DECISION
OAL DKT. NO. EDU 04612-20
AGENCY REF. NO. 42-2/20

STEPHEN KUBRICKI,
Petitioner,
v.
JOHN BELLONE, PINELANDS REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, OCEAN COUNTY,
Respondent.

Stephen Kubricki, petitioner, pro se

Jared S. Schure, Esq., for respondent (Methfessel & Werbel, PC, attorneys)

Record Closed: December 9, 2020 Decided: December 30, 2020

BEFORE **DAVID M. FRITCH, ALJ**:

STATEMENT OF THE CASE

Petitioner filed a complaint with the New Jersey Department of Education's Office of Controversies and Disputes (OCD) against respondent alleging violations of the School Ethics Code. Petitioner alleges that respondent, who serves as the Facilities Manager for the Pinelands Regional School District (PRSD) violated the Code of Ethics for School Board Members because he is also a member and Vice President of the Little Egg Harbor Board of Education (LEHBOE). Petitioner asserts that, because the Pinelands Regional School District (PRSD) and Little Egg Harbor School District (LEHSD) share a superintendent, respondent's position on the Board of the LEHBOE while being an employee of the PRSD represents a conflict of interest in violation of the School Ethics Act (SEA), N.J.S.A. 18A:12-24. Respondent seeks dismissal of petitioner's action because OCD lacks jurisdiction over disputes of alleged violations of the SEA.

PROCEDURAL HISTORY

The matter stems from a complaint petitioner filed with the OCD on February 18, 2020. OCD transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on May 11, 2020, for determination as a contested case. A prehearing conference was held with the parties on October 14, 2020. At that conference, counsel for respondent indicated they wished to file a motion for summary decision to dismiss petitioner's complaint. Pursuant to a briefing schedule established with the parties, respondent's motion was received on October 22, 2020. Petitioner's response to respondent's motion was received on November 16, 2020. As petitioner requested oral argument on the motion, oral argument was scheduled to be held via teleconference on December 9, 2020. Notice of this oral argument was sent to the parties via email on December 1, 2020. At the scheduled date and time, respondent was on the teleconference bridge for the scheduled appearance, but petitioner failed to dial into the teleconference bridge. Following petitioner's non-appearance at the scheduled oral argument, the record closed.

FACTUAL DISCUSSION

As the following facts are undisputed, I **FIND** the following **FACTS**:

1. On or about February 18, 2020, petitioner filed a Pro Se Petition of Appeal with OCD. (Schure Cert. at Ex. A.)

2. Petitioner's petition set forth the following allegations:

   a. Respondent, John Bellone, serves as a member and Vice President of the LEHBOE.

   b. In April 2018, while serving as a member of the LEHBOE, respondent applied for and secured a position as Facilities Manager with the PRSD.

   c. Both the PRSD and LEHSD share a common superintendent.

3. The basis of petitioner's petition to OCD was that, because of Bellone's employment with the PRSD, he could not be permitted to serve as a board member of the LEHBOE because allowing him to hold both positions would "be inconsistent with the 'Conflict of Interest' provisions of N.J.S.A. 18A:12-24."

4. Petitioner alleges that Bellone cannot serve as an employee of the PRSD, reporting to the shared superintendent of LEHSD and PRSD, while also serving as a board member of the LEHBOE who exercises supervision over the shared superintendent in their capacity as superintendent of the LEHSD.

5. Petitioner avers that Bellone's serving as both an employee of the PRSD and a board member of the LEHBOE violates the provisions of N.J.S.A. 18A:12-24.

6. Petitioner's petition to OCD does not allege any other wrongdoing or improprieties regarding respondent.

LEGAL DISCUSSION

N.J.A.C. 1:1-15.5 provides that summary decision should be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This language is substantially similar to summary judgment under New Jersey Court Rule 4:46-2(c). Though not required to do so, the OAL uses the standards for summary judgment, as set forth by the New Jersey Supreme Court, as our standards for summary decision. "[S]ince there are pronounced similarities in the exercise of judicial and 'quasi-judicial' powers, . . . court fashioned doctrines for the handling of litigation do in fact have some genuine utility and relevance in administrative proceedings." City of Hackensack v. Winner, 82 N.J. 1, 29 (1980). It is recognized that the OAL performs many "quasi-judicial" or adjudicative functions and that, in doing so, "[j]udicial rules of procedure and practice are transferable to [the OAL] when these are conducive to ensuring fairness, independence, integrity, and efficiency in administrative adjudications." Matter of Tenure Hearing of Onorevole, 103 N.J. 548, 554-55 (1986).

Summary decision is granted if, after considering the evidence presented in the light most favorable to the non-moving party, there exists no genuine issue of material fact. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995). The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." Id. at 533. The Brill Court recognized that this necessarily involves the judge in the process of weighing the evidence presented. Id. When determining whether a genuine issue of material fact exists, "the court should be guided by the same evidentiary standard of proof . . . that would apply" at a hearing. Id. This weighing differs from the weighing the judge would perform after a hearing in that "on a motion for summary [decision] the court must grant all the favorable inferences to the non-movant." Id. at 536.

"When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). "If an adverse party does not so respond, a summary decision, if appropriate, shall be entered." Id. I **CONCLUDE** that, under the Brill standards, this matter is appropriate for summary disposition. The material facts, as set forth by the parties in their filings, are undisputed as they relate to respondent's challenge to OCD's jurisdiction over the allegations as stated in petitioners' petition of appeal. Accordingly, as there are no disputed material facts, the matter is ripe to be determined for summary decision.

Respondent seeks dismissal of petitioner's petition with the OCD because it alleges a violation of the SEA, and OCD lacks jurisdiction over disputes involving alleged violations of the SEA. (Resp. Br. at 7.) The SEA (N.J.S.A. 12:21 et seq.) is intended to ensure that the conduct of school officials holds the respect and confidence of the people. SEA defines "school officials" as school board members, school administrators, charter school trustees, charter school administrators, and New Jersey School Boards Association officers and professional staff. N.J.S.A. 18A:12-23 and 23.1. Through the SEA, the Legislature declared that school officials must avoid conduct which is in violation of their public trust or which creates a justifiable impression that the public trust is being violated. Fisher v. Hamilton, 2013 N.J. Super. Unpub. LEXIS at *11-12 (App. Div. July 12, 2013). Additionally, the Legislature determined that school administrators should "have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards among them." N.J.S.A. 18A:12-22(b). To accomplish its objectives, the Legislature established standards for conflicts of interest, N.J.S.A. 18A:12-24, and of ethical conduct, N.J.S.A. 18A:12-24.1, by which all school officials must abide. Among these standards, the SEA sets forth a Code of Ethics (N.J.S.A. 18A:12-24.1(a) through (j)), which applies to school board members and charter school trustees.

Because the OAL is not a court, but a tribunal designated to hear disputes transmitted from state agencies, it derives its jurisdiction from the transmitting agency.

Although "[t]he judge may render any ruling or order necessary to decide any matter presented to him or her which is within the jurisdiction of the transmitting agency conducting the hearing" N.J.A.C. 1:1-14.6, the OAL shall not "receive, hear or consider any pleadings, motion papers, or documents of any kind" relating to matters beyond its limited jurisdiction. N.J.A.C. 1:1-3.2.

Petitioner in this matter is contending that respondent's continued service as a member of the LEHBOE is in violation of the SEA. (See Schure Cert. at Ex. A.) Petitioner, in his briefing, cited to numerous SEC advisory opinions in support of his position that respondent's conduct violates the SEA. (Pet. Br. at ¶¶ 2–4.) See also State of New Jersey, Department of Education, School Ethics Commission, Advisory Opinion A11-13, July 31, 2013 (advising school board member in joint services agreement with regional school district cannot be employed by regional school district sharing services or superintendent with a board of education where they are a member without violating N.J.A.C. 18A:12-24(c)). The basis of respondent's motion, however, is not on the merits of petitioner's claims under the SEA but rather whether this tribunal possesses jurisdiction to adjudicate them.

While this matter was filed with OCD, violations of the SEA are solely within the jurisdiction of the School Ethics Commission (SEC). N.J.A.C. 6A:28-1.4(a). Any person who seeks to have a school board member disciplined for misconduct under the SEA must use the statutory mechanism set forth in N.J.S.A. 18A:12-29. This includes submission of the complaint on a prescribed form; review of the complaint by the SEC which must decide whether probable cause exists to credit the allegations. N.J.S.A. 18A:12-29, N.J.A.C. 6A:28-6.2(a). If probable cause is found, the SEC refers the matter to the OAL for a hearing. N.J.S.A. 18A:12-29(b). In this case, the SEC has not had the opportunity to decide whether probable cause exists to credit petitioner's allegations and has not referred a case to the OAL because the matter was not filed with the SEC.

Petitioner filed this matter with OCD, and OCD referred the matter to the OAL. (See Schure Cert. at Ex. E.) Because violations of the SEA are solely within the

jurisdiction of the SEC, OCD lacks the subject matter jurisdiction to adjudicate petitioner's claims in this matter alleging Code of Ethics violations by respondent. Thomas Taylor v. Bd. of Educ. of the Borough of Washington, Warren County and Lance Rozsa, Superintendent, EDU 04803-12, Final Decision, (March 19, 2013) http://lawlibrary.rutgers.edu/oal/search.html. See also Bd. of Educ. v. Twp. Council of E. Brunswick, 48 N.J. 94, 102 (1966) ("Where the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel"); Ciripompa v. Bd. Of Educ. of the Borough of Bound Brook, EDU 00121-16, Final Decision, (November 7, 2016) http://lawlibrary.rutgers.edu/oal/search.html (allegations of violations of SEA by school board member is beyond jurisdiction of Commissioner of Education and must be filed with SEC).

Since this tribunal's jurisdiction is derived from the transmitting agency, the lack of jurisdiction of OCD to decide matters involving alleged violations of the SEA precludes this tribunal from exercising such jurisdiction in a case transmitted by OCD and not the SEC. Accordingly, I **CONCLUDE** that this tribunal lacks jurisdiction to determine whether Bellone's alleged conduct as set forth in petitioner's appeal to OCD violates the SEA. Accordingly, I **CONCLUDE** that this matter, as filed with OCD, must be dismissed for lack of subject matter jurisdiction and respondent's motion for summary decision seeking to dismiss petitioner's pleading due to lack of subject matter jurisdiction should be **GRANTED**.

ORDER

It is therefore **ORDERED** that respondent's motion for summary decision is hereby **GRANTED**.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES**, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 30, 2020
DATE

DAVID M. FRITCH, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/dw

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

February 17, 2021

VIA EMAIL ONLY
Maryann Moretti
12 Meadow Ridge Lane
Lafayette, NJ 07932

Marc H. Zitomer, Esq.
Schenck, Price, Smith & King, LLP
115 West Century Road, Suite 100
Paramus, NJ 07652

Re: *M.M., on behalf of minor child v. Board of Education of the Township of Lafayette, Sussex County, Agency Dkt. No. 94-5/20, Commissioner Decision No. 253-20.*

Dear Parties,

I have reviewed the materials filed in connection with petitioner's Motion to Stay the November 5, 2020 decision dismissing the petition in this matter, pending appeal.[1]

Initially, *N.J.A.C.* 6A:3-1.15 requires a motion for a stay to be filed within 45 days of the Commissioner's decision. Accordingly, the deadline for petitioner's motion was December 21, 2020. As the motion was not filed until February 4, 2021, it is untimely and is therefore denied.

Furthermore, pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that appellant has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

[1] Petitioner also filed a Motion for Emergent Relief, requesting that a decision regarding the Motion to Stay be issued as quickly as possible. That motion is rendered moot by this decision and is therefore denied.

Upon review of the parties' submissions, I find that appellant has failed to meet the standard required for a stay of the November 5, 2020 decision. Most notably, appellant has failed to establish a likelihood of success on the merits.

In the November 5, 2020 decision, the Acting Commissioner determined that petitioner's claim regarding the district's harassment, intimidation, and bullying (HIB) decision was not ripe for review. As was stated in the decision, the Acting Commissioner could not determine whether the board of education had acted in an arbitrary, capricious, or unreasonable manner – the standard provided for in HIB law – because the board had not yet issued a decision that could be reviewed. Furthermore, as stated in the November 5, 2020 decision, petitioner was not entitled to discovery of video recordings, nor to copies of them under New Jersey's Pupil Records Act. In her motion papers, petitioner generally reiterated the arguments previously made before the Acting Commissioner, which were fully considered before the November 5, 2020 decision was issued. As a result, petitioner has failed to demonstrate a likelihood of success on the merits.

In light of the fact that all of the *Crowe* prongs must be met in order for a stay to be granted, it is not necessary to analyze the three remaining factors. Accordingly, petitioner's request for a stay of the November 5, 2020 decision is hereby DENIED.[2]

Sincerely,

Angelica Allen-McMillan. Ed.D.

Angelica Allen-McMillan. Ed.D.
Acting Commissioner

AAM/JKH
c: State Law Library
Aimee Rousseau, DAG

46-21L

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

48-21

48-21
OAL Dkt. No. EDU 05526-20
Agency Dkt. No. 90-5/20

New Jersey Commissioner of Education

Final Decision

S.L., on behalf of minor child, B.L., and C.H., on behalf of minor child, D.H.,

Petitioners,

v.

Board of Education of the Township of Southampton, Burlington County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 19, 2021
Date of Mailing: February 19, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05526-20

AGENCY DKT. NO. 90-5/20

S.L. on behalf of minor child, B.L., and
C.H. on behalf of minor child D.H.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTHAMPTON, BURLINGTON COUNTY,

Respondent.

S.L., on behalf of B.L., petitioner, pro se

C.H., on behalf of D.H., petitioner, pro se

David M. Serlin, Esq., for respondent

Record Closed: January 7, 2021 Decided: January 11, 2021

BEFORE **JUDITH LIEBERMAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 8, 2020, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement and Release indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement and Release resolves all issues in dispute.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Judith Lieberman

January 11, 2021
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: 1/11/2021

Date Mailed to Parties: 1/12/2021

mph

Rec'd 12/11/2020

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

S.L. o/b/o minor child B.L. and C.H. o/b/o minor child D.H. Petitioners, v. Southampton Township Board of Education, Respondent.	:	Agency Ref. No. 90-5/20 Docket # EDU-05526-2020S **SETTLEMENT AGREEMENT AND RELEASE**

WHEREAS, during the 2019-20 school year, S.L., B.L., C.H., and D.H., ("Petitioners"), lived within the area served by the Southampton Board of Education ("District") and minors B.L. and D.H. were enrolled in public school within the District;

WHEREAS, a dispute arose as to certain disciplinary action Respondent took against B.L. and D.H., Petitioners filed a Complaint and with the State of New Jersey, Office of Administrative Law, and requested a hearing before the Commissioner of Education;

WHEREAS, Petitioners C.H. and D.H. also filed a Complaint with the United States Department of Education, alleging violations of the Family Educational Rights and Privacy Act ("FERPA"); and

WHEREAS, the Parties are desirous of resolving the issues raised by the Complaints, and have reached an amicable resolution thereby avoiding the time and expense associated with further litigation.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the Parties agree as follows:

1. The District agrees to remove any from any of its records (paper, computer, or other format) the January 6, 2020 incident involving B.L. and D.H., including but not limited to disciplinary records. The District agrees to provide Petitioners and each student's high school with a copy of each student's records so as to confirm the removal of said incident.

2. Petitioners agree to withdraw the FERPA Complaint within the United States Department Education, currently assigned tracking no. 20-0251.

3. Petitioners release and waive any and all other claims which they, whether individually, separately, jointly and/or on behalf of B.L. and D.H. asserted or could have asserted against the District, collectively and individually, its past and present members, agents, employees, administrators, officers, attorneys, their successors, heirs and assigns, including but not limited to claims under any federal, state or local law, statute or regulation or ordinance, referring or relating to B.L. and D.H.'s allegation that the District improperly acted with regard to the January 6, 2020 incident.

4. This Agreement represents the entire understanding between the Parties and will not be modified in whole or in part except by a mutual subsequent written and signed agreement. The parties acknowledge and agree that they have entered into this Agreement freely, willingly and voluntarily, without duress or coercion, and that they fully understand its terms and conditions.

5. This Agreement shall be governed by the laws of the State of New Jersey.

6. Nothing herein shall act or serve as an admission by either party that their positions and/or claims regarding the within matter were anything less than legitimate and valid.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth below.

SOUTHAMPTON BOARD OF EDUCATION

Business Administrator

DATED: 11-30-2020

Board President

DATED: 11/30/2020

Petitioner S.L. o/b/o B.L.

DATED: _____

Petitioner C.H. o/b/o D.H.

DATED: _____

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth below.

SOUTHAMPTON BOARD OF EDUCATION

Business Administrator

DATED: _____

Board President

DATED: _____

Petitioner S.L. o/b/o B.L.

DATED: December 2, 2020

Petitioner C.H. o/b/o D.H.

DATED: 12/2/2020

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth below.

SOUTHAMPTON BOARD OF EDUCATION

Business Administrator

DATED: 11-30-2020

Board President

DATED: 11/30/2020

Petitioner S.L. o/b/o B.L.

DATED: _____

Petitioner C.H. o/b/o D.H.

DATED: _____

50-21

NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

IN THE MATTER OF THE TENURE HEARING OF:

BOARD OF EDUCATION OF THE CITY OF NEWARK

Petitioner

and

ADAM DiPAOLO

OPINION AND AWARD

Respondent

Agency Docket No. 223-8/1

Before
James W. Mastriani
Arbitrator

Appearances:

For the Petitioner:
Fiona E. Cousland, Esq.
Riker Danzig Scherer
Hyland & Perretti, LLP

For the Respondent:
Colin M. Lynch, Esq.
Zazzali, Fagella, Nowak,
Kleinbaum & Friedman

This matter concerns a tenure charge of inefficiency filed by the Board of Education of the City of Newark [the "Petitioner"] against tenured teacher Adam DiPaolo [the "Respondent"]. This charge is governed by the Teacher Effectiveness and Accountability for the Children of New Jersey Act ["TEACHNJ"; "Act"]. N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1. The statute provides that where a teacher has received annual summative evaluations of "partially effective" or "ineffective" in two consecutive years, the teacher shall be subject to a charge of inefficiency. As discussed below, DiPaolo received a rating of "partially effective" for the 2016-2017 school year, "partially effective" for the 2017-2018 school year, and "ineffective" for the 2018-2019 school year. The Board filed the tenure charge at issue with the Commissioner of Education on or about August 26, 2019. On September 6, 2019, Respondent filed an Answer seeking dismissal of the tenure charges. On or about September 13, 2019, the Commissioner referred the matter to arbitration and, pursuant to the Act, I was appointed to serve as arbitrator on September 13, 2019.

On November 15, 2019, Respondent filed a motion before me to dismiss the charges or to compel the Board to answer interrogatories, arguing that the Petitioner had "effectively abandoned its obligation to provide any meaningful information whatsoever." The Board responded in opposition, denying that it had failed to respond to the interrogatories as required by the Act. The parties agreed in the interim to go forward with the first previously scheduled hearing date on November 25, 2019 without prejudice to either party's position and ability to

present evidence on the motion. After each party submitted a brief in support of its position, I issued an interim decision on the Respondent's motion on December 20, 2019. That decision held that the charges would not be dismissed for failure to provide adequate responses to the Respondent's interrogatories, but required the Petitioner to respond more fully to several of the interrogatories. The District complied with this order, as reflected in the completed record discussed below.

The parties submitted testimony and substantial documentary evidence during seven hearing days held on November 25, 2019, June 24, and June 25, 2020, and September 14, 15, 16, and 18, 2020. The State of Emergency in response to the pandemic caused several cancellations of scheduled hearing dates for various related reasons causing delay in the completion of the record and the need for extensions of time. Testimony was received from the District witnesses Vice Principal Elzira Prophete, Vice Principal Dr. Shana Burnett, Vice Principal Stephanie Vargas, and Principal Havier Nazario. The Respondent testified on his own behalf.

BACKGROUND

Adam DiPaolo was hired by the District in 2005. He holds a teaching certificate earned in 2003 and could "teach pretty much anything K through eight." From his date of hire until the end of the 2016-2017 school year, DiPaolo taught at the South Street School. There he received "effective" evaluations in every year until the years at issue in this case. DiPaolo taught Kindergarten, which he

described as his "dream," until approximately 2012. From 2012 through 2016, DiPaolo taught 5th grade math and science at South Street School, and was partnered with Carmela Fariola, an English Language Arts (ELA) and Social Studies teacher. According to DiPaolo, he had an excellent working relationship with Fariola.

DiPaolo testified that shortly prior to the 2016-2017 school year, there were many changes at South Street. Among these changes was the retirement of his supervisor, Principal Grey, with whom DiPaolo testified he had a good working relationship. Havier Nazario became the new principal at South Street in June, 2016. Around this time, DiPaolo was reassigned to teach a "self-contained" fourth grade. Self-contained is understood to mean that students do not rotate between teachers for different subjects, and are taught their subjects by the same teacher.

Vice Principal Elzira Prophete testified on behalf of the District. She was assigned to the South Street School in the 2015-2016 school year. In the 2016-2017 school year, she was assigned to observe and evaluate DiPaolo. Evaluations in the District are done in accordance with the Newark Board of Education Teacher Evaluation Framework for Effective Teaching (Framework). The Framework was developed by the Board in accordance with the Act in order to evaluate employees and provide them with a "roadmap" for improvement where necessary. The Framework contains five categories referred to as "Competencies": Competency 1 is "Lesson Design and Focus"; Competency 2 is "Rigor and

Inclusiveness"; Competency 3 is "Culture of Achievement"; Competency 4 is "Student Progress Towards Mastery"; Competency 5 is "Commitment to Personal and Collective Excellence."

Each Competency is broken into subcategories known as "Indicators." Indicators are used to evaluate a teacher's competence in both a one-time observation and also over the course of a school year. An exception is for the Indicators in Competency 5 which do not apply to specific observations. The Indicators evaluated in each competency are:

- Competency 1: Lesson Design and Focus
    - In one lesson:
        - 1a. Lesson Sequence. Individual, standards-aligned lessons build on previous lessons and on students' prior knowledge
        - 1b. Lesson Components. Lesson components are standards-aligned and move students toward mastery of an objective that is aligned to essential understandings in the standards.
        - 1c. Pacing and Momentum. Teacher maximizes learning time.
        - 1d. Clarity. Teacher clearly and accurately communicates content and instructions.
    - Over the course of the year
        - 1e. Coherent Planning. Lesson plans are also standards-based, grade-level appropriate, and reflect work toward annual student achievement goals. Lesson plans are, when applicable, collaboratively developed with other staff who will be helping to implement the lesson plan

        - 1f. Progression of Instruction. Lesson Objectives fit into a larger, coherent sequence that leads to student mastery of the appropriate standards.

- Competency 2: Rigor and Inclusiveness
    - In one lesson
        - 2a. Tailored Instruction. Teacher tailors instruction to move all students toward mastery
        - 2b. Questions and Tasks. Questions and tasks ensure student comprehension and ask for application, analysis and/or synthesis
        - 2c. Teacher anticipates and responds to student reactions and misunderstanding by adjusting instructional strategies.
        - 2d. Precision and Evidence. Teacher and students require precision and evidence in tasks and responses.
    - Over the course of the year:
        - 2e. Revisions. Student Work includes revisions based on teacher and peer feedback, especially revised explanations and justifications to demonstrate student movement toward mastery.
        - 2f. Depth of Knowledge. Lesson objectives, tasks and materials require students to demonstrate the following skills: recall and reproduction; basic application of concepts; strategic thinking; and extended thinking
- Competency 3: Culture of Achievement
    - In one lesson:
        - 3a. Enthusiasm for Learning. Students express satisfaction in solving problems and mastering new material
        - 3b. Persistence. Students show persistence in confronting demanding concepts and tasks
        - 3c. Community. Classroom norms promote positive and productive teacher-student and student-student relationships.
        - 3d. Attention. Teacher's strategies and routines capture and maintain student attention on learning.
    - Over the course of the year

        - 3e. High Expectations. The teacher fosters a classroom culture that is consistently one of high expectations and hard work and the teacher models excellence.
        - 3f. Peer Accountability. Students hold themselves and their peers accountable for learning and supporting the culture of the classroom.

- Competency 4: Student Progress Toward Mastery
    - In one lesson:
        - 4a. Checks for understanding. Teacher consistently checks for understanding.
        - 4b. Feedback. Teacher and students give and receive timely, specific, and constructive feedback.
        - 4c. Demonstration of Learning. Students know more at the end of the lesson than they did at the start.
    - Over the course of the year:
        - 4d. Using Data. Teacher tracks assessment data to understand each student's progress toward mastery and uses results to guide planning and instruction.
        - 4e. Understanding of Growth. Teacher can articulate specifically (and with evidence) whether or not each student has internalized grade-level standards and, if not, what s/he still needs to learn
        - 4f. Progress towards goals. Data reflect that students are mastering the objectives of the focus areas, leading toward mastery of grade-level standards.
- Competency 5: Commitment to Personal and Collective Excellence
    - Over the course of the year:
        - 5a. Commitment to continuous improvement. Teacher accurately self-assesses strengths and substantive growth areas, seeks and incorporates feedback from others, and pursues his or her own growth and development.
        - 5b. Collaboration. Teacher contributes ideas and experience to further colleagues' and the school's growth and incorporates productive insights into his or her own instruction.

- 5c. Communication of student progress. Teacher communicates student progress clearly and consistently to students, families, and school leaders.
- 5d. Attendance and promptness. Teacher is present and prompt, and attendance reflects his or her focus on student learning as a priority.

Each indicator is scored as either Highly Effective (4 points), Effective (3 points), Partially Effective (2 points), or Ineffective (1 point). The Framework describes these scores as follows:

- Highly Effective: A Highly Effective teacher ensures exceptional rates of student growth. Such classrooms consist of a community of learners, with highly motivated and engaged students who assume considerable responsibility for their own learning. Highly Effective teachers have the knowledge, skills, and capacity to serve as models for other teachers. This performance level is reserved for teachers who are truly exceptional in their practice.
- Effective: An Effective teacher consistently [emphasis in original] meets the expectations set forth by the Framework. Effective teachers have a broad repertoire of strategies and activities to ensure students achieve mastery. Years of experience are not, in and of themselves, an indicator of effectiveness. Students grow in effective teachers' classes.
- Partially Effective: A Partially Effective teacher may meet some expectations articulated in the Framework, but either does not meet all expectations or is inconsistent in meeting these expectations. Typically there are clear areas where the teacher might improve his or her practice to achieve effectiveness. Partially Effective performance should not denote meeting expectations.
- Ineffective. An Ineffective teacher is not meeting expectations for teaching in NPS. There are several clear areas where the teacher must improve his or her practice to achieve effectiveness. In some instances, performance that Ineffective level represents teaching that is below the licensing standard of "do no harm." Immediate improvement is required for teachers at the Ineffective level to remain in NPS.

The total number of points obtained in each of the competencies is used to calculate the overall numerical observation rating. When calculating mid-year and annual summative evaluations, the same point structure is applied to both "in one lesson" and "over the course of the year" indicators, and Competency 5 is also assessed.

At outset of the school year, teachers develop a set of goals based on the Framework in coordination with their supervisor. If a teacher has received a "Highly Effective" or "Effective" rating in the previous year's annual summative review, the teacher then creates an Individualized Professional Development Plan (IPDP). If the teacher received a "Partially Effective" or "Ineffective," a more rigorous document is created known as a Corrective Action Plan (CAP). The IPDP and CAP are similar in structure and purpose. However, the CAP includes additional information to help guide the teacher's progress for the upcoming year, as well as to set a benchmark for future evaluations. In this case, Respondent was subject to a CAP during 2017-2018 and 2018-2019 due to having received "Partially Effective" ratings.

Prophete and DiPaolo coordinated prior to the 2016-2017 school year at South Street to draft DiPaolo's IPDP. His IPDP identified baseline student proficiencies and set target goals. Prophete testified that while she and DiPaolo worked together to formulate the IPDP, only DiPaolo had access to the computer program used to input the information. DiPaolo testified that he used general,

school-wide information in order to generate his 2016-2017 IPDP, because his class's composition had not yet been finalized. He believes that the data entered in his IPDP, particularly with respect to the Partnership for Assessment of Readiness for College and Careers (PARCC) standard, was supplied by Prophete.

A teacher with an IPDP must have a formal announced classroom observation, as well as a formal unannounced observation, during the course of the school year. A teacher with a CAP must have an additional formal announced classroom observation. A formal announced classroom observation entails a pre-observation meeting between the teacher and the evaluator to discuss the goals for the lesson. An unannounced observation is not discussed between the participants beforehand, but is still scored in accordance with the Framework, and weighed in the mid-year and annual summative evaluations. In addition, Prophete testified, there are also often various informal "walkthroughs," where observers enter the teacher's classroom, but do not necessarily document their experiences. Nevertheless, mid-year and annual summative evaluations include the totality of the evaluator's experience in the teacher's classroom, including informal observations both documented and undocumented.

Prophete conducted a 40-minute formal announced classroom observation on December 15, 2016. The observation evaluation form has fields for "Evidence-based strengths" and "Evidence-based Growth Areas" for each of the first four Competencies. Prophete evaluated DiPaolo as "Partially Effective" overall.

Prophete identified some of DiPaolo's strengths, such as, for example, Indicator 1b: Lesson Components. She complimented his ability to "balance the responsibility of each learner while balancing the workload among learners." She also identified several areas that DiPaolo should improve, such as, for example, Indicator 2a: Tailored Instruction. She stated that "there was no evidence of activities tailored to support varied learning styles or abilities...During this lesson no students were called to review the lesson or provided manipulatives or instructional tools." Prophete testified that DiPaolo needed to improve his ability to connect the individual lesson's goal to a longer-term, more overarching goal for the students. She also testified that DiPaolo "didn't use enough support materials," specifically the display of anchor charts throughout the classroom. Anchor charts are visual references that students can look at to help them learn. Finally, Prophete noted that DiPaolo tended to ask questions of students but was inattentive to correcting their answers, or sometimes provided the answer himself when they were incorrect.

DiPaolo's mid-year review for the 2016-2017 school year, as completed by Prophete, appears in the record. DiPaolo received an overall "Partially Effective" rating, based on the formal evaluation discussed above, as well as informal walkthroughs completed on December 13, 2016, January 20, 2017, and January 23, 2017. Prophete evaluated DiPaolo's various strengths and weaknesses, which aligned with her documentation of his formal observation. She reiterated that he had to organize information for students more clearly, and pay more attention to

tailoring his instruction to individual student needs. The mid-year assessment also included an objective component, comparing student performance scores against DiPaolo's documented goals. According to Prophete's testimony, this area showed modest student growth.

DiPaolo disagreed with Prophete's "Partially Effective" rating, especially against the backdrop of having received only "Effective" annual summative evaluations in the preceding school years. He also testified that he had had a similar situation with Prophete several years earlier, in which she had rated him "Partially Effective" by a narrow margin. According to DiPaolo, that result was overturned and his rating was revised to "Effective." He also noted that because he had not taught 4th Grade before, he did not have a collection of anchor charts at his disposal, and believed that the critique that he did not consistently post anchor charts was arbitrary and unfair. Prophete testified that she was unaware of whether DiPaolo offered a rebuttal to her evaluation. DiPaolo testified, however, that he had requested Prophete to revisit his classroom subsequent to his evaluation, but that she did not do so.

After receiving a "Partially Effective" rating, DiPaolo reached out to Principal Havier Nazario to request a different evaluator going forward. Nazario testified that DiPaolo "expressed a lot of dissatisfaction with his midyear rating with the process and the actual rating itself." Nazario testified that he himself had conducted many informal walkthroughs of DiPaolo's classroom throughout the

year, and that Prophete's rating was consistent with his own observations of DiPaolo's performance. DiPaolo testified, however, that Nazario's visits to his classroom, although frequent, were cursory. In response to DiPaolo's request, Nazario assigned Rhonda Williamson-Greene, another Vice Principal at South Street School, to complete DiPaolo's second formal evaluation of the year. In addition, Nazario modeled a lesson for DiPaolo.

Williamson-Green completed DiPaolo's unannounced formal observation for the 2016-2017 school year on June 9, 2017. The observation focused on Competency 2. Her rating was overall "partially effective." She identified DiPaolo's strength as Indicator 2b: Questions and Tasks, and noted that DiPaolo "asked targeted questions...his insistence on each student recognizing and then restating the question helped them to solidify their answers." She also identified areas for him to improve, for example, Indicator 2c, where she noted that the "teacher does not recognize misunderstanding or rarely adjusts instructional strategies based on student reactions." She wrote that DiPaolo was not attentive to all of the students in the class, and some of them were off-task and not redirected. In summary, she wrote, "Mr. DiPaolo has great enthusiasm when teaching in his classroom. Most of his students are thoroughly engaged in his teaching. Mr. DiPaolo needs to remember to engage all of his students in the work that goes on in his classroom and to use all modalities of learning."

DiPaolo requested that Williamson-Green return to his classroom to conduct another evaluation. She did, unannounced, on June 16, 2017. She observed the class for 15 minutes, focusing again on Competency 2. This time, she found that DiPaolo's strengths included Indicators 2a and 2b, which she rated as "Effective." She identified Indicator 2d as an area requiring improvement. Her overall rating for this observation was "Effective."

DiPaolo's annual evaluation for 2016-2017 appears in the record. It is dated 6/15/17, although testimony on the record indicates that this is the date that the record was opened, not necessarily the date that the annual evaluation was finalized. Prophete, who completed and submitted the evaluation, testified that the evaluation took into consideration the totality of the administration's observations of DiPaolo, including Williamson-Green's June 16, 2017 evaluation discussed above, as well as informal, undocumented evaluations. DiPaolo's annual rating was "Partially Effective." He received an "Effective" in Competency 1, receiving praise for his lesson design, pacing, and planning. However, Indicator 1d: Clarity, was ranked "Partially Effective" because "verbal and visual resources fail to effectively lead students to understand concepts. When misunderstandings occur, the teacher will at times continue with the lesson or re-explain in the same way rather than provide an effective alternative explanations [sic] or strategies." In addition, Indicator 1f: Progression of Instruction was rated "Partially Effective" because DiPaolo was not observed adjusting instructional strategies on the basis of "students' current levels of performance." In Competency 2, DiPaolo received

a "Partially Effective" with most Indicators rated "Partially Effective." In Competency 3, DiPaolo received an "Effective" rating, with particular praise for his attitude and the engagement of his students. However, Indicator 3b: Persistence was discussed at length and ranked "Partially Effective," with reference made to how DiPaolo had not sufficiently adjusted to the mid-year criticism of the placement of his anchor charts. In Competency 4, DiPaolo was rated "Partially Effective," with criticism directed at his failure to adequately track and use data to tailor his teaching strategies to the students' needs. The evaluation notes that DiPaolo's students did not meet the objective testing goals that he had set for them in his IPDP. Prophete testified that his students did not meet their goals for the PARCC assessment, nor the SRI assessment which is used to determine reading level. DiPaolo was rated "Effective" for Competency 5, indicating that DiPaolo was punctual, professionally engaged, and collegial. It also noted that DiPaolo's use of sick days resulted in him "falling slightly below the district and states [sic] mandate for attendance."

In total, DiPaolo received 10 out of a possible 19 points in his annual evaluation. This indicated "Partially Effective" performance for the school year. In "Preliminary Professional Growth Areas," which Prophete testified is a field in the evaluation intended to assist teachers to improve in the following year, Prophete wrote the following:

> I strongly suggest that Mr. DiPaolo seeks professional development focused on alternative strategies to support students when they are

struggling and PD that will support tailoring instruction through differentiation in ELA and Math.

Provide helpful and positive suggestions when students are unable to answer questions rather than simply providing the answer to students.

Mr. DiPaolo must engage learners in tailored activities to support varied learning styles and abilities within his class. I strongly suggest that the teacher utilizes the Math in Focus Reteach resource book as well as scaffold instruction to reflect the needs of students during small group instruction. I also suggest that the teacher provides learners with graphic organizer [sic] to support them during writing tasks during their first draft.

It is important that Mr. DiPaolo monitors and adjusts his instructional pacing as well as the instructional needs of the learners by scaffolding instructional tasks.

I strongly suggest that the teacher incorporates opportunities that will engage students' lessons that will provide opportunities for them to take part in extended learning experiences integrating all core contents areas for learning focused on culminating activities.

Make certain that all materials are displayed in an organized manner. The teacher must make certain that the learning environment is organized in which students have access to materials, resources, technology and teacher-created anchor charts for instructional purposes. The teacher must post anchor [charts] in an organized manner around the classroom.

DiPaolo testified that he faced various challenges during that school year that negatively impacted his performance in a way that was overlooked by the administration in determining his rating for the year. He stated that there were an unusually large number of students that could not speak English at all, and that there were students with Individual Education Plans (IEP). In his view, this negatively affected his ability to make sure that these students were meeting their objective testing goals in ELA. He testified that he did not receive adequate

support from the administration to teach students who don't speak English, especially because he does not speak Portuguese, and is not credentialed to teach ESL. He stated that he received language support from a teacher named Ms. Almeda, but only from the months of October through February, and then only sporadically.

During the 2016-2017 school year, the South Street School was in the process of transitioning from an old building to a new building. During that year, the new building was still under construction. Instruction in the new building began in the 2017-2018 school year. At some point during the second half of the 2016-2017 school year, Nazario informed DiPaolo that he would not be transferring to the new building and would have to find a new school to work at. Nazario testified that because of a change in the programming at the new school, he told DiPaolo that "the real only opportunity that he had to remain at South Street School with us and move to the new South is if he had additional certifications or endorsements." Specifically, Nazario was looking for bilingual teachers, and DiPaolo did not speak Portuguese or Spanish. He told DiPaolo that if he could obtain a certification in Special Education, he might be able to transfer, but this was not possible. DiPaolo testified that he was "heartbroken" because he had taught at South Street for 15 years and felt he was "part of the community."

That summer, DiPaolo applied to approximately 20-25 schools through a District program called Talent Match. He was ultimately placed in the Rafael

Hernandez school for the 2017-2018 school year. DiPaolo's initial placement was as a support, push-in/pull-out instructor, but his assignment was switched to 4th Grade science the day before the school year started. His supervisor and evaluator for that school year was Vice Principal Stephanie Vargas, who helped him formulate his CAP for that year, which was first finalized in October, 2017. It was later revised by DiPaolo in February, 2018. Vargas testified that teachers sometimes revise their goals if they feel it would be "impossible to meet" them. The CAP in evidence reflects DiPaolo's revised goals.

DiPaolo's CAP identified two student goals and two professional growth areas. For each of his student goals, he indicated that he expected 9 of his 19 students to achieve a 65% or better score on applicable standardized testing at the end of the year. For his professional growth areas, he selected Competency 1a: lesson sequence and Competency 3c: community.

Vargas testified that as part of duties as Vice Principal she continuously visited teacher classrooms, including DiPaolo's, in an informal capacity. She characterized this as "conduct[ing] rounds." These visits were especially emphasized in the beginning of the school year, when teachers are still getting acclimated. Vargas testified that she had a meeting with DiPaolo at some point in the beginning of the school year, where they discussed his prior year's performance and how he had not had a good experience with his evaluators. Vargas expressed that she was "very sympathetic to that," that she would give him

"the benefit of the doubt," and that she would make sure that she "was going to help him as much as I can."

Vargas conducted her first formal observation of DiPaolo on October 11, 2017, which was unannounced. Initially, she noted that there was "no posted objective visible," and that DiPaolo stated the lesson's objective verbally. She identified several strengths of DiPaolo's, including Competency 1d, which she graded "effective," and commented that "content and instructions are communicated clearly and accurately...as a result, students were able to understand the text as well as the assignment they will be working on." She also found him "effective" in Competency 2c, and noted that he "quickly recognizes misunderstanding(s) and employs effective strategies to reach most students." DiPaolo received "partially effective" or "ineffective" ratings in Competencies 1a, 1b, 1c, 2a, 2b, 2d, 3a, 3b, 3c, 4a, and 4b, each of which were explained with a paragraph of text. For example, Vargas noted with respect to Competency 3c: community (an area identified as a growth area in DiPaolo's CAP)

> Teacher sometimes uses positive, productive language. Classroom values and norms are inconsistently reinforced. Mr. DiPaolo praised students with positive language and awarded student with candy when responded correctly...However, classroom norms were not always followed by the class. Students responded in incomplete sentences. Thus impacting the culture of the class. Mr. DiPaolo needs to ensure students are engaged in their learning and follow through with expectations.

In other competencies, Vargas observed that "checks for understanding occur only sometimes or may not be aligned with the objective," and "teacher feedback is

academically focused and appropriate, but is not tailored to the unique needs of each student or is often teacher directed." Vargas testified that "Mr. DiPaolo was asking low level questions" and that "the students were not given the opportunity to answer and we did not see evidence of the entire classroom being able to show mastery toward objective." She also testified that DiPaolo did not address incorrect responses, and did not correct students when they answered in incomplete sentences. Vargas concluded her observation with identified "action steps" for DiPaolo, including (under Competency 1a) "provide students with a posted objective and have students connect the lesson to previous and future learning goals" and (under Competency 1b) "use a timer to keep students on task." DiPaolo's overall rating for the first evaluation was "partially effective."

Vargas testified that following her first evaluation, she offered to co-plan and execute a lesson with DiPaolo, but that "there were numerous reasons why he said he couldn't do that with me." She stated that he cited not wanting to use his prep time and not wanting to come in early or leave late as reasons for why they didn't end up employing this strategy.

Vargas conducted a follow-up informal observation on November 27, 2017. While such informal evaluations are not always documented, this one was. Vargas stated that the purpose of this evaluation was to give the teacher feedback, and that he was certainly aware of it, because each time an evaluation is filed, the teacher receives an automated email allowing them to view it. In her informal

evaluation, Vargas again emphasized that DiPaolo should have the lesson objective posted and should connect the lesson with previous and future learning.

DiPaolo's next evaluation was conducted by Vargas on December 1, 2017; this evaluation was a formal, announced evaluation. Vargas and DiPaolo first met on November 28, 2017 to discuss the lesson. She testified that at this conference, she "suggested based on his CAP goal that he should connect the lesson to the previous learning." They formulated the lesson plan together. DiPaolo again received a "partially effective" rating, with a mixture of positive and negative observations. Vargas identified Competency 2b:questions and tasks as a strength for DiPaolo, because "questions and tasks often ensure student comprehension as well [as] some application, analysis and synthesis." Also, she noted that DiPaolo clearly posted a lesson objective, which had been a weakness for him in previous evaluations. Similarly, DiPaolo performed well in Competencies 3a, 3c, and 3d. In competency 3c: community (a professional growth area in DiPaolo's CAP), Vargas observed that

> Teacher and students often use positive, productive language and promote classroom values and norms. Students worked cooperatively within their group. When it was time to transition, Mr. DiPaolo use '1,2,3, eyes on me' to get students to quiet down and focus on him. Mr. DiPaolo used school wide Sharky system to reward students for good responses. As a result, students were on task and there were no discipline issues.

However, DiPaolo also received significant criticism, much of which carried over from his previous evaluations. For example, in competency 1a: lesson sequence,

DiPaolo received a "partially effective," with the comment that "students did not connect lesson to future learning or unit objectives." In competency 2c: responsiveness, Vargas stated:

> Teacher sometimes recognizes student misunderstanding(s) and adjusts instructional strategy. Adjustments are somewhat effective. Teacher was cognizant of misconceptions when asking students question...Mr. DiPaolo consistently questioned to address misconceptions when discussing. However, when students were writing responses he did not clarify misconceptions. Students had mistakes such as writing simply...Moving forward, Mr. DiPaolo should use the same questioning strategies he uses with students during discussion to address misconceptions on written work.

DiPaolo received "partially effective" or "ineffective" in competencies 1a, 1b, 1c, 1d, 2a, 2c, 2d, 3b, 4b, and 4c. Vargas summarized her evaluation: "it is evident Mr. DiPaolo has worked on maintaining classroom norms and procedures. It is noted his ratings have improved in Competency 3 since his last formal evaluation. Students were attentive and engaged with their work. He should ensure to focus on areas we spoke about in the first observation of 1a. Lesson sequence, 1b. Lesson Components, and 1c, Pacing and Momentum." Each competency received a paragraph of detailed explanation in the evaluation.

DiPaolo's mid-year evaluation was overall rated as "ineffective." He received "partially effective" ratings in competencies 1-3, as well as 5, and "ineffective" in competency 4. The mid-year evaluation is very long and detailed, but addresses similar themes to prior evaluations completed by Vargas. Vargas identified several areas where DiPaolo fell short in her testimony at hearing. She

testified that "there were numerous times when either the lesson objective was missing or connection to the previous and future learning goals were not evident." She also took issue with DiPaolo's lesson organization and time management. While Vargas noted that DiPaolo showed some improvement in competency 3c: community, which DiPaolo had identified as a professional growth area in his CAP, she also stated that "overall," community remained an area within which DiPaolo needed to grow and improve. This included "making sure that the teacher is giving students...rigorous work" and "making sure that the classroom norms and routine are...followed." She testified that "there was no evidence" that DiPaolo had posted anchor charts. Of particular importance to Vargas was that DiPaolo was "not on track to make the goals" he had set out in his CAP. She stated that "zero percent of the students mastered" the second of two objective goals he had set forth in his CAP, even though his CAP required at least nine students to do so. She also noted that DiPaolo "did not make specific progress" towards his CAP professional growth goals in competencies 1a: lesson and sequence and 3c: community. In summary, Vargas testified that she gave DiPaolo an "ineffective" overall evaluation because "competency 4 weigh[ed] heavily."

In the second half of the year, Vargas continued to informally evaluate DiPaolo, but he received his formal, documented evaluation from Aprel King, another Vice Principal at Rafael Hernandez school at the time. King did not testify. Vargas stated that King was brought in to evaluate DiPaolo "because you never want a teacher to feel like they are targeted." King's evaluation, on March 22, 2018,

was overall "partially effective." King noted that DiPaolo used a timer for the lesson, which had been an issue previously identified that year by Vargas. However, also consistent with previous evaluations, King observed that DiPaolo did not effectively connect his lesson to larger unit goals, which negatively affected his Competency 1a score. Additionally, King wrote that "questions and tasks are not challenging or teacher does not ask questions" and "Mr. DiPaolo said to students at the beginning of the lesson 'so basically all you have to do is take the quiz.'"

Vargas completed DiPaolo's annual summative evaluation on April 6, 2018, after he received the required three formal evaluations (2 from Vargas, 1 from King). Vargas testified she completed the annual summative evaluation so early in the school year because all teachers who have CAP must have a summative evaluation by May 15 of that year, and that all three of the required evaluations had been completed. Vargas rated DiPaolo "partially effective" for the 2017-2018 school year based on the totality of her formal and informal evaluations, as well as the formal evaluation completed by King.

DiPaolo testified at length about his experience at Rafael Hernandez School in the 2017-2018 school year. He explained that he discovered, around the second or third day of the school year, that Rafael Hernandez had an "Election to Work Agreement" (EWA). A school with an EWA has a longer workday schedule than other schools in the District, with increased pay, but staff are not forced to work the longer hours but may elect to do so. DiPaolo testified that he "couldn't sign it,"

because of personal circumstances that were out of his control. He stated that he believed that he was one of "maybe one or maybe two of the only teachers in that school that didn't sign it." He identified this as a potential problem because he felt like the other teachers and staff might see him as a "slacker."

DiPaolo also testified with respect to "the composition of his class" in the 2017-2018 school year. He had a significant number of students with IEPs, which he estimated to be "more than half" of his class. At the time he submitted his CAP, he did not know the number of children he would be teaching that had IEPs. He testified that this substantially increased the difficulty of his job because "more students really need more individual help." He detailed several instances of serious conflict that arose between his students because of behavioral issues.

DiPaolo testified that he was "taken aback" by the October 11, 2017 evaluation completed by Vargas rating him "partially effective." In his opinion, the evaluation was overly harsh because "I was just getting my footing...it was October 11. I think we were in school maybe five weeks tops." He also didn't believe that the evaluation took into account the challenges presented by his new class.

He also took issue with the November 27, 2017 evaluation completed by Vargas. That evaluation was completed on the day after a return from Thanksgiving break, and "the children...want to share their week with you. They want to talk about who had turkey, who didn't, you know, and it's just a tough day

to get going that early." Similarly, he disputed Vargas's December 1, 2017 formal evaluation that resulted in his receiving a "partially effective." He testified:

> I have two thoughts about this observation that come to mind. One, was before this observation, I had shared with Ms. Gois and Ms. Vargas that my wife was diagnosed with breast cancer...and I was struggling with that. As well as with, you know, the children in my class with the IEPs and the extended workday and everything that came with that was going on...It was too important of a year being on a CAP and I didn't want that to be held against me. So I did my best to come in and not only that, this observation was an announced observation that I prepared for more than I probably ever prepared for an observation. I mean, you know, I had it down. And, you know, without going through the entire observation and reading it, which I hope, you know, everyone does, I'm working with live animals. With a class full of children that are IEP or special needs and it was an incredible class....These children learned more in that lesson than sometimes you could ask for in a week...I mean, I rolled out the carpet I felt for Ms. Vargas that day and just to...shine. And when I came back to read it, I just couldn't believe that, you know, such a lesson in my mind and my children's reactions and learning that I saw that day could be written up in a manner that was partially effective.

DiPaolo received his annual summative evaluation on April 6, 2018, well before the school year ended on or about June 25 of that year. He testified that he believed that this was unfair because he still had a significant period of time left in the school year to try and adjust his performance. He also noted that the composition of his class had changed significantly since he had set his objective student growth goals in his CAP: "the nine out of 19 had changed tremendously that I no longer had the 19. The same 19, if not more...I'm not even sure who those nine students exactly were that were supposed to show mastery."

At the end of the 2017-2018 school year, DiPaolo was informed that if he did not sign the EWA for the 2018-2019 school year, he could not continue to teach at Rafael Hernandez. He made attempts to apply to other schools in the District, but was not selected. On or about August 28, 2018, near to the beginning of the 2018-2019 school year, DiPaolo received written notice that he was being transferred to South 17th Street School as an elementary school teacher, but without a grade assignment. He arrived the following day, but was informed by the principal that they hadn't received notice of his transfer there and that they didn't have a space for him. The day after that, he was told by Yolanda Mendez[1] to report back to Rafael Hernandez School. As before, Rafael Hernandez did not have a teaching position open for him. Although DiPaolo testified that he was "fuzzy" on the specifics of the different assignments he received in this short period of time, he stated that "I was sent to at least three or four different schools." Eventually, the day before the beginning of the school year for the students, DiPaolo was assigned to teach at Cleveland Elementary School. When he arrived, Principal Erskine Glover did not expect him either, but ultimately assigned him to team-teach with a teacher named Mr. Powell, who was slated to retire in October, 2018.

DiPaolo co-taught fifth grade with Powell until Powell's retirement in October. Although Cleveland Elementary also had an EWA, DiPaolo did not sign it either, although he agreed with Glover to arrive to work at 8 AM, earlier than the District-

[1] Mendez did not testify and her position is not clear on the record.

wide contract mandated. DiPaolo was not compensated extra for this time, even though he would have been if he were working under the terms of the EWA. After Powell departed, DiPaolo took full responsibility for the class assignment for the rest of the school year.

Because he had received a "partially effective" annual summative rating for the previous school year, DiPaolo was again placed on a CAP for the 2018-2019 school year. Vice Principal Dr. Shana Burnett worked with DiPaolo to develop this CAP. DiPaolo and Burnett met on September 27, 2018 to formulate the CAP. The CAP identified goals for student performance, including the requirement that 35% of his students would pass the standardized test PARCC, and that students would "demonstrate a 45% growth on the Inspired Science Assessments." The CAP also identified professional growth areas in each of the competencies: 1d: clarity; 2d: precision and evidence; 3e: high expectations; 4d: using data; and, 5b: collaboration. Each of these professional growth areas had multiple "action steps" attached, including "I will use peer observations" and "I will use anchor charts!" It also identified specific metrics and processes for assessing his progress in each area. The CAP was finalized on October 12, 2018.

Burnett completed her first formal evaluation of DiPaolo on October 22, 2018, which was unannounced. Not all of the competencies were addressed in the evaluation, but Burnett testified that unannounced evaluations do not require all of the competencies to be assessed and only announced evaluations require

that. Burnett's evaluation only identified growth areas for DiPaolo, and no strengths were observed. Among the growth areas identified were competencies 2a: tailored instruction, 3a: enthusiasm for learning, and 4a: checks for understanding. Each competency received a detailed description of what was observed as well as an assessment of Mr. DiPaolo's performance. Comments included: "Mr. DiPaolo's feedback is not tailored to the unique needs of each student and is often teacher-directed" and "No lesson plans were provided for the lesson observed." Burnett assigned DiPaolo to follow up with a math coach to "refine his practices," and requested that he read "Teach Like a Champion," which contains strategies for teaching improvement. DiPaolo received an "ineffective."

DiPaolo testified that "there were definitely some things in [the evaluation] that I felt I did great and there were definitely some things in here that I could have improved on." He added his belief that students with IEPs or behavioral problems affected his rating.

Burnett and DiPaolo met on January 8, 2019 for a pre-observation conference, and his second formal (announced) observation was conducted on January 11. This evaluation, which was overall "partially effective," touched on each of the competencies, and identified both strengths and growth areas. Detailed information was provided in each of the fields. Burnett's mid-year evaluation mainly restated the points she addressed in each of her formal evaluations, and addressed competency 5, as well. Burnett wrote that "Mr.

DiPaolo does not accurately self-assess substantive growth areas, nor does he incorporate feedback from others timely…he is very defensive when conversations are held with him around was [sic] to improve his teacher practices." DiPaolo testified that he disagreed with Burnett's assessment, especially with respect to his defensiveness. Burnett's overall mid-year evaluation was "ineffective."

Principal Erskine Glover performed two evaluations of DiPaolo in the second half of the 2018-2019 school year. Glover did not testify, but the evaluations he performed appear in the record. The first, conducted on March 6, 2019, was an informal, unannounced evaluation with an overall "partially effective" rating. Glover emphasized that DiPaolo was not systematic enough in tracking his students' growth, but stated "I am willing to review aggressive monitoring sheets on a weekly basis so that I can support you with scaffolding the work and plan for upcoming lessons." Glover also wrote that he expected improvement in the organization of DiPaolo's classroom and materials. Glover's May 10, 2019 formal evaluation of DiPaolo was also "partially effective." Glover focused on a mismatch between DiPaolo's submitted lesson plans and the lesson that was taught on that day. He also evaluated each of the competencies, and identified several in which DiPaolo had to demonstrate growth.

Burnett completed DiPaolo's final annual summative evaluation for the 2018-2019 school year. She rated him "ineffective" overall, and provided a very detailed review of all documented evaluations throughout that school year,

including Glover's May 10, 2019 formal evaluation. DiPaolo testified that he was not informed of Glover's May 10, 2019 evaluation until after he received his final summative evaluation for the year, and was not given an opportunity to review it or sign it until May 14.

DISCUSSION

Pursuant to N.J.S.A. 18A:6-10, "[n]o person shall be dismissed or reduced in compensation ... if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state ... except for inefficiency, incapacity, unbecoming conduct, or other just cause." Tenure charges concerning teaching inefficiency are governed by the Teacher Effectiveness and Accountability for the Children of New Jersey Act (TEACHNJ). TEACHNJ states that tenure charges be brought against a tenured teacher who receives two consecutive annual summative evaluations of "partially effective." When charges are brought, they are arbitrable but with a limited scope of review. The statute explicitly provides the standard of review in TEACHNJ arbitrations:

> a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:
>
> (1) The employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
>
> (2) There is a mistake of fact in the evaluation;

(3) The charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by state or federal law, or other conduct prohibited by state or federal law; or

(4) The district's actions were arbitrary and capricious.

b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

c. The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

The burden is on the District to establish that it met all relevant standards consistent with the requirements of TEACHNJ. Thus, the Board must carry the burden to show, by a preponderance of the evidence, that it acted consistently with the above statutory criteria and TEACHNJ requirements. Each party has offered substantial arguments in support of their respective positions on the record evidence. I concisely summarize each.

The Board contends it has satisfied its burden. Initially, the Board states that the evidence at hearing demonstrates that it "adhered substantially to its evaluation process." It points out that the Framework provides a Department of Education-approved process for evaluating teachers in compliance with TEACHNJ. Also, it submits that the evaluators substantially followed the Framework when it rated DiPaolo in all three school years at issue. According to the Board, it is undisputed that DiPaolo received the correct number and type of evaluations in

each of his three years. He also received an IPDP and two CAPS, pursuant to the Framework. It points out that he was observed by different administrators in different settings, and received both announced and unannounced observations which led to ratings which provided it with the authority to seek Respondent's dismissal.

The Board further asserts, notwithstanding DiPaolo's argument that the difficulty of his assignments was not taken into account by his evaluators, that the arbitrator has no authority to "second guess the educational judgment of the Board in placing Respondent in classes he was certified to teach, nor may this arbitrator second guess the judgment of the Department of Education in creating a system in which teachers are expected to teach and to teach effectively, in any assignment for which they are certified." It also notes that while it could have brought tenure charges of inefficiency against DiPaolo after the 2017-2018 school year, when he received his second consecutive annual summative evaluation of "partially effective," it elected not to and instead gave him a third year to improve his teaching performance. Despite this, the Board contends that the evaluations reflect that he did not improve, thus resulting in the filing of the tenure charges for inefficiency.

The Board disputes that there were any mistakes of fact in DiPaolo's evaluations. Alternatively, if any mistakes of fact in his evaluations were to exist, it contends that none are material to the outcome of the evaluations. Specifically, the Board argues that in 2016-2017, the record is clear that although the annual

summative evaluation carries the date June 15, 2017, and that DiPaolo received an additional "effective" observation on June 16, 2017, the June 15, 2017 date only applies to the date the evaluation was opened, and not when it was finalized. It argues that Prophete's testimony conclusively establishes that she took that final observation into account, and that it is reflected in DiPaolo's evaluation for that year.

The Board also submits that there is no mistake of fact with respect to any professional judgment made by evaluators to "break a tie" in a specific Competency where two Indicators are "effective" and two indicators are "ineffective." The Board asserts that all decisions made with respect to scoring were made over three years concerning DiPaolo's overall performance, as observed by several different administrators in various settings and, as such, were not done arbitrarily. The Board states that its evaluation system "has been approved—the determination of scoring and weighing is an integral part of that system and cannot be second guessed here."

Finally, the Board argues that its decision to bring the tenure charge against DiPaolo was not arbitrary and capricious. In doing so, the Board rebuts two specific allegations on the part of the Respondent. The first is DiPaolo's claim that the evaluations were arbitrary and capricious because he did not receive enough support in his classrooms with special needs students, students with IEPs, and students who did not speak English. The second is that DiPaolo's evaluations

were arbitrary and capricious because he was assigned to several different schools over the course of the three years and in one instance, immediately prior to the start of the school year. In response, the Board states that it has the responsibility and authority to expect that teachers will teach students with different needs, and that there is no evidence that Respondent was intentionally set up to fail. It also argues that it has the right to assign and reassign teachers to any class for which they have the certification to teach, and that there is no evidence that Respondent was assigned to a class without having the proper certification to teach.

Respondent first contends as a threshold matter that all three of the annual evaluations submitted by the District are "facially deficient" because they did not incorporate the correct measures of student growth. Respondent submits, assuming *arguendo* that the annual evaluations were not "facially deficient," that his evaluations were "riddled with both procedural errors, as well as arbitrary and capricious conduct...which materially affected the outcome of the evaluations." In support of this contention, Respondent points out that in the 2016-2017 school year, DiPaolo was faced with many new aspects of his teaching assignment that he had not encountered before, such as a new grade assignment, new subject matter, and new educational programs. He also was assigned to teach a class section with several students who did not speak English, without having a bilingual teaching certification and with inadequate support. In 2017-2018, DiPaolo was required to teach at a "renew" school with a new assignment and new class composition. He claims he was unlawfully assigned IEP special needs students in

excess of his teaching certification. In 2018-2019, DiPaolo submits he was again subject to a new environment and class composition with an excess of IEP students without sufficient support, and that he received his annual evaluation before he was able to review his mandated third observation. Respondent argues that the totality of the above challenges were insufficiently factored into his evaluations, thereby constituting arbitrary and capricious conduct on the part of the Board.

I observe at the outset that many of the factual elements of the record are not in dispute. The District completed the requisite number of evaluations. The evaluations were completed by administrators that were both authorized and qualified to complete them. Respondent was provided with CAPs where explicitly required by statute. There were no substantial inconsistencies between the ratings generated by the observations and those provided in the mid-year and final evaluations. Each evaluator used the same rubric for scoring DiPaolo, down to the repetition of many criteria, even across school assignments and evaluators. The evaluators were actually in the classroom when they said they were and they completed the requisite number and type of evaluations, and the evaluations followed the Framework and Rubric. The testimony from the evaluators was detailed, corresponded to the educational judgments each made with very specific recall of the evaluations each conducted. There is no evidence that the evaluators coordinated over their views to Respondent's teaching performance or prejudged him prior to the conduct of the evaluations.

Clearly, Respondent disagrees with the judgments made by the evaluators and the results of his evaluations which deprived him of "effective" status. The results were documented and explained in detail at hearing and each evaluator was subject to comprehensive cross-examination. Even assuming that the arbitrator might disagree with some of the judgments and discretion use in the District's evaluations, the arbitrator lacks authority under the law to substitute his judgment and the discretion exercised by the evaluators. Some contentions of Respondent challenge the District's educational policies and practices and the assignments he received which he believes affected the evaluation results. For example, assignments to specific schools, subjects, the placement of students with diverse backgrounds and the criteria upon which his performance was judged. However, the focus of the process before me is limited to whether the District followed the Framework, its Rubric, provided scores that were explained at hearing by the evaluators, whether the evaluations explained the rationale for their judgments and scores, whether there was a basis to find mistakes of facts that would have materially changed the content of the evaluations or the required method of scoring and whether there was evidence that the evaluators engaged in pre-textual conduct or acted with bias that impacted the factual findings and judgments made in either the evaluations or the scoring. Respondent's arguments that the scoring in certain evaluations finding "partially effective" was so close to meriting an "effective" rating is not persuasive. While this may be so in theory, it would render cutoffs meaningless and unenforceable. Indeed, the scoring system

would be rendered moot because someone else may be a point or two below the person who also seeks a higher evaluation score because of proximity to the next rating. There is no basis to conclude that the cutoffs were "moving targets" that were finessed or manipulated by the evaluators to produce a certain result. Rather, I credit Prophete, Vargas and Burnett's testimony that they calculated the Respondent's scores in good faith and using their best professional judgment.

TEACHNJ provides a specific framework for arbitration proceedings that concern tenure charges based on inefficiency. Under this framework the arbitrator's scope of review is limited to that set by law. After full review of the evidence and the arguments of each party within the context of the arbitrator's authority as derived from N.J.S.A. 18A:6-17.2, I conclude that the Board has met its statutory burden and thus, the tenure charges must be sustained. The Board has established that (1) the evaluations *did* adhere substantially to the evaluation process, (2) there was no demonstrable mistake of fact in the evaluation or the scoring, and (3) the charges were not brought for considerations of political affiliation, nepotism, union activity, discrimination, etc.

The most substantial legal issue in dispute is whether the Board acted arbitrarily and capriciously in its evaluation process. Arbitrary and capricious action is that which is undertaken without rational basis. Respondent has raised several allegations of what he contends amounted to arbitrary and/or capricious treatment by the Board.

Respondent argues that his evaluators failed to take into consideration the makeup of his classroom in determining his effectiveness as an educator. Respondent alleges that he received inadequate administrative support for students with behavioral issues, those with learning disabilities, and those that did not speak English as a first language, or at all. Respondent's alleges that the failure of the evaluators to take into account the inadequacy of the administrative support in his classroom also constitutes an arbitrary or capricious act on the part of the Board.

The record does reflect that DiPaolo taught students in each of the 2016-2017, 2017-2018, and 2018-2019 school years who had behavioral issues, learning disabilities, or weren't fluent in English. It is also clear from Respondent's testimony, the documentary evidence he provided on the record, and some of the testimony adduced from the Board's witnesses, that having these students in his classroom presented challenges. However, these circumstances, standing alone, do not undermine the findings or ratings of the evaluators. Respondent asserts, without evidentiary support, that the evaluators held his students' difficulties against him as an educator and resulted in less than effective evaluations. I find no merit to this argument. There is no contention, nor evidence, that Respondent was treated differently from any other similarly situated teacher in the District, nor that the deficiencies found in his performance were the result of the makeup of the students in his class. The evaluations centered mainly on teaching methodology

and did not take the diversity of the students into consideration as a factor that diminished or enhanced his teaching methodology. It is entirely speculative that Respondent's evaluations would have been better had he taught a class with less challenging students. Moreover, even assuming that the Respondent's arguments are accurate, *i.e.* that his evaluators did not take the makeup of his classrooms into account when evaluating him, the Respondent has not demonstrated that such action was arbitrary and/or capricious. His contentions appear to accuse his evaluators of mistakenly assuming that his classrooms were populated by students without challenges and that he suffered as a result of having responsibility over students whose potential for success was lessened by their individual circumstances. There is simply no evidence that the presence of special needs students in Respondent's class negatively impacted on the criteria upon which Respondent was judged.

Much of the testimony and documentary evidence in the record actually reflect that they did consider Respondent's contention. Almost without exception, the evaluators praised DiPaolo's ability to interact with his students on a professional and personal level. This is especially true of the evaluations conducted in the first two school years at issue. All of the evaluations properly focused on the Respondent's teaching methodology and professionalism in relation to his students' performance, rather than on the students' perceived inabilities to match their performance to DiPaolo's expectations. The main focus of the three years of evaluations conducted by several evaluations and the results

have been previously summarized and need not be restated. In sum, they followed the Framework and Rubric, made detailed observations and scored the results based on the ratings that reflected the overall performance rating.

The Respondent's other allegations with respect to the Board's alleged arbitrary and capricious actions are dismissed because I do not find them to have materially affected the outcome of any of the respondent's evaluations. Paragraph (b) of TEACHNJ, as referenced above, requires that any applicable evidence of the failure of the Board to meet its burden must still be determined to have materially affected the outcome of Respondent's evaluations. I take specific notice of the consistency and comprehensiveness of the evaluations, the observers' and administrators' specific attempts to assist the Respondent in improving, and the Respondent's seeming inability to adjust his supervisors' expectations. These factors have been weighed against the Respondent's allegations that isolated or minutely specific errors, miscalculations, or procedural irregularities were material to the outcome of any or all of his evaluations. Such allegations mostly center on the timing of the Respondent's evaluations, and his ability to specifically rebut the observations with his own opinions with respect to his performance. The record is nevertheless clear that in all material and substantial ways, the observations were conducted fairly and in accordance with the Framework and the applicable statutes. Because I find that no individual criticism of the evaluation process offered by the Respondent, nor the totality of the criticisms alleged, were material to the outcome of his evaluations, the Respondent's remaining arguments are dismissed.

Accordingly and based upon all of the above, the District has established by a preponderance of the evidence that the tenure charges shall be sustained.

AWARD

The Board of Education of the City of Newark has established by a preponderance of the evidence that the tenure charges shall be sustained.

Dated: February 26, 2021
Sea Girt, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth } ss:

On this 26th day of February, 2021, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Gretchen L Boone
Notary Public
New Jersey
My Commission Expires 8-24-2022
No. 50066778

53-21

53-21
OAL Dkt. No. EDU 01389-20
Agency Dkt. No. 328-12/19

New Jersey Commissioner of Education

Final Decision

L.R., on behalf of minor child, M.R.,

Petitioner,

v.

Board of Education of Upper Township, Cape May County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled January 7, 2021 OAL hearing, has been reviewed. Petitioner did not file an explanation for the failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 5, 2021
Date of Mailing: March 5, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

54-21

54-21R

New Jersey Commissioner of Education

Decision

C.B., on behalf of minor child, C.B.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

Synopsis

Pro se petitioner challenged the determination of the respondent Board that C.B. and her minor child were not domiciled in Elizabeth for the 2019-20 and 2020-21 school years. The Board became aware of inconsistencies in petitioner's residency in November 2019 when petitioner requested that bus service for her minor child be changed to an address in Newark. C.B. has been in an out of district placement for special services at the Developmental Learning Center in New Providence since 2018, and the Board requested tuition reimbursement based upon the cost of C.B.'s out of district placement.

The ALJ found, *inter alia*, that: children aged five to twenty years are entitled to a free public education in the district in which their parent or guardian are domiciled; petitioner in this case failed to provide any documentation that she resided at the Elizabeth address provided to the district; petitioner's testimony was not credible; petitioner did not call family members as witnesses on her behalf, even though she claimed to sign annual leases with her mother on the second floor of the premises she purported to reside in; and evidence from surveillance over a period of four months by the district's residency investigator shows that C.B. never entered the house which petitioner claimed to reside in, but instead waited outside the home for a ride to an address in Newark. The ALJ concluded that the petitioner was not domiciled in Elizabeth during the 2019-20 and 2020-21 school years; accordingly, the respondent Board is entitled to tuition reimbursement in the amount of $96.972.24 for the cost of C.B.'s education through November 9, 2020, plus $391.22 per school day for the remainder of the school year.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ that petitioner failed to establish that she and her minor child were domiciled in Elizabeth from the 2019-20 school year to the present, and therefore C.B. was not entitled to a free public education in the district's schools during that time. The Commissioner, however, disagreed with the ALJ's calculation of tuition owed to the Board and instead found that the Board's ability to recover tuition is limited pursuant to *N.J.S.A.* 18A:38-1(b), which does not specify that the assessed tuition be equal to the actual costs incurred by the district for educating the student at issue; rather, it uses the measure of annual per pupil cost, which is based on the district's overall costs and enrollment and is not specific to any individual student. As the Commissioner was unable to discern the per pupil cost from the record, the matter was remanded to the OAL for recalculation of tuition pursuant to *N.J.S.A.* 18A:38-1(b).

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

54-21R

OAL Dkt. No. EDU 17292-19
Agency Dkt. No. 301-11/19

New Jersey Commissioner of Education

Decision

C.B., on behalf of minor child, C.B.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto.

In this matter, petitioner challenges the Board's determination that she does not reside in the Elizabeth school district. After a hearing on the merits, the Administrative Law Judge (ALJ) found that petitioner was not domiciled in Elizabeth for the 2019-20 and 2020-21 school years. The minor child attends an out of district placement at the Developmental Learning Center (DLC) in New Providence for special services; DLC has charged the Board tuition costs in the amount of $80,541 for the 2019-2020 school year and $391.22 per day for the 2020-21 school year. Accordingly, the ALJ found that the Board is entitled to tuition reimbursement from petitioner in the amount of $96,972.24 for the 2019-20 school year and 42 days of the 2020-21 school year (through November 9, 2020), plus $391.22 per day for each day that the minor child receives services from the district after November 9, 2020.

In her exceptions, petitioner disagrees with the Initial Decision's factual findings and the conclusion that she does not reside in Elizabeth. She argues she was home when the Board's investigator came to her door but did not answer. She also contends that her electric bill, pictures taken from her home, and statements from her minor child's after-school respite care provider demonstrate that she lives in Elizabeth. She further maintains that the person seen by the investigator picking up the minor child on the steps of her home was a family friend who would take the child to her own house to care for him after school.[1]

Upon review, the Commissioner concurs with the ALJ's finding that petitioner failed to sustain her burden of establishing that she and her minor child were domiciled in Elizabeth from the 2019-20 school year to the present. The Commissioner further concurs with the ALJ's conclusion that the minor child was, therefore, not entitled to a free public education in the district during that time. The Commissioner does not find petitioner's exceptions to be persuasive, as she simply expresses her disagreement with the ALJ's decision. The ALJ addressed the evidence submitted by petitioner in detail and explained why it fails to demonstrate that she resides in Elizabeth. The ALJ also found that petitioner was not a credible witness, a finding which cannot be overturned unless it is found to be arbitrary, capricious, unreasonable, or unsupported by sufficient, competent, and credible evidence in the record. *N.J.S.A.* 52:14B-10(c). The Commissioner finds no reason in the record to disturb the ALJ's credibility assessments or the factual findings based thereon.

With respect to the assessment of tuition, the Commissioner disagrees with the ALJ's calculation of tuition owed to the Board, and instead finds that the Board's ability to recover tuition from petitioner is limited. *N.J.S.A.* 18A:38-1(b) provides that if a parent loses a

[1] In reply, the Board argues that petitioner's exceptions should not be considered because they were filed one day late and fail to set forth specific findings of fact and conclusions of law to which exception is taken. The Commissioner will nevertheless consider petitioner's exceptions. *N.J.A.C.* 6A:3-1.16.

residency appeal, the Commissioner shall assess tuition "computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance." The statute does not specify that the assessed tuition be equal to the actual costs incurred by the district for educating the student at issue. Instead, it uses the measure of annual per pupil cost, which is based on the district's overall costs and enrollment and is not specific to any individual student. *See N.J.-B., on behalf of minor child, I.T. v. Board of Education of the Township of Union, Union County*, Commissioner's Decision No. 112-20, decided April 24, 2020 (finding that tuition reimbursement is limited to 1/180 of the per pupil cost and does not include the assessment of special education and related costs). The Commissioner is unable to discern the annual per pupil cost from the record. The Commissioner, therefore, is constrained to remand this matter for determination of the annual tuition cost and a calculation of tuition that is consistent with *N.J.S.A.* 18A:38-1(b).

Accordingly, this matter is remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 8, 2021
Date of Mailing: March 9, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT NO. EDU 17292-19
AGENCY REF. NO. 301-11/19

C.B. o/b/o MINOR CHILD, C.B.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondents.

C.B., on behalf of minor child C.B., petitioner pro se

Christina M. DiPaola, Esq., for respondent (LaCorte, Bundy, Varady & Kinsella, attorneys)

Record Closed: November 11, 2020 Decided: December 8, 2020

BEFORE **ERNEST M. BONGIOVANNI**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner C.B., (petitioner) appeals the residency determination that petitioners do not reside in Elizabeth, and the tuition due associated with it, by the respondent, Board of Education of the Township of Elizabeth, Union County (respondent or BOE).

Petitioner filed a pro se residency appeal with the Department of Education, Bureau of Controversies and Disputes, which transmitted this matter to the Office of Administrative Law (OAL), where it was filed on December 9, 2019 as a contested case, pursuant to N.J.A.C. 6A:3-1 et seq. and N.J.S.A. 52:14B-1 to -15. A hearing was held on November 2, 2020, and the record left open for post hearing submissions until November 11, 2020 at which time the record closed.

FACTUAL DISCUSSION

Testimony

Diana Pinto Gomez

Diana Pinto Gomez (Gomez) is the Director of Special Services for the BOE. As such she has presided over the implementation of 3700 IEPS in the past four years.

The petitioner's son, C.B. is autistic, and as such, has been placed "out of District" since December 2018 at the Developmental Learning Center (DLC) in New Providence. The BOE uses their own transportation to bus children to and from their homes and the DLC.

In September, Ms. Gomez learned of a problem with the bus transportation of C.B. The bus drivers had reported that there was no one accompanying the minor child at the place of home pickup in the morning and home drop off in the afternoon. The bus company decided to suspend services until this condition was corrected.

Ms. Gomez said that on November 12, 2019, the petitioner sent her an email requesting that C.B. be picked up and dropped off at xxxxx Street, Newark, NJ. (Newark address) Ms. Gomez quickly replied to petitioner that C.B. cannot be transported to and from a residence in Newark, only to a residence in Elizabeth. The petitioner in turn sent another email to Ms. Gomez, stating "This will serve as my notice of an Address

Change." The email further stated that "Circumstances have unfortunately limited my options and I am afraid that, for the time being, the address that I have provided will be my new residing address." Owing to this information, Ms. Gomez immediately undertook a residency check.

Victor Tropeano

Victor Tropeano (Tropeano) is employed by respondent as a residency inspector within the legal department, a position he has held for three years. Prior to that employment he was an Elizabeth police department detective for 26 years.

On November 12, 2019, just two hours after Ms. Gomez received the second email from the petitioner, Tropeano went to xxxx Street in Elizabeth, (Elizabeth address) the same which had been previously provided to the BOE by the petitioner as her address. He rang the front doorbell which was responded to by a woman's voice. Tropeano asked if the petitioner and her son C.B. lived at this address. The voice responded that she "could not help" him and refused to come to the door

On November 14, 2019, the BOE sent a Notice of Initial Determination of ineligibility to both the Newark and Elizabeth addresses. The UPS sent to the Newark address came back return to sender, however the UPS delivery to the Elizabeth address was signed for by "C.B.". Later, the petitioner sent an email to Ms. Gomez and other school officials saying that her 16-year-old son had signed that USP for her but didn't open it, because he was not an adult of age at least 21. On November 20, petitioner sent another email to Ms. Gomez and other BOE officials saying that petitioner was on active military service but residing in Elizabeth. That same day, when the bus attempted to drop off C.B. at the Elizabeth address no adult was there for pick up and C.B. had to be transported back to the Special Services school until he could be picked up.

On November 22, 2019 Tropeano conducted surveillance of the Elizabeth address beginning approximately at 3 PM. He saw a woman dropped off by a vehicle. The woman sat on the front porch and remained there until C.B. was dropped off by the

School bus. The woman and C.B. remained on the porch until picked up by what appeared to be (after a license plate check) an UBER or Lyft vehicle. A tax search revealed that xxx Street, Elizabeth was owned by the petitioner's mother, and C.B.'s grandmother.

On November 26, 2019, Tropeano conducted afternoon surveillance of the Elizabeth address. He observed a woman dropped off by an UBER or Lyft vehicle at 3:20 p.m. At 3:30 p.m., the school bus dropped C.B. off. He remained on the porch with the woman until another UBER/Lyft vehicle picked them up at 3:52 p.m. Significantly, C.B. and the woman never entered what was supposedly C.B.'s home. Tropeano drove to the Newark address and saw the woman and C.B. enter the home at the Newark address.

Tropeano conducted similar surveillances of thee Newark address in the afternoons in January and February 2020 Again, the same pattern would occur. In the afternoon, soon after the school bus drop off of C.B., he observed the Uber/Lyft vehicles drop the woman and C.B. off at the Newark address. He also observed the woman being dropped off at the Elizabeth address wait for C.B. to arrive, and then wait for another car to pick them up. On at least one occasion the woman and C.B. remained outside the Elizabeth house for 45 minutes before being picked up. After waiting, another vehicle would bring the two to the Newark address home.

Tassian Winkley

Tassian Winkley (Ms. Winkley) was called to testify by the petitioner. She is a friend of the petitioner. She has lived at the Newark address with her brother and mother for the last 3-4 years. The apartment is leased by all three of them. In addition to being the petitioner's friend, the petitioner's adult brother who lives at the Elizabeth address is Ms. Winkley's boyfriend. She works as a home health aide with shifts of either 9AM to noon or 9::00 a.m. to 5:00 p.m. She provides these health aid services at the homes belonging to those in need of her care. However, In November 2019 she was between jobs (she works through an agency) and agreed to help provide "services" for C.B., namely she would pick up C.B. at the Elizabeth address and bring him home to

her house until petitioner came home from work. (P-5) She received no pay, but the petitioner paid for the transportation of Ms. Winkley from Newark to Elizabeth and for C.B. and Ms. Winkley back to Newark. Ms. Winkley said she would bring C.B. to her house in Newark rather than wait for the petitioner to come home to the Elizabeth house because there are other children at her house C.B. could play with.

As documentary proof that Ms. Winkley herself resides at the Newark address, she provided a letter from a company that provides extended warranties for servicing vehicles. The letter is undated but talks about a price increase effective August 27, 2020. Ms. Winkley did not know why this letter was sent to her as she doesn't own a vehicle. She said the petitioner did ask her to provide documentary proof of her residency at the Newark address, and this was her proof. She stated she leases an apartment at the Newark address along with her mother and sister. Her name is on the lease and on the utilities. She also has children of her own enrolled in Newark school. She did not provide any proof of the lease, the utilities, or the enrollment to show she resides at the Newark address.

Ms. Winkley did not say why she never entered the Elizabeth address house where C.B. lived, during all these pick-ups. She is aware that in addition to petitioner and C.B., the petitioner's brother, her boyfriend, lives there, along with C.B.'s mother and C'.B's 16-year-old brother.. She said she stopped providing these services for C.B. after December because it was too complicated a situation. She explained that as part of taking care of C.B. she had to log onto a computer and report to C.B.'s mother.

The Petitioner

She testified that what precipitated the residency investigation was her problem of getting aftercare for C.B. She had run out of FMLA, and was working in NYC. She did not provide a specific explanation for the times that no one was present to pick up C.B. at the Elizabeth address, forcing the bus to return C.B. to Special Services. Regarding the arrangement she made in November with Ms. Winkley, it made sense to her to leave C.B. at Ms. Winkley's house in Newark, rather than her house in Elizabeth,

until she got home from work, as she had to drive through Newark to get to Elizabeth and could pick C.B. up on the way.

She stated that on the date of the email exchanges when she notified Ms. Gomez of the address change, she was aware that the BOE was concerned that C.B. did not reside in Elizabeth. Nevertheless, she did not expect an Investigator to come to her door that day. She said she was the female voice that responded to Mr. Tropeano when he asked for information through the front door intercom at the Elizabeth house. She said she told him as a response to whether she and/or C.B. lived there that "I don't know how I could help you." She did not identify herself. She refused to open the door. While Mr. Tropeano had identified himself as being an investigator for the BOE, and while she had just had two email exchanges regarding a residency inquiry, she did not accept the man at the door as a BOE agent. She is aware of many people who come to her door saying they are with agencies when they are really not. She said, "I think it was a threat."

When she got the letter of Initial determination of Ineligibility via UPS, which she said her 16 year old son had signed for her at the Elizabeth address, she refused to open it even though she knew if was from the BOE and that there as a residency investigation. She said she "did not want to admit" that she received anything from the BOE.

Eventually she received an email from the BOE attaching the same Notice of Determination of Ineligibility and associated documents that had been sent via UPS to both addresses. The Notice, included a "Statement of Compliance with Compulsory Education Law "My student, C.B. is being denied enrollment n the Elizabeth School District because it has been determined he is not entitled to attend the schools free of charge pursuant to N.J.S.A. 18A:3801. The "Notice of Initial Determination of Ineligibility" (R-2) stated their review indicated the petitioner's "Domicile/Residency not in the district" and therefore ineligible to attend schools of the Elizabeth Public School District. It further stated that if she did "**not accept these reasons"** you may request **a hearing before the Board of Education,"** (emphasis supplied) by contacting the BOE on or before November 21, 2019. The petitioner testified that by the time she read the

email the date was past November 21. She acknowledged, however, receiving many emails and other attempted communication phone calls made by Mr. Tropeano and emails sent by the BOE, including his secretary, and that she responded to none of them.

Petitioner said the reception on her cellphone was weak and that she did not understand why the BOE did not attempt to call her at her office in NYC. She did not, however attempt to explain why she did return any messages left on her cellphone. She admitted she thought the Board would afford her a hearing if she requested it, however she did not want to open the UPS parcel containing the appeal documents because she was afraid to "admit anything" by opening it up. Even after she got the email again with all the appeal forms, but she "refused" to provide any proof of residency to the BOE, "other than my word." She referred to an email (P-2) she sent the BOE on November 20, 2020 which stated in pertinent part:

> My son and I reside in Elizabeth, NJ. **We have occupied and have not relocated** from the premises in which we are currently residing as I consider this to be our home. **I have occupied these premises to which I am referring to, following my return from a two year deployment in Iraq to the year 2013**, when my son [C.B.] was born. I am not currently deployed and the status of my occupancy of the premises where I live in in Elizabeth NJ remains the same **I have Not, Nor have I ever in fact Moved from these premises or Provided Verbal or Written Confirmation Pursuant to a Specified date for which I have given notice would be a date I intend to move.** [emphasis and capital letters in original]

The email went on to explain that her November 12 "Notice" to the BOE only referred to her "hardship and the limitation on foreseeable options" referred to her "FEAR that I might need to move" when in fact she had no such intention.

Petitioner entered as an exhibit (P-7) photographs that she said showed her son getting on the bus at the Elizabeth address on November 26, 2019, the date of one of Mr. Tropeano's surveillances; however when pointed out to her, she acknowledged that Mr. Tropeano testified he did no surveillance at all in the morning, and referred only to his surveillance in the afternoon.

Petitioner said her brother, age 38, resides at the Elizabeth address, as does her 17-year-old son, and her mother, age 65. She rents the upstairs floor from her mother who owns the two-family house. She signs a lease every year with her mother and did so on January 1, 2019 and on January 1, 2020. She provided a PSEG bill sent to her from "my account@pseg.com" to her Yahoo email address. That account shows a balance owed for the Floor 2 unit at the Elizabeth house of $3,688.63 which was due on January 15, 2020. It did not show current usage of the utilities for that floor nor how the bill accumulated such a total.

When asked why she did not produce the lease or other documentary proof of her address being the Elizabeth address, petitioner had no reply. When asked why she did not ask her mother, her brother or her 17 year old son to testify as proof of her residency, petitioner said she did not wish to "drag them into this," notwithstanding she knows the BOE is seeking in their counterclaim, approximately $100,000 a year as reimbursements for these services provided for C.B.

Petitioner also provided a document from Neuropath Behavioral Health that she began using once "services" were provided to her which show they are providing "In Home Respite care for C.B." on January 13, 2020, and January 14, 2020. The employees "Time in/Time Out" on January 13 was 2:31 A.M-8:31 P.M. and on January 14, 2:36 p.m. and 8:07 P.M. This she said "contradicted" Mr. Tropeano's surveillance on those days. Actually, the documents do not contradict his testimony.

FINDINGS OF FACT

In light of the contradictory testimony presented by respondent's witness and petitioner, the resolution of this matter requires that I make credibility determinations with regard to the critical facts. The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved

as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to observe the demeanor of the witnesses, I **FIND** Ms. Gomez and Mr. Tropeano to be credible. They were truthful and accurate. They testified clearly and directly, without any a bias against petitioner. I found petitioner and her witness Ms. Winkley to be less credible. First, it appeared that because she was petitioner's friend, she performed these pick-up services gratis, with petitioner paying for the Uber/Lyft rides. However soon after starting she found she was having to log into a computer, to, apparently report to the petitioner, about the pick-ups, which proved too difficult for her. Second while she claimed she stopped picking up J.B. in December, surveillance by Mr. Tropeano in January and February 2020 showed Ms. Winkley as in November and December, again picking C.B. up at the Elizabeth address, waiting for any Lyft/Uber ride. I found it not credible that while she claimed petitioner asked her to bring proof of Ms. Winkley's residence being in Newark, she only thought to produce a piece of "junk' mail about a car she didn't own, rather than, for example her own lease of the Newark apartment, her utilities bills (which she claimed were in her name) or proof of enrollment of her own kids who attended according to her Newark public schools. I find her testimony in general to be not credible and tainted by bias, by being a friend of the petitioner, the girlfriend of her brother and perhaps an employee for caretaking services for C.B.

Further I did not find it credible that she and C.B. would never knock on the door of the Elizabeth house and seek entry when her boyfriend lives there. Even if her boyfriend was at work and if petitioner's mother was at work, it appears the 17 year old

son would have answered the door and let them in, assuming petitioner didn't entrust Ms. Winkley, with a housekey. IAs testified to by Mr. Tropeano, and unchallenged by petitioner, C.B.'s drop off was approximately at 3:15 p.m.

Exhibit P-3 contained a picture of a man holding a UPS parcel. On the same page as the picture preceding it was a Nov 21, 3:49 PM email by petitioner to Ms. Gomez and other school officials which said "Please inform the Gentleman... that I was visited yet again from another person who described themselves as having affiliation with the Elizabeth Board of Education. For some reason he was under the impression that my 6-year-old son was left outside...and that he was checking to make sure everything was ok....it is most certainly something that did not occur nor would it ever".

Yet, it was well documented that the Bus transit employees had a continued problem with no one being at the drop off site at the appointed time and that C.B. had to be transported back to Special Services. They had threatened to discontinue the drop off. This was the problem that had been brought to the petitioner's attention, to which she personally acknowledged as being a problem which she asked to resolve by dropping off C.B. at the Newark address. So, her comment that this never occurred was untruthful or certainly evasive.

Further who took the picture of the gentleman on the porch? The photo was followed by another email again on November 21 by the petitioner to the BOE which recounted how her then 16-year-old son signed a UPS package a day or two ago at the Elizabeth address. If the son signed the UPS and took the picture from the house, why wouldn't he also be available on all the days of the afternoon surveillance to let his autistic younger brother in the house while he and Ms. Winkley waited for another car? It is undisputed that C.B.'s drop off time was supposed to be 3:15 P.M. And if the petitioner herself was the one who took the picture of the "gentleman" or was there on in Elizabeth on November 21 (her email said "I was visited...) again, why wouldn't she answer the door? There was no evidence that she even spoke to this gentleman that day which is why she had to write to the BOE to ask them to "inform him...that all is well." Her email does not say she answered the door or communicated directly in any

way to this gentleman. So, if she was there, and took the picture, what was she hiding from?

In fact, I believe it not credible that the arrangement would be for Ms. Winkley to watch C.B. at her home in Newark rather than C.B.'s own home in Elizabeth, if C.B. really lived there. As noted by petitioner's exhibit of time logs by Neuropath Behavioral Healthcare, they described C.B.'s behavior as either "aggravated" or "very aggravated" with C.B. hitting the caregiver, throwing shoes and cursing. It's unlikely that this child would be better behaved at Ms. Winkley's house in Newark than in his own house among his own family in Elizabeth if that were the case. Ms. Winkley never indicated in any way it was a hardship to do the caregiving at her boyfriend's house and C.B.'s home, and its her profession to do caregiving at other people's homes rather than her own.

None of petitioner's documentary evidence matched or supported her contentions. The JCP&L bill looked like a collection notice for an unpaid bill for many months. It was for nearly $4,000 and did not show any current use or when the services were incurred. It was not mailed to the Elizabeth address but only emails. This "proof" suggests that it was more likely that petitioner had once lived at the Elizabeth address but had left, possibly because she couldn't (or wouldn't) pay her bills, than proof that she lives there currently.

Similarly, the documents (P-8) from Neuropath Behavioral Health shows a healthcare professional employee providing "In Home Respite care for C.B." on January 13, 2020, and January 14, 2020. The employee's "Time in/Time Out" on January 13 was 2:31 a.m.-8:31 p.m. and on January 14, 2:36 p.m. and 8:07 p.m. This, petitioner claimed "contradicted" Mr. Tropeano's surveillance on those days. However, the documents show only the time in/time out of the employee. They do not state that C.B. was there all that time. As noted, on those days Tropeano followed the car from Elizabeth to Newark. The Uber/Lyft car would get to Newark around 3:45 p.m. It's entirely consistent that the hours of actual car giving began at that time rather than when the employee clocked in at 2:30 p.m. It would not be unusual for a caregiver to get paid an hour for waiting time. Further it is interesting that again, these documents

which were obtained to help her case, were not sent to a street address but again by email. Nowhere does a street address appear on the document, nor does it state at what address the services were performed. Finally, the photos (P-7) taken from what I will presume was the Elizabeth address on November 26, 2019, do not in fact show, as petitioner contended, C.B. getting on or walking toward a bus. None of the pictures show a school bus. One of the four pictures shows two to four people who could be students walking in the same direction; but none of them appear to be even close to the figure of a six-year-old boy or anyone with a six-year-old.

Respondent's Counterclaim for Reimbursement

The tuition for C.B. who receives special services contracted for by the BOE. for the 2019-2020 school year was $80,541. The daily rate for C.B.'s tuition for the 2020-2021 school year is $391.22 per day. 42 school days had elapsed by the close of the record on November 9, 2020 for $16,431.23. The yearly rate for 2020-2021 is $70, 419.00 (R-4)

Based on the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. C.B. is a 6-year-old autistic child who was enrolled for Special Services education for the 2019-2020 and continues to attend there despite having been determined to be ineligible to attend for free public education there.
2. Soon after the 2019-2020 school year began, there were multiple incidents reported by the Bus transportation unit of long waits for adult, parent or guardian to appear for pick ups with C.B. This resulted in the child having to be returned by the bus company to the Special Services school and a warning that busing would have to be suspended.
3. As a result of inquires made by the BOE, the petitioner, C.B.'s mother first asked to have C.B. picked up and dropped off at an address in Newark. When told this was not possible, the petitioner replied that she was notifying the

district of her change of address to xxxx Street in Newark, and that this would be the "new residing address."

4. None of the proofs offered by petitioner credibly overcame her own admission that the Newark address was her "new residing address" as she had advised the BOE of in writing on November 12, 2019, but instead re-enforced and supported that C.B. and petitioner, if they ever did live at the Elizabeth address, had moved to the Newark address.

LEGAL ANALYSIS

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning. State v. Benny, 20 N.J 238, 250 (1955). The domicile of an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. ex rel. minor child E.Y. v. Board of Educ. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001).

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a

> preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

In this matter, petitioner provided no documentation that she resided at the Elizabeth Address. There was offered no mail to her sent to that address, although there was a past due bill reproduced from her online account for nearly $4000 by JCP&L which at best indicated she once lived at that her address. She did not provide a copy of her driver's license with the Elizabeth address, although she does drive a car. C.B., her six year old autistic child, while under surveillance for a period of four months was not seen entering what petitioner claimed was his own house, but rather would wait outside sometimes for up to 45 minutes for another ride to the Newark house.

The petitioner did not act like a credible person who had nothing to hide about her current place of residence. Instead she was deceptive and evasive. If we believe this part of her story at all, the first thing she did when confronted with the BOE's concern that she was not residing at the Elizabeth address, and asked if she lived at the Elizabeth address was to refuse to answer the door to the person who identified himself as being an investigator with the BOE, and further refusing to identify herself and saying "there is nothing I can do to help you." Although petitioner claimed she didn't file for a hearing because it was too late to do so, she had the parcel containing the Notice and all documentation needed to file for a hearing but "refused" to open it because to her mind it constituted an admission. Besides, even had she wanted to ask for a hearing, she "refused" to provide any proof of her residency to the BOE other than her own word. These are not the actions of one who has nothing to hide about her address.

In this hearing, the petitioner has essentially done the same thing, by just demanding her word alone be believed. She had ample opportunity to present a variety documentary evidence of residency, e.g. the annual leases she said she signs to her mother but chose not to. Similarly, even though acknowledging that the BOE was seeking over $100,000 in reimbursed tuition from her she chose not to call her 38 year old brother, 65 year old mother or 17 year old son, who supposedly live with her at the Elizabeth address because she "did not want to drag them into this thing." That is not the behavior of an innocent and credible witness.

I agree with the comments in the post hearing submission of respondent that, in accordance with the test in State v. Hill, 199 NJ. 545 (2009) there is a specific adverse interest to be drawn from failure to call her mother-also her alleged landlord-as her witness, as well as other family members. In particular; 1) her mother as her landlord has a special relationship with her as a party to these proceedings and the petitioner has superior knowledge of the identity of this witness and the testimony the witness might be expected to give (petitioner named her as a person having knowledge of the subject matter of the dispute in answers to interrogatories). 2) The witness was available both practically and physically (she described her mother as 65 and very active working well over 40 hours every week) 3) The testimony of her mother would elucidate relevant and critical fact issues (her mother owned the Elizabeth house and supposedly leased the second floor to her daughter the petitioner for use by her and her two sons) 4) Her mother/landlord's testimony would appear superior to evidence already utilized in respect of the facts to be proven. Here, the evidence of daily transportation from the Elizabeth address to the Newark address over a period of months was strong evidence that C.B. and petitioner no longer lived at the Elizabeth address if they ever did. Petitioner's only other witness, Ms. Winkley was vague; she did not communicate an authentic real sense of being familiar with the Elizabeth address by, e.g. not describing the inside the house.. She was generally not credible and potentially biased, and knew nothing about the lease arrangement between petitioner and her mother. In fact, she didn't even provide competent evidence that she lived at the Newark address. Further, petitioner's documentary evidence was woefully inadequate and tended to prove the opposite of what petitioner said it would prove. Again, it would appear petitioner believes her word must be believed, regardless of credibility. Therefore, her failure to call her mother as a witness without a reasonable explanation leads to the natural inference that her testimony would be unfavorable to petitioner and to her story.

As noted, tuition for C.B. for the 2019-2020 school year was $80,541. The daily rate for C.B.'s tuition for the 2020-2021 school year is $391.22 per day. 42 school days had elapsed by the close of the record on November 9, 2020 for $16,431.23. The yearly rate for 2020-2021 is $70, 419. (R-4)

The Board asserts that it is entitled to be reimbursed for tuition for the 2019-2020 and 2020-2021 school years for C.B.'s ineligible enrollment. Whereas here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

> If in the judgment of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

N.J.S.A. 18A: 38-1(b) likewise requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioners were not domiciled in the Elizabeth School District for the 2019-2020 and 2020-2021 school years and that respondent is entitled to reimbursement from the petitioner for the costs of tuition in the amount of $96,972.24 and for $391.22 per day for every day he continues thereafter to receive services from the school district for the remainder of the 2020-2021 school year.

ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that petitioner C.B. and her minor child C.B. were not residents or domiciles of Elizabeth New Jersey and were not domiciled within its school district during the 2019-2020 and 2020-2021 school years, is hereby **AFFIRMED**. It is further **ORDERED** that the respondent's counterclaim for tuition is also **GRANTED**. It is further **ORDERED** that respondent be reimbursed tuition from petitioner in the amount of $96.972.24 for the 2019-2020 and 2020-2021 school year as of November 9, 2020, and to be further

reimbursed at the rate of $391.22 per school day for the remainder of the school year until and unless petitioner transfers C.B. for public or private education to another district or becomes domiciled in Elizabeth.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 8, 2020

Ernest M. Bongiovanni

DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: December 8, 2020

Date Mailed to Parties:

EB/id

APPENDIX

LIST OF WITNESSES

For Petitioner:

C.B., petitioner

Tassian Winkley

For Respondent:

Diana Pinto Gomez

Vito Tropeano

LIST OF EXHIBITS

For Petitioner:

P-1 Petitioner's Answers to Interrogatories

P-2 Comments and summary by petitioner

P-3 Email of November 21, 2019, indicating petitioner's address in Elizabeth, and associated emails.

P-4 Not entered as evidence

P-5 Statement of witness Tassian Winkley, dated August 31, 2020

P-6 PSEG bill of January 1, 2020

P-7 Photos of December 11, 2019 alleged to show C.B. getting on bus

P-8 Letters from Neuropath Behavioral HealthCare

For Respondent:

R-1 Memo/Summary of File by Vito Tropeano, (undated)

R-2 Notice of Initial Determination of Ineligibility, dated November 14, 2019

R-3 Notice of Final Ineligibility dated November 22, 2019

R-4 Purchase Order between Elizabeth BOE and Morris Union Jointure Commission for services at the Developmental Learning Center, for 2019-2020, dated April 16, 2019.

R-5 Respondent's Answers to Interrogatories with attached emails of petitioner, C.B.

55-21

55-21
OAL Dkt. No. EDU 05469-20
Agency Dkt. No. 81-4/20

New Jersey Commissioner of Education

Final Decision

O.F., on behalf of minor child, J.J,

Petitioner,

v.

Board of Education of the City of New Brunswick, Middlesex County,

Respondent.

The record of this matter, the parties' proposed Consent Agreement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In so doing, however, the Commissioner notes the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.* with respect to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential.

Accordingly, this matter is hereby dismissed, subject to compliance with the terms of the settlement consistent with applicable public records law.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 8, 2021
Date of Mailing: March 9, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05469-20
AGENCY DKT. NO. 81-4/20

O.F. O/B/O MINOR CHILD J.J.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,
Respondent.

O.F. on behalf of minor child J.J., petitioner, pro se

George F. Hendricks, Esq., for respondent (Hendricks & Hendricks, attorneys)

Record Closed: January 4, 2021 Decided: January 19, 2021

BEFORE **SUSAN L. OLGIATI**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 17, 2020, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Consent Order of Stipulated Settlement and Dismissal indicating the terms thereof. A copy of that document is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached a Consent Order of Stipulated Settlement and Dismissal.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

1/19/21
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency: 1/20/2021

Mailed to Parties: 1/21/2021

/lam

2020 DEC 31 A 11:13

George F. Hendricks, Esq.
HENDRICKS & HENDRICKS, ESQS.
73 Paterson Street
New Brunswick, NJ 08901
Tel. (732) 828-7800
Attorneys for Respondent

O.F. o/b/o minor child, J.J.,	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
vs.	:	AGENCY REFERENCE NO. 81-4/20
	:	OAL DOCKET NO.: EDU 05469-2020 S
CITY OF NEW BRUNSWICK BOARD OF EDUCATION, MIDDLESEX COUNTY,	:	
Respondent.	:	CONSENT ORDER OF STIPULATED SETTLEMENT AND DISMISSAL

THIS MATTER having been opened to the Court on filed Petition of Petitioner, Olufemi Francis o/b/o minor child, J.J., and George F. Hendricks, Esq. of the Law Offices of Hendricks & Hendricks, Esqs., appearing on behalf of Respondent, City of New Brunswick Board of Education, and the parties having now amicably resolved the matter and having set forth their settlement to the Court herein, and Petitioner further desiring to dismiss the within action as a result of the concurred settlement,

IT IS on this ____ day of December, 2020,

ORDERED that any and all references to an HIB violation by minor child, J.J., shall immediately be expunged by the Respondent from any and all student records/student transcripts maintained for said minor child by the Respondent District; and it is further

ORDERED that Petitioner, Olufemi Francis, hereby dismisses the within action without prejudice; and it is further

ORDERED that the parties unilaterally agree that the settlement reflected herein shall be held in the strictest of confidentiality. Any disclosure violation by the Petitioner shall generate, on notice to the Petitioner, a reinstatement by the Respondent District of its HIB violation as to minor child, J.J. Alternatively, should there be a breach in confidentiality as set forth herein by the Respondent District, Petitioner shall, on notice to the Respondent District, make application to this Court for reinstatement of the within action; and it is further

ORDERED that a copy of the within Order shall be served upon all parties and counsel of record within _____ days from the date hereof.

HON. SUSAN OLGIATI, J.A.L.

The undersigned hereby consent and stipulate to the form and entry of the within Consent Order.

OLUFEMI FRANCIS, Petitioner

HENDRICKS & HENDRICKS, ESQS
Attorneys for City of New Brunswick
Board of Education, Middlesex County

By: _____
GEORGE F. HENDRICKS, ESQ.

57-21

57-21

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION.
----------X
In the Matter of the TENURE Charges Against

Louis Cicenia,

257-10/18

By: South Orange-Maplewood School District,
Essex County, NEW JERSEY
----------X
Before **Deborah M. Gaines, Esq.**, Impartial Arbitrator

ORDER APPROVING SETTLEMENT OF TENURE CHARGES

The South Orange-Maplewood School District, Essex County (the "Board") certified tenure charges against Louis Cicenia ("Respondent" or "Cicenia"), a tenured teacher in the South Orange-Maplewood School District. The Board's counsel, David Rubin, Esq. (David B. Ruin, P.C.), filed Tenure Charges alleging various claims related to Unbecoming Conduct, with the Commissioner of Education of the State of New Jersey; the Commissioner received the charges on February 19, 2020. Respondent, by his counsel, Ronald J. Ricci, Esq. (Ricci Fava, LLC) filed an Answer with the Commissioner, denying the allegations and asserting various defenses. The Commissioner of Education, having reviewed the Tenure Charges and the Respondent's Answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation and, therefore, referred the matter to arbitration. These charges were referred to the undersigned Arbitrator on March 23, 2020 pursuant to *N.J.S.A.* 18A:6-16, as amended by *P.L.* 2012, c. 26. A timely request for an extension of time was granted.

The parties reached a mutually acceptable settlement of the tenure charges at a hearing on January 26, 2021. The settlement terms were thereafter set forth in a written Stipulation of Settlement ("Stipulation"). On February 25, 2021, the Stipulation, signed by the parties and the Board's counsel, was forwarded to the arbitrator for review and approval. In accordance with *N.J.A.C.* 6A:3-5.6, the settlement of the tenure charges pursuant to the terms of the Stipulation is hereby approved; the standards for settlement have been satisfied as set forth below.

1. A copy of the Stipulation, as well as the Tenure Charges and the Answer are annexed to this Order.
2. The settlement of the tenure charges is warranted as it resolves the charges without additional cost to the State or to the parties and without any disruption to the school district arising from calling personnel as witnesses. The settlement also removes the uncertainty of litigation for both the Board and the Respondent.
3. Both the charged and charging parties have consented to the settlement terms. Both parties were represented by counsel in the negotiation of the settlement terms and the preparation of the Settlement Agreement (Settlement). Cicenia signed the Settlement indicating his voluntary agreement to its terms on February 4, 2021. The Board President signed the Settlement indicating the Board's voluntary agreement to its terms on February 25, 2021, following the Board's approval of the Settlement at a meeting on February 25, 2021. The Board's counsel signed a

Certification of Consent to Settlement Terms Pursuant to *N.J.A.C.* 6A:3-5.6(b) on February 25, 2021.

4. Respondent expressly confirmed in the Settlement that he fully understands the settlement terms and that he voluntarily entered into the settlement with a full understanding of his rights. Competent counsel provided advice and counsel to the Respondent throughout the settlement process.
5. The settlement is in the public interest. By the settlement, the Board avoids the uncertainty of the outcome of the arbitration, the time and expense associated with litigation and any disruption to the school district resulting from school personnel's participation in the hearing.
6. Under the Stipulation's terms, Respondent has voluntarily resigned in good standing from his position with the school district. In accordance with *N.J.A.C.* /6A:3-5.6(a)6, and as confirmed in Section 7 of the Stipulation, Respondent has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners.
7. Under the Settlement's terms (paragraph 2 and 7) the parties indicated the settlement is subject to approval of the Commissioner. Upon review of the statute, the undersigned and the parties have determined that such approval is not necessary because such approval is only necessary prior to the case being referred to an arbitrator. Thus, the reference to the Commissioner's approval in the parties

Settlement referred to in paragraphs 2 and 7 of the settlement is considered deleted.

By reason of the foregoing, the settlement of the tenure charges against the Respondent, Louis Cicenia, pursuant to the terms set forth in the Settlement Agreement, is approved.

Dated: March 9, 2021

Deborah Gaines

Deborah M. Gaines, Esq., Arbitrator

Affirmation

State of New York }

County of New York } ss:

I, DEBORAH GAINES, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

Date: March 9, 2021

Deborah Gaines

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Settlement Agreement

Whereas, the South Orange Maplewood Board of Education ("the Board") certified tenure charges against Louis Cicenia ("Cicenia"), a tenured teaching staff member ("the Charges"), annexed hereto as Exhibit A; and

Whereas, the Commissioner of Education referred the charges to Arbitrator Deborah Gaines ("the Arbitrator") for a hearing, *In re Tenure Hearing of Louis Cicenia/South Orange Maplewood School District, Essex County*, Agency Dkt. No. 74-3/2; and

Whereas, during the course of the hearing, in light of the evidence adduced thus far, the parties agreed to resolve the dispute on the terms set forth herein;

It is Now, Therefore, Agreed that the Charges are withdrawn, and the tenure charge proceedings are dismissed with prejudice, on the following terms:

1. Cicenia represents that, while he claims to have no recollection of the statements to students attributed to him in the Charges, he has no reason to question the veracity of the students' accounts thereof.
2. Immediately upon issuance of all approvals required from the Commissioner of Education and/or the Arbitrator by *N.J.A.C.* 6A:3-5.6, Cicenia shall be suspended without pay for a period of 180 calendar days.
3. During the period of Cicenia's suspension, and for so long thereafter as the Superintendent of Schools deems necessary,

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Cicenia shall participate in a training program to address the behaviors giving rise to the Charges. The training program shall be selected by the Superintendent of Schools, may at the Superintendent's discretion take place after school hours or on weekends, and may include regular attendance and active good faith participation by Cicenia on an ongoing basis. Cicenia acknowledges that any failure to comply with the requirements of this paragraph, or any further misconduct of the sort alleged in the Charges or worse, shall be grounds for dismissal in accordance with the procedures of the Tenure Employees Hearing Law.

4. The terms of this Settlement Agreement are deemed reasonable by the parties based upon: (a) the unavailability of testimony from certain student witnesses whose families moved out of the school district during the pendency of the proceedings; (b) a *bona fide* question whether a prior disciplinary action had been rescinded by agreement of the parties at that time; and (c) informal input from the Arbitrator that the terms hereof likely would constitute the quantum of discipline to be imposed even if the Charges ultimately were proven.

5. Cicenia acknowledges that he has been represented by Ronald Ricci, Esq., his independent legal counsel, throughout the proceedings, that he is satisfied with the services of his legal counsel, that he fully understands the terms of this Settlement Agreement and agrees to be bound by them, that he enters into this Settlement Agreement voluntarily and without coercion or

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duress, and that he has been advised that, notwithstanding this Settlement Agreement, the Charges may nevertheless be referred to the New Jersey State Board of Examiners for such proceedings regarding his teaching certificates as that agency may deem appropriate.

6. Cicenia releases the Board, its members, employees, agents and representatives from any claims of any nature, known or unknown, based on any facts or events preceding execution of the Settlement Agreement, including but not limited to any claims of procedural or substantive impropriety or irregularity in the investigation culminating in the Charges, or in the certification or prosecution thereof by the Board.

7. This Settlement Agreement is subject to approval of the Board, the Arbitrator and the Commissioner of Education. In the event that any of these approvals are declined, the arbitration proceedings shall resume to a conclusion.

SOUTH ORANGE MAPLEWOOD BOARD OF EDUCATION

Dated: February 25, 2021 By: _____

dotloop verified
02/04/21 9:23 PM EST
IEJU-OPDM-KCGX-OR7W

Dated: _____

LOUIS CICENIA

SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, NJ
PUBLIC BOARD MEETING
February 22, 2021

FOR ACTION

RESOLUTION **4110**

SUBJECT: **APPROVE CONFIDENTIAL SETTLEMENT AGREEMENT WITH EMPLOYEE #2446**

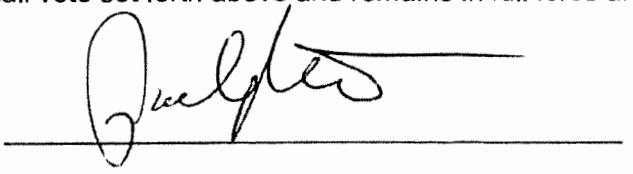
BE IT RESOLVED, that the Board of Education approves a settlement agreement with employee #2446 and authorizes the Board President to execute the settlement agreement.

RESOLVED, That the following resolution be considered by the next NJSBA Delegate Assembly to be held in May 2021.

MOTION made by Dr. Ronald Taylor seconded by Board Member R. Baker to approve Resolution 4110.

ROLL CALL: Motion 4110 Passed. YES: Board Members Bergin, Cuttle, Joshua, Maini, Malespina, Siders, Winkfield, Wright, Zubieta NO: None

I, Paul Roth, Secretary of the South Orange-Maplewood Board of Education, hereby certify that the attached resolution was adopted at a duly convened meeting of the Board of Education on February 22, 2021 by the roll call vote set forth above and remains in full force and effect.



Paul Roth, Board Secretary

58-21

58-21

New Jersey Commissioner of Education

Final Decision

Charles Avellone,

Petitioner,

v.

Board of Education of the City of Hackensack, Bergen County,

Respondent.

Synopsis

In June 2020, petitioner filed an appeal asserting that the respondent Board violated *N.J.S.A.* 18A:20-34 by improperly granting the use of school premises from April 2020 through August 2020, free of charge, to a private condominium association. Specifically, on June 15, 2020, the Board passed a resolution permitting residents of Devonshire Condominium Association (Devonshire) to use the Hackensack High School parking lots during a period of construction on Devonshire's parking area. This agreement coincided with a period of remote educational services at the high school because of the Covid-19 epidemic. Petitioner sought to set aside the parking agreement with Devonshire, contending that political corruption on the part of members of the Board of Trustees had led to the grant of improper use. The Board denied petitioner's allegations. The parties filed cross motions for summary decision.

Upon review, the ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; *N.J.S.A.* 18A:20-34 confers wide discretion on the Board regarding community use of its facilities; the Board did not violate its policy for use of school facilities by outside groups when it allowed the condominium association to use the parking lots for free while they were not in regular use by the school community during the Covid-19 epidemic; authorizing such use did not interfere with the orderly conduct of a thorough and efficient system of education; such use is contemplated by *N.J.S.A.* 18A:20-34(c) and the Board's Policy 7510; the Board's granting of this use was not arbitrary, capricious or unreasonable; and, further, any allegations of violation of the School Ethics Act by members of the Board must be initiated by filing a complaint with the School Ethics Commission, and petitioner has not filed such a complaint. Accordingly, the ALJ granted the Board's motion for summary decision, and the matter was dismissed.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ that the petition must be dismissed for the reasons well detailed in the Initial Decision. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

58-21

OAL Dkt. No. EDU 06749-20
Agency Dkt. No. 145-6/20

New Jersey Commissioner of Education

Final Decision

Charles Avallone,

Petitioner,

v.

Board of Education of the City of Hackensack, Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

Petitioner in this matter alleges that the Board violated *N.J.S.A.* 18A:20-34 and its own policy when it allowed residents of a local condominium association to use the parking lots at Hackensack High School at no cost when the school was operating remotely due to the Covid-19 pandemic. The Administrative Law Judge (ALJ) granted the Board's motion for summary decision, finding that *N.J.S.A.* 18A:20-34 confers wide discretion on the Board regarding community use of its facilities, and that the Board did not violate its policy by allowing the condominium association to use the parking lots for free. The ALJ further noted that any allegation of violations of the School Ethics Act by members of the Board must be initiated by filing a complaint with the School Ethics Commission, and that petitioner had not filed any such complaint.

Upon review, the Commissioner concurs with the ALJ that summary judgment is appropriate and that the Board's actions did not violate the statute or its policies, for the reasons thoroughly detailed in the Initial Decision.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 15, 2021
Date of Mailing: March 16, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

59-21

New Jersey Commissioner of Education

Final Decision

A.P., on behalf of minor child, J.P.,

Petitioner,

v.

Board of Education of the Borough of North Arlington, Bergen County,

Respondent.

Synopsis

Pro se petitioner challenged the respondent Board's decision to assign J.P., to the Jefferson Elementary School (Jefferson) for the 2020–21 school year, as part of a district-wide plan to reduce overcrowding in classrooms. J.P., a fourth grader, had previously attended Washington Elementary School (Washington) but was reassigned to Jefferson based on newly established attendance areas which coordinate with a student's home address. Jefferson is located one block from petitioner's home, while Washington is a mile away; A.P. maintained that the Board's decision was arbitrary, capricious, and unreasonable, and that J.P. should be allowed to remain at Washington until the end of fifth grade because his transfer has caused transportation and childcare issues, financial hardship, and has been detrimental to J.P.'s academic and emotional progress. The Board maintained that J.P. was among a group of 15 students whose parents had appealed the transfer based on similar reasons; none of these students were granted an exception to remain at Washington for the 2020-21 school year. The Board filed a motion for summary decision, which was opposed by petitioner without any supporting affidavits.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; a school board has discretionary power to determine which school students will attend within its district, so long as the decision is not contrary to law; the Board presented ample evidence supporting its reasons for the establishment of new attendance areas to reduce overcrowding and to populate a new elementary school; petitioner did not challenge the legitimacy of the Board's rationale for adopting new District policies, but rather asserted that an exception should be made for J.P., above all other transferred students, because of A.P.'s claimed inconveniences and her unsupported assertion that J.P. has regressed during his time at Jefferson, compared to the progress he had made at Washington. The ALJ concluded that the Board was not arbitrary, capricious, or unreasonable when it sought to reduce overcrowding by creating new attendance areas, which resulted in J.P.'s transfer to Jefferson Elementary School, located one block from his home. Accordingly, summary decision was granted in favor of the Board, and the petition was dismissed.

Upon review of the record, the Commissioner concurred with the ALJ's findings and conclusion. The Initial Decision was adopted as the final decision in this matter, for the reasons well expressed therein, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

59-21

OAL Dkt. No. EDU 08417-20
Agency Dkt. No. 174-8/20

New Jersey Commissioner of Education

Decision

A.P., on behalf of minor child, J.P.,

Petitioner,

v.

Board of Education of the Borough of North Arlington, Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Petitioner challenges the Board's decision to reassign J.P. to Jefferson Elementary School when he had previously attended Washington Elementary School. The Administrative Law Judge (ALJ) found that the Board was not arbitrary, capricious, or unreasonable when it sought to reduce overcrowding by creating new attendance areas based on student addresses, which resulted in the transfer of J.P. to Jefferson Elementary School, located one block from his home.

Upon review, the Commissioner agrees with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in establishing new attendance areas and declining to make an exception for petitioner.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 15, 2021
Date of Mailing: March 16, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

60-21

60-21SEC

SEC Dkt. No. T01-20 (https://www.state.nj.us/education/legal/ethics/training/2020/T01-20.pdf)
Agency Dkt. No. 9-1/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Maria Maldonado,
Board of Trustees of the Camden's Promise
Charter School, Camden County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c).

The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completes the required training before the Commissioner issues her final decision, the SEC recommends that respondent be suspended for 30 days. The Commission advises that respondent completed training after the issuance of its January 26, 2021 decision. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon board members by law.

Accordingly, respondent is hereby suspended for 30 days as a school official found to have violated the School Ethics Act, effective as of the date of this decision.

IT IS SO ORDERED.*

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 15, 2021
Date of Mailing: March 19, 2021

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T01-20
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Maria Maldonado,
Camden's Promise Charter School, Camden County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on December 22, 2020, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC served on December 22, 2020, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Camden, County of Camden. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete Governance 4 training program by June 30, 2020.

On July 1, 2020, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2020, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, the Camden County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in November 2020, the Commission's staff notified the County that Respondent was identified as a school official who failed to complete training by June 30, 2020. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated December 10, 2020, via electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance.[2] This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was served on Respondent.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2020 and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2020, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on January 26, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to ***six (6)*** charter school trustees throughout the State about the

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: January 26, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T01-20

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Maria Maldonado (Respondent) is a charter school trustee of Camden's Promise Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete Governance 4 training program by June 30, 2020; and

Whereas, at its meeting on December 22, 2020, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2020, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2020, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, at its meeting on January 26, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its meeting on January 26, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on January 26, 2021.

Kathryn A. Whalen, Director

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2020, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020 to the NJSEC.

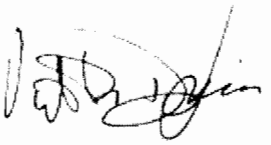
4. Prior to preparing the July 1, 2020 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 19, 2020, June 29, 2020 and July 30, 2020.

5. On June 17, 2020, Maria Maldonado was registered to take Governance 4 training and an email with the link was sent to her registered email address. An additional email was sent to all charter school trustees about mandated training on June 19, 2020.

6. An additional notice was sent to the Camden Promise Charter School Business Administrator on June 19, 2020, June 29, 2020 and July 30, 2020, advising that Maria Maldonado had not completed the Governance 4 training. All business administrators were called the week of July 29, 2020.

7. On June 19, 2020, June 29, 2020, July 23, 2020 and July 30, 2020, NJSBA communicated through email with Maria Maldonado with the link and instructions for completing Governance 4.

8. Maria Maldonado did not complete Governance 4 training.



January 20, 2021

61-21

61-21SEC

SEC Dkt. No. T02-20 (https://www.state.nj.us/education/legal/ethics/training/2020/T02-20.pdf)
Agency Dkt. No. 10-1/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Donna Siminiski,
Board of Trustees of Environment
Community Opportunity Charter School,
Camden County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c).

The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completes the required training before the Commissioner issues her final decision, the SEC recommends that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon board members by law.

Accordingly, respondent is hereby removed as a school official found to have violated the School Ethics Act, effective as of the date of this decision.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 15, 2021
Date of Mailing: March 19,2021

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T02-20
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Donna Siminiski,
Environment Community Opportunity Charter School, Camden County

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I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on December 22, 2020, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC served on December 22, 2020, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Camden, County of Camden. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete Governance 2 training program by June 30, 2020.

On July 1, 2020, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2020, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, the Camden County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in November 2020, the Commission's staff notified the County that Respondent was identified as a school official who failed to complete training by June 30, 2020. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated December 10, 2020, via electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance.[2] This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was served on Respondent.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2020 and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2020, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on January 26, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to ***six (6)*** charter school trustees throughout the State about the

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: January 26, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T02-20

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Donna Siminiski (Respondent) is a charter school trustee of Environment Community Opportunity Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete Governance 2 training program by June 30, 2020; and

Whereas, at its meeting on December 22, 2020, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2020, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2020, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, at its meeting on January 26, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its meeting on January 26, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on January 26, 2021.

Kathryn A. Whalen, Director

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2020, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020 to the NJSEC.

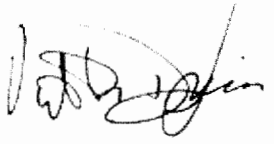
4. Prior to preparing the July 1, 2020 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on August 21, 2019, September 4, 2019, September 12, 2019, September 18, 2019, September 20, 2019, September 26, 2019, October 3, 2019 and October 10, 2019.

5. On June 18, 2020, Donna Siminiski was registered to take Governance 2 training and an email with the link was sent to her registered email address. An additional email was sent to all board members about mandated training on June 19, 2020.

6. An additional notice was sent to the Environment Community Opportunity Charter School Business Administrator on December 13, 2019, December 20, 2019, December 27, 2019, January 17, 2020, January 24, 2020, February 18, 2020 and February 26, 2020, advising that Donna Siminiski had not completed the Governance 2 training. All business administrators were called the week of July 29, 2020.

7. On July 3, 2019, December 11, 2019, December 23, 2019, January 3, 2020, February 18, 2020 and February 26, 2020, NJSBA communicated through email with Donna Siminiski with the link and instructions for completing Governance 2.

8. Donna Siminiski did not complete the Governance 2 training.



January 20, 2021

62-21

62-21SEC

SEC Dkt. No. T03-20 (https://www.state.nj.us/education/legal/ethics/training/2020/T03-20.pdf)
Agency Dkt. No. 11-1/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Emerson Crooks,
Board of Trustees of Environment
East Orange Community Charter School,
Essex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c).

The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completes the required training before the Commissioner issues her final decision, the SEC recommends that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon board members by law.

Accordingly, respondent is hereby removed as a school official found to have violated the School Ethics Act, effective as of the date of this decision.

IT IS SO ORDERED.*

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 15, 2021
Date of Mailing: March 19, 2021

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T03-20
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Emerson Crooks,
East Orange Community Charter School, Essex County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on December 22, 2020, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC served on December 22, 2020, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of East Orange, County of Essex. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of his position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete Governance 1 training program by June 30, 2020.

On July 1, 2020, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2020, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, the Essex County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in November 2020, the Commission's staff notified the County that Respondent was identified as a school official who failed to complete training by June 30, 2020. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated December 10, 2020, via electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance.[2] This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was served on Respondent.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2020, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2020, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on January 26, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to ***six (6)*** charter school trustees throughout the State about the

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: January 26, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T03-20

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Emerson Crooks (Respondent) is a charter school trustee of East Orange Community Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete Governance 1 training program by June 30, 2020; and

Whereas, at its meeting on December 22, 2020, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2020, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2020, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, at its meeting on January 26, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

Whereas, at its meeting on January 26, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on January 26, 2021.

Kathryn A. Whalen

Kathryn A. Whalen, Director

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2020, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020 to the NJSEC.

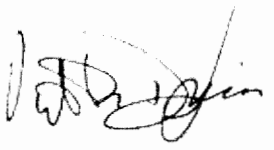
4. Prior to preparing the July 1, 2020 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on August 21, 2019, September 4, 2019, September 12, 2019, September 18, 2019, September 20, 2019, September 26, 2019, October 3, 2019 and October 10, 2019.

5. On June 18, 2020, Emerson Crooks was registered to take Governance 1 training and an email with the link was sent to her registered email address. An additional email was sent to all charter school trustees about mandated training on June 19, 2020.

6. An additional notice was sent to the East Orange Community Center Charter Business Administrator on December 13, 2019, December 20, 2019, December 27, 2019, January 17, 2020, January 24, 2020, February 18, 2020 and February 26, 2020, advising that Emerson Crooks had not completed the Governance 1 training. All business administrators were called the week of July 29, 2020.

7. On December 11, 2019, December 23, 2019, January 3, 2020, February 18, 2020 and February 26, 2020, NJSBA communicated through email with Emerson Crooks with the link and instructions for completing Governance 1.

8. Emerson Crooks did not complete Governance 1 training.



January 20, 2021

63-21SEC

SEC Dkt. No. T05-20 (https://www.state.nj.us/education/legal/ethics/training/2020/T05-20.pdf)
Agency Dkt. No. 13-1/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Lindi Ashton,
Board of Trustees of the Achievers Early
College Prep Charter School,
Mercer County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c).

The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completes the required training before the Commissioner issues her final decision, the SEC recommends that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon board members by law.

Accordingly, respondent is hereby removed as a school official found to have violated the School Ethics Act, effective as of the date of this decision.

IT IS SO ORDERED.*

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 15, 2021
Date of Mailing: March 19, 2021

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T05-20
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Lindi Ashton,
Achievers Early College Prep Charter School, Mercer County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on December 22, 2020, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC served on December 22, 2020, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Trenton, County of Mercer. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete Governance 2 training program by June 30, 2020.

On July 1, 2020, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2020, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, the Mercer County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in November 2020, the Commission's staff notified the County that Respondent was identified as a school official who failed to complete training by June 30, 2020. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated December 10, 2020, via electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance.[2] This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was served on Respondent.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2020 and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2020, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on January 26, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to ***six (6)*** charter school trustees throughout the State about the

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: January 26, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T05-20

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Lindi Ashton (Respondent) is a charter school trustee of Achievers Early College Prep Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete Governance 2 training program by June 30, 2020; and

Whereas, at its meeting on December 22, 2020, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2020, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2020, and also failed to complete training; and

Whereas, at its meeting on January 26, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its meeting on January 26, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on January 26, 2021.

Kathryn A. Whalen, Director

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of board of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2020, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020 to the NJSEC.

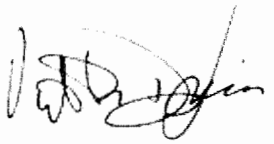
4. Prior to preparing the July 1, 2020 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on August 21, 2019, September 4, 2019, September 12, 2019, September 18, 2019, September 20, 2019, September 26, 2019, October 3, 2019 and October 10, 2019.

5. On December 9, 2019, Lindi Ashton was registered to take Governance 2 training and an email with the link was sent to her registered email address. An additional email was sent to all charter school trustees about mandated training on June 19, 2020.

6. An additional notice was sent to the Achievers Early College Prep Charter School Business Administrator on December 13, 2019, December 20, 2019, December 27, 2019, January 17, 2020, January 24, 2020, February 18, 2020 and February 26, 2020, advising that Lindi Ashton had not completed the Governance 2 training. All business administrators were called the week of July 29, 2020.

7. On December 11, 2019, December 23, 2019, January 3, 2020, February 18, 2020 and February 26, 2020, NJSBA communicated through email with Lindi Ashton with the link and instructions for completing Governance 2.

8. Lindi Ashton did not complete the Governance 2 training.



January 20, 2021

64-21

OAL Dkt. No. EDU 14554-19
Agency Dkt. No. 228-9/19

New Jersey Commissioner of Education

Final Decision

Robert Misyak,

Petitioner,

v.

Board of Education of the Sussex Wantage Regional School District, Sussex County

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 17, 2021
Date of Mailing: March 19, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 14554-19
AGENCY DKT. NO. 228-9/19

ROBERT MISYAK,
Petitioner,
v.
BOARD OF EDUCATION OF THE SUSSEX WANTAGE REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,
Respondents.

Keith Waldman, Esq., for petitioner (Selikoff & Cohen, attorneys)

Brent R. Pohlman, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: December 2, 2020 Decided: February 4, 2021

BEFORE **ANDREW M. BARON**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on October 10, 2019, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Resolution setting forth the terms of their agreement, which is attached and fully incorporated herein.

Having reviewed the record and the Resolution setting forth the terms of the parties' agreement, I **FIND**:

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

February 4, 2021
DATE

ANDREW. BARON, ALJ

Date Received at Agency: February 4, 2021

Date Mailed to Parties: February 4, 2021

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A Professional Corporation

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≥Member of NJ, PA & DC Bar
~Member of NY, NJ & DC Bar

Please reply to New Jersey

December 2, 2020

VIA EMAIL: Andrew.Baron@oal.nj.gov
VIA EMAIL: Maria.Montaner@oal.nj.gov
Honorable Andrew M. Baron, ALJ
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

RE: **MISYAK, ROBERT VS. SUSSEX-WANTAGE BOE**
Our File No. : 88127 BRP
Docket No. : EDU 14554-2019N/REF NO.: 228-9/19

Dear Judge Baron:

Enclosed please find the fully executed settlement agreement for the above matter. We request that Your Honor confirm and approve the settlement. Thank you for your assistance in bringing this matter to a resolution.

Respectfully submitted,

METHFESSEL & WERBEL, ESQS.

Brent R. Pohlman
pohlman@methwerb.com
Ext. 182

BRP:aem

cc: **VIA EMAIL: KWaldman@SelikoffCohen.com**
VIA EMAIL: mjoyce@SelikoffCohen.com
Keith Waldman, Esq.
Selikoff & Cohen, P.A.
700 East Gate Drive, Suite 502
Mount Laurel, New Jersey 08054

RELEASE

This Release, dated November 11, 2020, is given

BY the Releasor, Robert Misyak RM

referred hereafter to as "I",

TO Releasees, Sussex-Wantage Regional School District Board of Education

referred to as "You".

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. **Release**. I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I agree to pay from the settlement proceeds an amount sufficient to discharge any and all liens and monetary obligations including, but not limited to medical, wage, worker's compensation, health insurance, Medicare, welfare, child support or other benefits paid by anyone on my behalf, together with such additional sums as may accrue thereon. **Before you make disbursement to me, I will provide to you verification that I am not currently subject to any Medicare lien and a Charles Jones search demonstrating that I am not subject to a child support judgment.** I further acknowledge that I have specifically discussed this provision of this Release with my attorneys. I specifically release the following claims: **Any and all claims for damages, injuries, medical bills, lost wages or losses of any kind and future expenses associated with the Verified Petition of Appeal filed under docket number: EDU 14554-2019N; Agency Reference Number 228-9/19.** This Release specifically excludes: (a) claims, if any, arising under the New Jersey Workers' Compensation Act which are unrelated to the Action and which may arise after execution of this Agreement; (b) claims that I cannot release or waive by law; and (c) claims, if any, arising from the breach of this Agreement. I certify that I am unaware of a factual basis for any such claims at this time.

2. **Payment**. I have been paid a total of One Thousand Three Hundred and Eighty-Seven Dollars and Sixty-Eight Cents ($1,387.68), in full payment for making this Release. I agree that I will not seek anything further including any other payment from you regarding this matter.

3. **Promise to satisfy all liens out of the Payment**. I agree to satisfy all claims and/or liens, past, current and/or future arising out of this settlement or asserted against the proceeds of this settlement.

4. **Who is Bound**. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

5. **Signatures**. I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witness or Attested by:

Adrian Bregintzer ..... (Seal)

CONSTANCE M. FETTERMAN
Notary Public, State of New Jersey
My Commission Expires
November 04, 2024

Witness or Attested by:

Constance M Fetterman ..... (Seal)

STATE OF NEW JERSEY, COUNTY OF : SS.:

I CERTIFY that on 12th , 2020, November

Robert Misyak personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as his or her act and deed.

Prepared by: **(Print signer's name below signature)**

Constance M Fetterman

(Print name and title below signature)

CONSTANCE M. FETTERMAN
Notary Public, State of New Jersey
My Commission Expires
November 04, 2024

Sworn to and subscribed before me
this 12 day of November
2020

65-21

New Jersey Commissioner of Education

Final Decision

D.D., on behalf of minor child, A.B.,

Petitioner,

v.

Board of Education of the Town of West New York, Hudson County,

Respondent.

Synopsis

Petitioner contended that her son was unfairly suspended from school during the 2019-2020 school year and sought his reinstatement. The respondent Board replied that its actions were reasonable; compliant with applicable law and regulation; and that in any event, the suspension was lifted during the 2019-2020 school year, rendering petitioner's claims moot.

The ALJ found, *inter alia*, that: petitioner confirmed in January 2021 that the suspension at issue had been lifted, and A.B. had been returned to school remotely due to Covid-19; despite the fact that petitioner agreed to withdraw the instant petition, she failed to do so; the Board thereafter filed a motion to for summary decision. The ALJ concluded that, as the only relief petitioner sought in her petition was the lifting of the suspension, this matter is now moot, and petitioner's appeal must be dismissed.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed as moot.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

65-21

OAL Dkt. No. EDU 05468-20
Agency Dkt. No. 101-5/20

New Jersey Commissioner of Education

Final Decision

D.D., on behalf of minor child, A.B.,

Petitioner,

v.

Board of Education of the Town of West New York, Hudson County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge's (ALJ) conclusion that this matter is moot. Petitioner has already received the relief sought by the petition, as A.B.'s suspension has been lifted and he has returned to class as a classified student.[1] Additionally, petitioner indicated to the ALJ that she intended to withdraw this matter but failed to submit the withdrawal in writing. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 17, 2021
Date of Mailing: March 21, 2021

[1] The district has shifted to remote learning due to the COVID-19 pandemic. As such, to the extent that A.B. has not returned to in-person learning, it is solely due to the pandemic and unrelated to any discipline.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 05468-20
AGENCY DKT. NO. 101-5/20

D.D. ON BEHALF OF A.B.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,
Respondent.

D.D. on behalf of **A.B.,** pro se

David I. Solomon, Esq., for respondent (Florio, Perrucci, Steinhardt, Cappelli Tipton and Taylor, attorneys)

Record Closed: February 1, 2021 Decided: February 4, 2021

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner contends that her son was unfairly suspended from school during the 2019-2020 school year and seeks his reinstatement. The West New York Board of Education ("the Board") replies that its actions were always reasonable; compliant with

applicable law and regulation; and that in any event, the suspension was lifted during the 2019-2020 school year, rendering petitioner's claims moot.

PROCEDURAL HISTORY

A pro se petition of appeal was filed with the Commissioner of Education by D.D. on April 16, 2020. An answer was filed on behalf of the Board, and the matter was transmitted to the Office of Administrative Law ("OAL") as a contested case on June 8, 2020. The case was initially assigned to Judge Andrew Baron on July 17, 2020.[1] Judge Baron scheduled a telephonic prehearing conference with the parties, but the petitioner failed to appear. Before a follow-up attempt to confer with the parties took place, the matter was reassigned to me on December 15, 2020.

I conferred with the parties on January 6, 2021, at which time D.D. confirmed that the suspension at issue had been lifted, and that her son had been returned to school, albeit remotely due to COVID-19. She moreover confirmed that, insofar as the only relief she sought was his reinstatement, there was no further relief that I could offer her in this forum. I suggested that she withdraw her petition of appeal and she agreed. Thereafter, my assistant contacted petitioner two times to inquire about the withdrawal; D.D. twice indicated it would be forthcoming. D.D. has not forwarded a letter of withdrawal to date.

On January 12, 2021, I directed the parties to address in writing, before January 26, 2021, the question of whether the claims in the petition are moot. I received a Motion for Summary Decision, letter memorandum and an accompanying certification of Allan Roth, Esq., from counsel for the Board on January 26, 2021. I afforded petitioner several more days to file her submission. But hearing nothing from her, I closed the record on February 1, 2021.[2]

FINDINGS OF FACT

[1] The slight delay in assigning the case was occasioned by the COVID-19 pandemic.

[2] The factual background set forth in the Roth certification is uncontested.

The salient facts are not in dispute, and I **FIND**:

A.B. was an eleventh-grade student during the 2019-2020 school year and attended Memorial High School. After a disciplinary incident in January 2020, A.B. was placed on a long-term suspension. A hearing was conducted before the Board on February 12, 2020. Petitioner did not attend. Via letter dated February 21, 2020, she was advised that the Board had upheld A.B.'s suspension through the end of the school year and that he would be reinstated in September 2020. He was placed on homebound instruction. Thereafter, on March 13, 2020, and with his mother's consent, A.B. was classified as eligible for Special Education services; provided with an Individualized Education Program (IEP); and his suspension was lifted.

But by March 16, 2020, classes had shifted to remote instruction for all West New York students, A.B. included.[3] Petitioner expresses concern in her petition that her son was unable to participate in baseball during 2020, a sport in which he excelled. Sadly, all extra-curricular activities, including baseball, were suspended in the Spring of 2020 in West New York due to COVID. The COVID crisis continues to date, and West New York students continue to receive remote instruction, including A.B., who is now a senior and on track to graduate provided he completes his coursework and achieves the necessary grades.

I have carefully reviewed the petition of appeal, which in addition to alleging that A.B. was unfairly disciplined, asserts that the Board, through its administration, was responsible for a break-in and trespass at her home which took place after Board representatives allegedly had complained about her to the West New York police; and that school personnel gave false information to the West New York Housing Authority with the intent to have her evicted. But the only relief sought in the petition is that A.B. "be allowed to return to school."

[3] On or about March 9, 2020, Governor Murphy, via Executive Order 103, declared a public health emergency due to the COVID-19 pandemic.

CONCLUSIONS OF LAW

N.J.A.C. 1:1-12.5(b) provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'Fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 252. I **CONCLUDE** that this matter is ripe for summary decision. The facts alleged by the Board are uncontested and its motion is unopposed. The Board is entitled to judgment as a matter of law.

Petitioner has already received the relief sought by her petition. A.B.'s suspension has been lifted, and he has been returned to classes as a classified student. Petitioner

has at no time suggested otherwise. While A.B. is engaged in remote learning, this is due only to the pandemic, and not related to the controverted discipline. Accordingly, the claims petitioner raises are moot and should be dismissed.

An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For reasons of judicial economy and restraint, it is appropriate to refrain from decision-making when an issue presented is hypothetical; judgement cannot grant effective relief; or the parties do not have a concrete adversity of interest. Anderson v. Sills, 143 N.J. Super., 432, 437 (Ch. Div. 1976). See also: S.J. v Mountain Lakes Bd. of Educ., EDU 07081-03, Initial Decision (October 7, 2003), aff'd Comm'r (November 17, 2003), aff'd., St. Bd. (February 3, 2004),<http://lawlibrary.rutgers.edu/oal/search.html>.

There is no relief which I can afford this petitioner. An order lifting A.B.'s suspension would at this juncture be purely academic.[4] It is not my role, nor that of the Commissioner, to function in the abstract or to enter rulings that are advisory.[5] See: N.J. Civil Service Ass'n v. State of New Jersey, 88 N.J. 605,611 (1982); Crescent Park Tenants Assoc. v. Realty Eq. Corp. of New York, 58 N.J. 98, 107 (1971).

ORDER

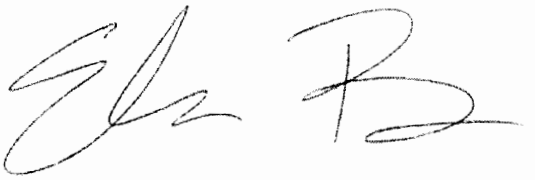
Based on the foregoing, it is **ORDERED** that the petition of appeal be **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

[4] It bears reiterating that an end to the suspension is the only relief sought by the petition.

[5] To the extent that the petitioner alleges that actions by school personnel were harassing or resulted in a break-in at her home, these claims do not arise under the school laws and accordingly, are not cognizable in this forum. N.J.S.A. 18A:6-9. It is well-established that claims concerning school staff do not necessarily arise under the school laws. See: Bd. of Educ. of East Brunswick v. Twp. Council, 48 N.J. 94, 102 (1966).

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



February 4, 2021

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: February 4, 2021

Date Mailed to Parties: February 4, 2021

sej

66-21
OAL Dkt. No. EDU 01428-20
Agency Dkt. No. 27-1/20

New Jersey Commissioner of Education

Final Decision

F.P., on behalf of minor child, M.P.,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

The Commissioner has reviewed the record of this matter and the Initial Decision of the Office of Administrative Law (OAL).[1] The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that summary decision is appropriate, and that petitioner's claims should be dismissed because they were addressed by a settlement agreement between the parties prior to the filing of the petition of appeal.

Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 18, 2021
Date of Mailing: March 19, 2021

[1] The Commissioner notes that the Initial Decision indicates that the petition of appeal was filed with the Office of Special Education Policy and Procedure. The petition was actually filed with the Office of Controversies and Disputes.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISON
OAL DKT. NO. EDU 01428-20
AGENCY DKT. NO. 27-1/20

F.P. O/B/O MINOR CHILD, M.P.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

F.P., petitioner, pro se

Afshan Ajimari Giner, Esq., and **Jaclyn S. D'Arminio,** Esq., for respondent (Florio, Perrucci, Steinhardt & Cappelli, LLC, attorneys)

Record Closed: June 4, 2020 Decided: February 1, 2021

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

Petitioner, F.P., on behalf of M.P. ("student"), alleges that on November 27, 2019, the Board of Education of the City of Newark, ("the Board"), wrongfully suspended the student from attending the McKinley Elementary School ("McKinley"). F.P. alleges that the Board violated F.P. and the student's due process rights in failing to notify F.P. of the

student's suspension and failing to provide him with a hearing before the Board regarding the same. F.P. seeks relief to reinstate the student at the School.

PROCEDURAL HISTORY

On January 29, 2020, F.P. filed a petition of appeal with the Office of Special Education Policy and Procedure (OSEPP), seeking emergent relief pursuant to N.J.A.C. 6A-31.6, to overturn the student's suspension and to have him reinstated in the school. The matter was transferred to the Office of Administrative Law (OAL) and filed at the OAL on January 31, 2020, as an emergent and contested matter.

On February 12, 2020, the parties appeared before me and on February 13, 2020, I issued an Order denying the emergent relief sought. On March 2, 2020, the Commissioner of Education entered an Order on Emergent Relief concurring with my Order of February 13, 2020, denying emergent relief and ordering that the matter continue at the OAL on the issues raised in the petition of appeal regarding suspension of the student. Therefore, I retained F.P.'s petition of appeal for a disposition of the merits of his claim. A hearing was scheduled for May 20, 2020.

On or about April 21, 2020, the Board filed the within motion for summary decision. M.P. did not file opposition to the same. On June 4, 2020, oral argument was heard telephonically. M.P. did not call in to appear for oral argument, and the record closed. [1]

FACTUAL SUMMARY

At the time M.P. filed the underlying petition ("Second Petition") and emergent relief ("Second Emergent") in January 2020, M.P. was an 11-year-old student, currently in the 6th grade. He was transferred to McKinley at the beginning of the 2018-2019 school year. Since entering McKinley, the student has had several incidents that resulted in out-of-

[1] Pursuant to Executive Order No. 127, in any contested case, any pending deadline for filing of decision by an Administrative Law Judge at the OAL pursuant to N.J.S.A. 52:14B-10(c); and any pending deadline for adopting, rejecting or modifying are commended report and decision by the sending Agency, shall be extended by the number of days of the Public Health Emergency declared in Executive Order No. 103 (2020) plus an additional 90 days.

school suspensions of varying lengths. The Board alleges that multiple efforts had been made to evaluate the student by the Child Study Team (CST) to determine an appropriate program and that F.P. refused to consent to any evaluations.

In order to fully understand the facts of this matter, a discussion of a prior emergent application made by F.P. concerning identical allegations contained in the Second Petition and Second Emergent will follow.

M.P. alleges that after an incident that occurred on November 25, 2019, the Board suspended the student four (4) days). Thereafter, on or about December 2019, F.P. filed an emergent relief application, bearing OAL Docket No. EDU-17349-19, (First Emergent) and petition of appeal (First Petition) with the Commissioner of Education. Simultaneous to M.P.'s filing, the Board filed a due process petition with a request for emergent relief to compel F.P., to consent to evaluations of M.P. by the CST. On or about December 17, 2019, the First Emergent and First Petition were settled pursuant to the terms of a Settlement Agreement (Settlement), and the Board then withdrew its due process petition.

F.P. then filed the Second Emergent application and Second Petition, in January 20, 2020, containing the same allegations that he made in the First Petition and the First Emergent application. In the Second Petition F.P. alleged that the student was "expelled" from school and he sought the student's reinstatement to the school district. F.P. also alleged that he was not aware of the proceedings related to the First Petition and that his former attorney withdrew the First Petition without his knowledge

On February 13, 2020, I issued an Order denying the Second Emergent, and found that F.P. and the Board had entered into a Settlement Agreement on December 17, 2019, allowing for home instruction of the student and that F.P. would allow the CST to conduct certain evaluations of the student for the Board to determine what resources the student might require. The Order of February 13, 20220, did not dispose of the Second Petition, and therefore the allegations concerning the Board's suspension of the student contained in the Second Petition formed the basis for the underlying petition.

Before a hearing could be had in this matter, on or about March 2, 2020, F.P. represented to the Board that the student had transferred schools, but he did not provide the Board with the name of the new school. On March 4, 2020, counsel for the Board sent F.P. a letter requesting that he provide proof of the student's attendance in another school (Ajmiri Giner Cert. ¶ 13, Exhibit G). Petitioner was further asked to verify that he was complying with the State's compulsory education laws (Ajmiri Giner Cert. ¶ 14, Exhibit G). F.P. did not respond to the Board's inquiry; he did, however, respond to an email from the home instruction teacher relating to the student's home instruction (Ajmiri Giner Cert. ¶ 15, Exhibit H). To date, F.P. has not responded to counsel's or the District's queries regarding what school district M.P. was attending. F.P. has not submitted any documents or additional information in support of his allegations and request for relief in the Second Petition.

The Board then filed the within motion for summary decision to dismiss the Second Petition. The Board argues in its motion that F.P.'s present petition of appeal should be dismissed as the parties are bound by the terms of the Settlement Agreement resolving the issues reiterated in the First Petition, and thus, F.P. has no case or controversy to be decided before the OAL concerning the Second Petition.

DISCUSSION

A Motion for Summary Decision shall be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(a). If "a Motion for Summary Decision is made and supported, an adverse party in order to prevail, must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. A Motion for Summary Decision before the OAL must be analyzed, "in accordance with the principles set forth by the New Jersey Supreme Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995)." Nat'l Transfer v. New Jersey Dep't of Envtl. Prot., 347 N.J. Super. 401, 408 (App. Div. 2002). A determination that there is a genuine issue of material fact requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light

most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. Brill, 142 N.J. at 540-41.

In order to defeat the motion, the opposing party must establish the existence of genuine disputes of material fact relevant to the case. The facts upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful, frivolous, gauzy or merely suspicious.'" Brill. At 529 (citations omitted).

This matter is ripe for Summary Decision because the facts show that "there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(a).

I **FIND** that F.P. and the Board are parties to a duly executed Settlement Agreement, dated December 17, 2019, entered into between F.P. and the Board resolving all the issues raised in the First Petition, which issues are identical to the allegations raised in the Second Petition of appeal filed in January 2020. F.P. was represented by counsel, Bradley Flynn, Esq., at the time he entered into the Settlement Agreement with the Board. I **FIND** that the Board's moving papers also establish that the issues raised by F.P. in the Second Petition are identical to those raised in the First Petition and have been resolved by way of the Settlement Agreement. Finally, I **FIND** that the student is no longer enrolled in the school district since March 2020.

It is well settled, under New Jersey law, that an agreement to settle a lawsuit forms a contract between parties. Nolan v. Lee Ho, 120 N.J. 465, 472 (1990). Public policy encourages settlements. Jannarone v. W.T. Co., 65 N.J. Super. 472, 476 (App. Div.), *certif. denied* sub nom., Jannarone v. Calamoneri, 35 N.J. 61 (1961). Such public policy favoring settlements pertains to issues addressing sometimes difficult personal issues, including those involving the welfare of children. *See e.g.* Giangeruso v. Giangeruso, 310 N.J. Super. 476 (Ch. 1997); D.R. by M.R. v. East Brunswick Bd. of Educ., 838 F. Supp. 184, 189-90 (D.N.J. 1993).

Contractual interpretation is a legal matter ordinarily suitable for resolution on summary judgment. Celanese Ltd. v. Essex Cnty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009). A settlement agreement is governed by basic contract principles. J.B. v. W.B., 215 N.J. 305, 326 (2013)(*citing*, Pacifico v. Pacifico, 190 N.J. 258, 265 (2007)). The touchstone for interpretation is the parties' shared intent in reaching the agreement. Id. at 266. So long as that intent is evident from the contract's clear, unambiguous terms, the agreement will be enforced as written. Karl's Sales & Serv., Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487, 493 (App. Div.), *certif. denied*, 127 N.J. 548 (1991); Deerhurst Estates v. Meadow Homes, Inc., 64 N.J. Super. 134, 152 (App. Div. 1960), *certif. denied,* 34 N.J. 66 (1961). When a contract is plain and definite, as it is in this case, it is not the function of the court to rewrite or revise the contract but rather to enforce it. Pacifico, 190 N.J. at 266; Air Master Sales Co. v. Northbridge Park Co-Op, Inc., 748 F. Supp. 1110, 1114 (D. N.J. 1990).

I CONCLUDE that the Settlement Agreement entered into by M.P. and the Board in the First Petition is applicable to the allegations contained in the Second Petition, as the terms of the settlement resolved all claims and issues raised in the First Petition, which are again raised in the Second Petition. The Settlement Agreement is straightforward: In consideration of the Board reinstating the student to the school district, F.P. agreed to make the student available for the Board's CST to evaluate him so that the Board could determine whether M.P. should receive additional educational and other services when he returned to the school district. In addition, F.P. also agreed to ten (10) hours of home instruction for the student during the pendency of the CST evaluation and while the student was not in the school. I **CONCLUDE** that the filing of the Second Petition is F.P.'s attempt to undue the plain and unambiguous terms of the Settlement Agreement, as F.P.'s continued allegations to overturn the Board's suspension and to have M.P. reinstated in the school district were resolved in the Settlement Agreement.

Courts have refused to alter or vacate final settlements absent compelling circumstances because the settlement of litigation ranks so high in our public policy. Jannarone v. W.T. Co., 65 N.J. Super. 472 (App. Div.), *certif. denied,* 35 N.J. 61 (1961). Furthermore, settlement agreements will be honored absent a demonstration of unconscionability, fraud, or overreaching in negotiations of the settlement or other

compelling circumstances. Miller v. Miller, 160 N.J. 408, 419 (1999); Pascarella v. Bruck, 190 N.J. Super. 118, 125 (App. Div. 1983) (*citing*, Honeywell v. Bubb, 130 N.J. Super. 130, 136 (App. Div. 1974)). Before vacating a settlement agreement, our courts require "clear and convincing proof" that the agreement should be vacated. DeCaro v. DeCaro, 13 N.J. 36 (1953) I **CONCLUDE** that F.P. has failed to present any facts that suggests the existence of any such proofs. To the contrary, I **CONCLUDE** it is clear that F.P. knowingly and voluntarily entered into a binding Settlement Agreement of the First Petition, which fully satisfied the issues raised therein, that are again alleged in the Second Petition.

Finally, notwithstanding my conclusion that the Settlement Agreement is dispositive of the claims raised in the Second Petition, I **CONCLUDE** that F.P.'s actions in removing the student from the school district prevents the granting of his requested relief to lift the suspension and reinstate the student in the school district. In effect, by withdrawing the student from the school district, F.P. has abandoned his petition, and therefore, I **CONCLUDE** that the relief sought by F.P., cannot be granted and the Second Petition should be denied and therefor the Board's motion for summary decision **GRANTED**.

ORDER

IT IS hereby **ORDERED** that the Board's motion for summary decision is **GRANTED** and F.P.'s petition is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 1, 2021
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: February 1, 2021

Date E-Mailed to Parties: February 1, 2021

lr

67-21

OAL Dkt. No. EDU 08423-20
Agency Dkt. No. 172-8/20

New Jersey Commissioner of Education

Final Decision

N.N. and J.N., on behalf of minor child, M.N.,

Petitioners,

v.

Board of Education of the Westwood Regional School District, Bergen County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 22, 2021
Date of Mailing: March 23, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 08423-20
AGENCY DKT. NO. 172-8/20

N.N. and J.N. o/b/o minor child, M.N.,
Petitioner,
v.
WESTWOOD REGIONAL SCHOOL DISTRICT. BOARD OF EDUCATION, BERGEN COUNTY,
Respondents.

N.N. and J.N. o/b/o M.N. petitioner pro se

Isabel Machado, Esq., for respondent, (Machado Law Group, attorneys)

Record Closed: January 13, 2021 Decided: January 28, 2021

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

On September 4, 2020, the matter was transmitted to the Office of Administrative Law for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement and the Board's resolution.

Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.



January 28, 2021

DATE

JUDE-ANTHONY TISCORNIA., ALJ

Date Received at Agency: 2-4-21

Date Mailed to Parties: 2-4-21

id

MACHADO
LAW GROUP

1 CLEVELAND PLACE SPRINGFIELD, NJ 07081 732.540.8276 FAX 732.540.8296 WWW.MACHADOLAWGROUP.COM

Isabel Machado, Esq.
imachado@machadolawgroup.com

January 13, 2021

Via Electronic Mail
Honorable Jude-Anthony Tiscornia
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: M.N./Westwood BOE – EDU 08423-20

Dear Judge Tiscornia,

As Your Honor is aware, this firm represents the Westwood Board of Education regarding the above referenced matter. Enclosed please find an executed Letter Agreement for this matter.

Thank you for your courtesies.

Sincerely,
Machado Law Group

Isabel Machado, Esq.

Encl.
er

cc: Dr. Raymond Gonzalez, Superintendent (Email)
Nicolino and Janel Nese, Petitioners (Email)

MACHADO LAW GROUP

1 CLEVELAND PLACE SPRINGFIELD, NJ 07081 732.540.8276 FAX 732.540.8296 WWW.MACHADOLAWGROUP.COM

Isabel Machado, Esq.
imachado@machadolawgroup.com

January 8, 2021

Via Electronic Mail
Nicolino and Janel Nese
43 Gabriel Way
Township of Washington, New Jersey 07676

RE: N.N. and J.N. o/b/o M.N. v Westwood Regional Board of Education
Letter Agreement Regarding Docket Number: EDU 8423-20

Dear Mr. and Ms. Nese:

As you are aware, I represent the Westwood Regional Board of Education ("District"). Please accept this correspondence memorializing our agreement in this matter. Please sign and return a copy to my attention.

The parents and the District agree as follows:

1. Any reference to discipline related to the HIB matter reported to the District on December 6, 2019 will be removed entirely from M.N.'s records.
2. There will be no reference in M.N.'s school records to the incident reported to the District on December 6, 2019.
3. In the event the parents authorize the District to release M.N.'s school records to a third party, those school records will not include any reference to discipline or an HIB violation relating to the incident reported to the District on December 6, 2019.
4. The parents, on behalf of M.N., hereby agree withdraw, with prejudice, the above captioned petition of appeal and further agree not to pursue any further proceeding or complaint before the Westwood Regional Board of Education, other agency, or court as it relates to the incident(s) reported to the District on December 6, 2019.
5. Petitioner shall release the District from any and all claims, rights, and liability, including but not limited to any claims or costs for attorney's fees, civil liability, or any other equitable or legal relief at all relevant times, whether known or unknown as of the date of this Agreement, as it relates to the above captioned matter, or the events surrounding same.

MACHADO LAW GROUP
1 CLEVELAND PLACE SPRINGFIELD, NJ 07081 732.540.8276 FAX 732.540.8296 WWW.MACHADOLAWGROUP.COM

6. Except as required by law, the Parties agree to keep confidential and not disclose to any third party the terms and conditions of this Agreement.
7. By entering into this agreement, neither party makes any admission of any wrongdoing.

Please do not hesitate to contact me with any questions or concerns.

Sincerely,

Isabel Machado

cc: Dr. Raymond Gonzalez, *Superintendent*

I have read this correspondence and fully understand the terms set forth herein. This accurately reflects our understanding of the agreement with the Board of Education.

Nicolino Nese, Parent — Date: 1/11/21

Janel Nese, Parent — Date: 1/11/2021

68-21

OAL Dkt. No. EDU 00614-20
Agency Dkt. No. 330-12/19

New Jersey Commissioner of Education

Final Decision

R.C. on behalf of minor child, A.C.,

Petitioner,

v.

Board of Education of the Borough of Fair Lawn, Bergen County, and Board of Education of the Borough of Hawthorne, Passaic County,

Respondents.

The record of this matter, the proposed Settlement Agreement and Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 26, 2021
Date of Mailing: March 26, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00614-20
AGENCY DKT. NO. 330-12/19

R.C. ON BEHALF OF MINOR CHILD, A.C.,
Petitioner,
v.
BOARD OF FAIR LAWN BOARD OF EDUCATION, BERGEN COUNTY AND BORO OF HAWTHORNE BOARD OF EDUCATION, PASSAIC COUNTY,
Respondents.

George Holland, Esq. for petitioner R.C. o/b/o A.C.

Paul H. Green, Esq., (Schenck, Price, Smith and King, attorneys) for respondent Fair Lawn BOE

Stephen R. Fogarty, Esq., (Fogarty and Hara, attorneys) for respondent Hawthorne BOE

Record Closed: January 28, 2021 Decided: February 4, 2021

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

On January 14, 2020, the matter was transmitted to the Office of Administrative Law for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement.

Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

February 4, 2021

Ernest M. Bongiovanni

DATE

ERNEST M. BONGIOVANNI., ALJ

Date Received at Agency: 2/9/21

Date Mailed to Parties: 2/9/21

id

Dhabliwala, Ila

From:	Paul H. Green <PHG@spsk.com>
Sent:	Thursday, January 28, 2021 1:17 PM
To:	Dhabliwala, Ila; George Holland; Stephen R. Fogarty
Cc:	Ursula Puzio
Subject:	[EXTERNAL] RE: 622727 RC and AC v. Fairlawn EDU 614-20 (Jd. Bongiovanni)
Attachments:	FAIR LAWN LT ALJ with Cardona Release (02471379).pdf; FAIR LAWN Cardona Release (02471352).pdf

Ms. Dhabliwala,

Attached please find cover letter to Judge Bongiovanni and a fully executed Release resolving the above-captioned matter.

In light of this submission, we presume there is no need to hold the conference call scheduled for this afternoon.

Thank you for your attention to this matter.

Paul Green

Schenck Price
SCHENCK PRICE SMITH & KING, LLP
Serving Our Clients and Community for Over 100 Years

Paul H. Green
Partner
Schenck, Price, Smith & King, LLP
220 Park Avenue | PO Box 991 | Florham Park, NJ 07932
T: 973-540-7305 F: 973-540-7300
Email | Bio V-card Website

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From: Dhabliwala, Ila <Ila.Dhabliwala@oal.nj.gov>
Sent: Tuesday, January 12, 2021 11:27 AM
To: George Holland <georgehollandlaw@gmail.com>; Stephen R. Fogarty <sfogarty@fogartyandhara.com>; Paul H. Green <PHG@spsk.com>
Cc: Ursula Puzio <upuzio@fogartyandhara.com>
Subject: 622727 RC and AC v. Fairlawn EDU 614-20 (Jd. Bongiovanni)
Importance: High

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Fax: 973-540-7300
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January 28, 2021

Via Email
Hon. Ernest Bongiovanni, ALJ
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

RE: ***R.C. o/b/o A.C. v. Fair Lawn Board of Education, et al***
OAL Docket No. 00614-2020N

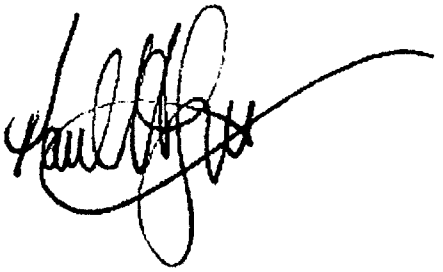
Dear Judge Bongiovani:

Enclosed for incorporation into an Initial Decision is a fully executed Release embodying the terms of the parties' settlement of the above-captioned matter, together with certified resolutions of the Fair Lawn and Hawthorne Boards of Education.

In light of this submission, we presume there is no need for the conference call scheduled for this afternoon. Please advise should you have any questions. Thank you for your courtesy and cooperation.

Very truly yours,

SCHENCK, PRICE, SMITH & KING, LLP



Paul H. Green

cc: George Holland, Esq. (*via email*)
Stephen R. Fogarty, Esq. (*via email*)

{02471379.DOCX.1 }

RELEASE

This RELEASE:

BY the Releasors: **THE FAIR LAWN BOARD OF EDUCATION**, with offices located at 37-01 Fair Lawn Ave, Fair Lawn, New Jersey 07410, in the County of Bergen; **AND THE HAWTHORNE BOARD OF EDUCATION**, with offices located at 445 Lafayette Avenue, Hawthorne, New Jersey 07506, in the County of Bergen (the "Releasors")

TO the Releasees: **RAQUEL CARDONA AND ALEJANDRO CARDONA**, located at 11-02 4th Street, Fair Lawn, New Jersey 07410, in the County of Bergen (the "Releasees").

1. **Release.** Releasors and Releasees release and give up the following claims against one another from the beginning of time up until now: Any and all claims, demands, actions and causes of action of every kind whatsoever, in any shape or form, for costs, expenses and attorney's fees arising from or out of the lawsuit, court matter entitled: **R.C., on behalf of her minor child, A.C. vs. Fair Lawn Board of Education; and Hawthorne Board of Education**, OAL Docket. No.: EDU 00614-2020N and Agency Ref. No.: 330-12/19 ("The Action").

2. **Terms.** In consideration for making this Release, Releasees shall issue a personal check, totaling $2,500.00, in 2 installments, the first in the amount of $1,250.00 by no later than January 15, 2021 and the second also in the amount of $1,250.00 by no later than February 15, 2021 to the Releasor, the Fair Lawn Board of Education, both payable to the "attorney trust account" of the Law Office of Schenck, Price, Smith & King, LLP, legal counsel for the Releasor, the Fair Lawn Board of Education. This shall constitute full payment for making this Release and, upon receiving said payment, both of the Releasors agree that they will not seek any other payment or any other form of relief from Releasees or each other in accordance with paragraph 1 of this Release. Legal counsel for the Releasor, the Fair Lawn Board of Education, will hold the aforementioned funds in trust until the Commissioner of the New Jersey Department of Education approves the Initial Decision in accordance with paragraph 4.

3. **Who is Bound.** Both of the Releasors are bound by this Release. Anyone who succeeds to their rights and responsibilities are also bound by this Release. Furthermore, this Release is also made for Releasees' benefit and all who succeed to Releasees' rights and responsibilities.

4. **Approval.** This Release is subject to approval by each of the Releasors at its next regularly scheduled board of education meeting following the execution of it by the Releasees. Within 10 days of obtaining approval of this Agreement by the respective boards of education of each of the Releasors, at the next scheduled board of education meeting(s) scheduled after the Releasees have executed this Agreement, the Administrative Law Judge assigned to The Action shall be sent a fully-executed form of this Release, along with the "board resolutions" or other written confirmations to provide proof of the approval as referenced above by the boards of education for each of the Releasors. It shall then be incorporated into an Initial Decision and Order issued by the Office of Administrative Law assigned for The Action upon approval by that Administrative Law Judge, which then must be approved by the Commissioner of the New Jersey Department of Education, and the approval shall be a precondition to the enforcement of this Release. If it is not approved by the Board or an/the Administrative Law Judge assigned as

well as the Commissioner of the New Jersey Department of Education, the Parties shall return to their original positions without prejudice.

5. **Signatures**. I understand and agree to the terms of this Release.

For the Releasor Fair Lawn Board of Education:

Date: January 20, 2021

Print name: Paul H. Green, Esq.
Board Attorney

For the Releasor Hawthorne Board of Education:

Date:

Print name: Gertrude Engle

For the Releasees:

Date:

Print name: Raquel Cardona

Date:

Print name: Alejandro Cardona

Fair Lawn Public Schools

Brooke Bartley
Business Administrator/Board Secretary

37-01 Fair Lawn Avenue
Fair Lawn, New Jersey 07410
Tel: (201)794-5500 x 7091
Fax: (201)703-4630
E-mail:bbartley@fairlawnschools.org

ADDENDUM I

Resolved, that the Fair Lawn Board of Education approves the Settlement Agreement and Release in the residency appeal filed under OAL Docket No. EDU 00614-2020N, as listed on the **attachment** for **Board Members Only,** authorizes its Attorney to execute same on behalf of the Board, and authorizes submission of the Agreement and Release to the Administrative Law Judge assigned to the controversy for incorporation into an Initial Decision.

This is to certify that the resolution listed above is a true and accurate copy of such resolution as it appeared on the December 17, 2020 Regular Monthly Meeting.

Brooke Bartley
Business Administrator/Board Secretary

EXTRACT FROM THE MINUTES OF A MEETING OF THE HAWTHORNE BOARD OF EDUCATION OF HAWTHORNE SCHOOL DISTRICT, PASSAIC COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of Hawthorne School District, in the County of Passaic, New Jersey on January 19, 2021 in a Regular Public Meeting held virtually in Hawthorne, New Jersey.

The following members of the Board of Education were present:

Ms. Goff, Mr. Clavijo, Mr. Reicher, Mr. Turco, Mr. Totaro,
Mr. Puluse, Dr. Morel, Mr. Carr

Pursuant to the recommendation of the Superintendent of Schools, the Committee on Finance and Administration recommends the following resolutions:

A-20. BE IT RESOLVED by the Hawthorne Board of Education (hereinafter referred to as the "Board") that the terms, stipulations and conditions as established in the Release between the Board and the Parents of a student (file # 010221) whose name is on file in the Superintendent's office, and which Release is located in the student's file, are hereby adopted and approved by the Board. The Board President and Business Administrator/Board Secretary are hereby authorized and directed to execute the Release, and any other documents necessary to effectuate the settlement.

F-16-19, A-20 - moved by Mr. Turco, seconded by Mr. Puluse

Ayes	**-**	**Mr. Carr, Mr. Totaro, Ms. Goff, Mr. Clavijo Mr. Reicher, Mr. Turco, Mr. Puluse, Dr. Morel**
Nays	**-**	**None**
Abstain		**None**
Absent		**None**

I, Gertrude Engle, Business Administrator/Board Secretary of Hawthorne School District, in the County of Passaic, State of New Jersey, hereby certify that the foregoing Extract from the Minutes of the Regular Meeting of the Board of Education of said district, duly called and held on January 19, 2021 has been compared by me with the original Minutes as officially recorded in my office in the Minute Book of said Hawthorne School District Board of Education this 20th day of January, 2021.

Gertrude Engle
Business Administrator/Board Secretary

69-21

69-21

IN THE MATTER OF TENURE BETWEEN

Antoinette Terlizzi

-And-

School District of the Township of Belleville, Essex County New Jersey

Agency Dkt. No. 86-4/20

Arbitrator/Mediator: Kinard Lang
Tele-Conference Dates: May 12;
June 17; July 6, 13, 17, 2020

Issues: Does the Belleville Township School District have sufficient cause to dismiss Teacher Antionette Terlizzi, for *"unbecoming conduct, incapacity and/or other just cause;* if not, what shall the remedy be?

FOR THE PARTIES:

Ari D. Schneider, Esq. - Petitioner

Ty Hyerdally, Esq.- Respondent

BACKGROUND

This matter came to Arbitration as a result of the Commissioner of Education's May 11, 2020 denial of the respondent's May 7th Motion for Dismissal of the School District's Tenure charges against Ms. Terlizzi. The Commissioner's Motion denial resulted in respondent's May 26th brief to this arbitrator in support of the Motion to dismiss the cited charges.

DISCUSSION

On May 12th the arbitrator conducted a tele-conference with the parties which resulted in their filing briefs on the Motion for Dismissal of the Tenure Charges. After review of all the evidence presented in support of the parties' briefs, this arbitrator dismissed the charges of "*Unbecoming Conduct and incapacity*", and found that the charge of *"Insubordination"* must be heard on the merits.

During a series of tele-conferences in June, July and August this arbitrator urged the parties to explore settlement options. On October 1st, in response to September inquiries regarding the status of settlement negotiations, I received a copy of the parties' *"SEPATARTION AGREEMENT/RELEASE"*.

FINDINGS

The cited Agreement was ratified by the Belleville Board of Education on August 18, 2020, and reads in pertinent part:

"3.16 BY SIGNING THIS SEPARATION AGREEMENT MS. TERLIZZI STATES THAT:

A. SHE HAS READ IT;

B. SHE UNDERSTANDS IT AND KNOWS THAT SHE IS GIVING UP IMPORTANT RIGHTS INCLUDING, BUT LIMITED TO RIGHTS UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION, THE NEW JERSEY FAMILY LEAVE ACT, THE PUBLIC EMPLOYE RELATIONS ACT, THE AGE IN DISCRIMINATION IN EMPLOYMENT ACT, THE CIVIL RIGHTS ACT OF 1964, THE AMERICANS WITH DISABILITIES ACT OF 1990, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AND ANY OTHER CONSTITUTIONAL STATUTORY OR COMMON LAW CLAIM AS MORE FULLY SET FORTH IN PARAGRAPHS 1 and 2 HEREIN ABOVE..."

The parties' Agreement is comprehensive and appears to contemplate all provisions of *N.J.A.C. 6A:3-5.6* Withdrawal, settlement, or mooting of tenure charges.

CONCLUSION

The Separation Agreement/Release is Approved.

Kinard Lang, Arbitrator/Mediator

Kinard Lang

SEPARATION AGREEMENT/RELEASE

This Separation Agreement and Release ("Separation Agreement") is made this 8/17/2020 day of August, 2020, by and between the Belleville Township Board of Education and its affiliates, present and former divisions, employees, servants, directors, officers, officials, trustees, members, agents, insurers and representatives, and all predecessors and successors (hereinafter collectively referred to as the "Board" and/or the "Released Parties") and Antoinette Terlizzi and all of her representatives, agents, affiliates, assigns, heirs and successors (hereinafter collectively referred to as Ms. Terlizzi (hereinafter, the Board and Ms. Terlizzi are collectively referred to as the "Parties").

RECITALS

WHEREAS, Ms. Terlizzi is an employee of the Board, serving as a teacher; and

WHEREAS, the Board and Ms. Terlizzi have concluded that, effective at the close of business on August 31, 2020, their employer-employee relationship will end; and

WHEREAS, the Board and Ms. Terlizzi desire to resolve amicably and in good faith all matters and issues arising out of Ms. Terlizzi's employment relationship with the Board;

NOW, THEREFORE, in consideration of the foregoing and in consideration of their respective rights and obligations set forth herein and for other good and sufficient consideration, receipt of which is hereby acknowledged, Ms. Terlizzi and the Board agree as follows:

ARTICLE I
Separation and Release

1. Separation of Employment – Ms. Terlizzi and the Board hereby agree that, effective at the close of business on August 31, 2020 ("Effective Retirement Date"), Ms. Terlizzi's employment with the Board will, in all respects, cease, due to her retirement, in good standing, as a result of an anticipated position elimination, related to the Covid-19 Pandemic.

2. Release – In return for its obligations pursuant to this Separation Agreement, Ms. Terlizzi hereby releases and discharges the Board as well as any and all of its former and current trustees, officers, employees, agents, contractors, representatives, predecessors, successors and assigns, as well as their heirs, executors and administrators, from liability on or for all claims, demands, causes of action, damages, costs, expenses, accounts, contracts, agreements, promises, compensation and all other liabilities of any kind or nature whatsoever, direct or indirect, known or unknown, which she may have had, now as or may hereafter have for any reason whatsoever on account or arising out of or in consequence of her employment relationship with the Board, other than for breach of this Agreement, including, but not limited to:

A. Any claims or actions under Title VII of the Civil Rights Act of 1964, the Age Discrimination and Employment Act, the Worker Adjustment and Retraining Notification Act, the Public Employee Relations Act the Employee Retirement Income Security Act, the Older Worker's Benefit Act, the Americans With Disabilities Act, the Family and Medical Leave Act, the National Labor Relations Act, the Fair Labor Standards Act, Section 1981-1988 of Title 42 of the United States Code, the Equal Pay Act of 1963, the Vocational Rehabilitation Act of 1973, the Occupational Safety and Health Act of 1977; the Education Laws and Regulations;

B. Any other claims or actions under the New Jersey Equal Pay Act, the New Jersey Law Against Discrimination, the New Jersey Wage-Hour and Wage-Payment Laws, the New Jersey Worker Health and Safety Act, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act;

C. Any claims arising out the terms and conditions of Mr. Terlizzi's employment with the Board, including claims arising out of Mr. Terlizzi 's separation of such employment, and/or any of the events relating directly or indirectly to or surrounding that separation;

D. Any charge, complaint, grievance, claim, legal or administrative action of any nature before any Court, tribunal and/or administrative agency to assert any claim against the Board, arising out of his employment by the Board, through the effective date of this Agreement, except as may be necessary to enforce this Agreement. Moreover, Mr. Terlizzi shall not cooperate in any way with the Belleville Education Association should the Association file or cause to be filed on his behalf any charge, complaint, grievance, claim, legal or administrative action of any nature before any Court, tribunal and/or administrative agency to assert any claim against the Board, arising out of her employment by the Board, through the effective date of this Agreement, except as may be necessary to enforce this Agreement, or if otherwise required by law

E. Any and all claims related to compensation of any kind, except as set forth in this Separation Agreement;

F. Any and all claims for damages of any kind;

G. Any and all claims arising out of the execution of this Separation Agreement, except for a claim for breach of this Agreement;

H. Any and all claims for attorney's fees, costs, disbursements or the like which they ever had, or have or hereafter can, shall or may have against each other for, upon or by reason of any act, omission, transaction or occurrence up to and including the effective date of this Separation Agreement, except for a claim of breach of this Agreement.

3. Mutual Release of Claims - all pending matters will also be withdrawn as part of this agreement (tenure charges and appeal to commissioner re: directive for mental examination).

ARTICLE II
Terms of Separation

2.1 Separation - Ms. Terlizzi shall submit an irrevocable letter of retirement, effective at the close of business on August 31, 2020, terminating any and all employment with the Board. Any Board vote to approve this Agreement is contingent upon the Board first receiving Ms. Terlizzi's irrevocable letter of retirement. The Board will approve Ms. Terlizzi's irrevocable letter of retirement by approving this agreement.

Mr. Terlizzi agrees and acknowledges that she is prohibited from seeking future employment with the Belleville Township Board of Education. Moreover, Ms. Terlizzi understands, acknowledges and agrees that she has no "recall" rights with the Board regarding and/or relating to any future employment opportunities.

2.2 Consideration - As consideration for Ms. Terlizzi's Release as set forth herein, the Board agrees to the following:

a.) Ms. Terlizzi will remain out of work on administrative leave (without pay) through the Effective Retirement Date.

b.) Within forty-five (45) days of this Agreement becoming approved by the Board, Ms. Terlizzi shall receive a W-2 payment of $26,775 to be sent as a certified check to Hyderally & Associates, P.C., 33 Plymouth Street, Suite 202, Montclair, NJ 07042..

c.) Within forty-five (45) days of this Agreement becoming approved by the Board, Ms. Terlizzi shall receive a 1099 payment of $21,000, representing one year of health benefits, to be sent as a certified check to.Hyderally & Associates, P.C., 33 Plymouth Street, Suite 202, Montclair, NJ 07042

d.) Within forty-five (45) days of this Agreement becoming approved by the Board, Ms. Terlizzi's counsel, Ty Hyderally, shall receive a 1099 payment of $60,000, constituting Mr. Hyderally's legal fees. Said payment shall be sent to Mr. Hyderally in the form of a certified check to the following address:

33 Plymouth Street
Suite 202
Montclair, New Jersey 07042

e.) Following the Effective Retirement Date, Ms. Terlizzi will no longer be entitled to receive salary and/or benefits from the Board, with the exception of those that expressly survive retirement.

f.) Following the Effective Retirement Date, Ms. Terlizzi will be reimbursed for value of all accumulated unused sick days and for salary accruing from August 25, 2020 through the August 31, 2020.

Ms. Terlizzi expressly acknowledges and represents that she will neither seek nor be entitled to any further consideration from the Board in connection with this Separation Agreement other than the consideration as detailed in this subsection, or for Breach of this Agreement.

2.3 No Future Employment – Ms. Terlizzi shall never seek and/or be entitled to future employment with the Board.

2.4 Unemployment – If Ms. Terlizzi does not procure alternative employment by August 31, 2020, the Board will cooperate fully with any inquires related to any applications made by Ms. Terlizzi for unemployment benefits. The Board shall truthfully inform the State of New Jersey that Ms. Terlizzi retired, in good standing, as a result of an anticipated position elimination resulting from the Covid-19 Pandemic.

2.5 Pension Application – The Board agrees to cooperate fully with Ms. Terlizzi's pension application.

ARTICLE III
Miscellaneous

3.1. Entire Agreement – This Separation Agreement sets forth the entire agreement between the parties with respect to the subject matter hereof and supersedes any and all prior agreements relating thereto. There are no other understandings or agreements between or among the parties with respect to the subject matter hereof, except as set forth herein, and as set forth in any other documents executed directly or in connection with this Separation Agreement. No condition or provision of this Separation Agreement may be modified, waived or revised in any way except in writing executed by all parties and referring specifically to this Separation Agreement.

3.2. No Admissions – The Parties understand, represent, and warrant that this Agreement is not an admission of wrongdoing or liability by or on the part of any Party.

The Board specifically denies any wrongful action or conduct. Similarly, Ms. Terlizzi denies any wrongdoing on her part. The Board and Ms. Terlizzi understand and agree that neither of them are to be considered a prevailing party.

3.3 Binding Effect – This Separation Agreement and all rights and duties set forth herein shall be binding upon and inure to the benefit of the parties hereto, as well as their respective successors and assigns.

3.4 Governing Law and Choice of Forum – This Separation Agreement and its interpretation and performance shall be governed by the laws of the State of New Jersey, without giving effect to its conflicts of law rules.

3.5 Captions – The captions set forth in this Separation Agreement are intended solely for the parties' convenience and ease of reference and are not intended to modify, limit, describe or affect in any way the scope, content or intent or this Separation Agreement.

3.6 Signature in Counterpart – This Separation Agreement may be executed simultaneously in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument. Delivery by facsimile or email of counterpart signatures and initials shall be as effective as delivery of the original, manually signed and initialed counterpart of this Settlement Agreement.

3.7 Authorization – The Board hereby represents and warrants that the undersigned officer of the Board is fully authorized to execute this Separation Agreement on the Board's behalf.

3.8 Acknowledgments – The parties to this Separation Agreement acknowledge and agree that they have entered into this Separation Agreement and have executed it without duress or coercion, and have done so with the opportunity to consult counsel. Each party further acknowledges and agrees that no other party has made representations, warranties, promises or agreements not set forth herein and no party relies in any way upon any representation, warranty, statement of fact or opinion, understanding, disclosure or non-disclosure not set forth herein in entering into this Separation Agreement and executing it, no party has been induced in any way, except for the consideration,

representations, warranties, statements and covenants recited herein, to enter into this Separation Agreement.

3.9 Construction and Enforcement – The terms of this Separation Agreement are the product of negotiations between the parties and shall be construed without regard to any presumption or other rule requiring construction against the party causing this Separation Agreement to be drafted.

3.10 Non-Disparagement - the Parties agree that they shall not make any disparaging remarks (verbal, written, electronic and/or otherwise) to any third party and/or via social media about and/or concerning any Party. Upon receipt of any inquiries from any potential employers, the Released Parties will only disclose the dates of Ms. Terlizzi's employment with the Board and the job title of the position held at the end of that employment.

3.11 The Parties agree and acknowledge that each of the provisions of this Agreement are reasonable and should be fully enforceable, and the Parties expressly waive any right to argue, assert or allege any claim(s) to the contrary. However, if any provision of this Agreement is determined by a Court of competent jurisdiction to be unenforceable because it is overbroad or unreasonable, the Parties agree that such provision(s) shall be modified and enforced to the maximum extent permissible. In the event that enforcement of any of the terms of this Agreement is necessary, the prevailing party in any such action brought shall be entitled to attorneys' fees and court costs.

3.12 Ratification - This Agreement is subject to ratification by the Board, and is not binding and without prejudice to any Party if same is not ratified.

3.13 Effective Date – The effective date of this Agreement shall be the day following the meeting of the Belleville Township Board of Education at this Agreement is ratified.

3.14 The drafting and negotiation of this Agreement have been / could have been participated in by each of the Parties and their respective counsel, and for all purposes, this Agreement shall be deemed to have been drafted jointly by each of the Parties. The Parties hereby acknowledge that they have been or have had the opportunity to be represented by counsel throughout the negotiation of this Agreement, and at the execution of this Agreement, and have or could have read and consulted with counsel regarding this Agreement. No ambiguity shall be resolved against any Party based upon authorship.

3.15 The parties agree that, in the event any party breaches any provision of this Agreement, any of them may institute an action against the other to specifically enforce any term or terms of this Agreement, in addition to any other legal or equitable relief permitted by law. The parties further agree that the prevailing party of an action pertaining to any alleged breach of this Agreement shall receive reasonable attorneys' fees and costs that such party incurs in initiating, prosecuting, and/or defending against the action.

3.16 BY SIGNING THIS SEPARATION AGREEMENT MS. TERLIZZI STATES THAT:

A. SHE HAS READ IT;

B. SHE UNDERSTANDS IT AND KNOWS THAT SHE IS GIVING UP IMPORTANT RIGHTS INCLUDING, BUT NOT LIMITED TO, RIGHTS UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION, THE NEW JERSEY FAMILY LEAVE ACT, THE PUBLIC EMPLOYEE RELATIONS ACT, THE AGE DISCRIMINATION IN EMPLOYMENT ACT, THE CIVIL RIGHTS ACT OF 1964, THE AMERICANS WITH DISABILITIES ACT OF 1990, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AND ANY OTHIS

CONSTITUTIONAL STATUTORY OR COMMON LAW CLAIM AS MORE FULLY SET FORTH IN PARAGRAPHS 1 and 2 HEREIN ABOVE;

C. SHE AGREES WITH EVERYTHING IN IT;

D. SHE HAS HAD THE OPPORTUNITY TO CONSULT WITH COUNSEL OF HER CHOOSING;

E. SHE HAS SIGNED THIS SEPARATION AGREEMENT KNOWINGLY AND VOLUNTARILY, AND WITHOUT COERCION;

F. SHE HAS BEEN GIVEN AT LEAST 21 DAYS IN WHICH TO CONSIDER WHETHER TO SIGN THIS SEPARATION AGREEMENT, AND ACKNOWLEDGES THAT SHE CAN WAIVE SAID 21 DAYS; AND ACKNOWLEDGES THAT SHE HAS AN ADDITIONAL 7 DAYS FOLLOWING THE DATE ON WHICH SHE SIGNS THIS SEPARATION AGREEMENT TO RENUNCIATE IT, AND THAT THE SEPARATION AGREEMENT WILL NOT BE EFFECTIVE UNTIL AFTER THE 7 DAY PERIOD HAS LAPSED.

IN WITNESS WHISEOF, the parties have executed this Separation Agreement on the date above written.

M. Antoinette Terlizzi
ANTOINETTE TERLIZZI

Dated: 8/17/2020

Francine Foti
WITNESS

Dated: 8/17/20

BELLEVILLE BOARD OF EDUCATION

Christine Lamparello
CHRISTINE LAMPARELLO, PRESIDENT

Dated: August 18, 2020

MATTHEW PALLADINO, BOARD SECRETARY

Dated: August 18, 2020

73-21

ARBITRATION PROCEEDINGS
BEFORE ARBITRATOR GARY T. KENDELLEN

In the Matter of the Tenure Hearing Gregory Janicki School District of the Township of Washington, Gloucester County Agency Docket No. 256-12/20	**ARBITRATOR'S DECISION ON MOTION TO DISMISS AMENDED/ SUPPLEMENTAL CHARGES**

COUNSEL:

For the District	Joseph F. Betley, Esq. Capehart Scatchard, P.A.
For Gregory Janicki:	Matthew B. Wieliczko, Esq. Zeller & Wieliczko, LLP

Background

During the course of the Hearings before the Undersigned held on November 6, 12, and 13 and December 2, 9, 11, and 15, 2020 in the related matter Agency Docket No. 52-2/20 ("TC 52-2/20"), the School District of the Town of Washington, Gloucester County, ("the District"), by letter dated December 22, 2020 submitted Amended/Supplemental Charges ("A/STC 256-12/20") in the above-captioned matter to the Commissioner of Education ("Commissioner"). On January 11, 2021 Respondent Gregory Janicki ("Mr. Janicki") submitted a Motion to Dismiss ("MTD") said A/STC 256-12/20. The parties made additional submissions to the Commissioner in January 2021, as recited below, whereupon on February 8, 2021, the Commissioner advised the parties that following receipt of Mr. Janicki's MTD, the District's A/STC 256-12/20 had been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to the Undersigned arbitrator's decision on the MTD. Accordingly, the Commissioner referred the A/STC 256-12/20 to the Undersigned, noting that should the MTD be denied by the Undersigned, Mr. Janicki shall file an answer directly with the Undersigned, who shall then consider and address the merits of the A/STC 256-12/20.

Parties' Submissions

As noted above, on December 22, 2020 the District submitted its A/STC 256-12/20 to the Commissioner and on January 11, 2021 Mr. Janicki his MTD regarding the A/STC 256-12/20. Thereafter, the District also submitted a January 22 Response to the MTD and on January 29 a Supplemental Brief in opposition to the MTD regarding a recently issued New Jersey Appellate Division decision in Simadiris v. Paterson Public School District, Docket No. A-0197-19T3 ("Simadiris"). On January 29, Mr. Janicki submitted a Reply Brief to the District's January 22 Response to the MTD.

December 22, 2020 - District's Submission of A/STC 256-12/20 to the Commissioner.

In the District's submission to the Commissioner of its A/STC 256-12/20, it described the contents thereof as including, first, the April 1, 2020 Opinion and Award of Arbitrator Arnold Zudick ("Zudick Award")[1] in a discipline arbitration brought by the Washington Township Education Association ("WTEA") on Mr. Janicki's behalf in which WTEA include the April 1, 2020 Opinion and Award of Arbitrator Arnold Zudick ("Zudick Award") in a discipline arbitration brought by the Washington Township Education Association ("WTEA") on Mr. Janicki's behalf that involved a challenge by the WTEA and Mr. Janicki to an increment withholding action taken by the District in June 2019 against Mr. Janicki for his refusal to attend faculty meetings dealing with LGBTQ issues in April 2019 and his conduct during a lock down drill in June 2019. The arbitration hearing was conducted prior to the filing of the original Tenure Charges; the Award was issued after the District certified the original Tenure Charges to the Commissioner on February 25, 2020. The Award upheld the District's increment withholding and made specific findings that Mr. Janicki was insubordinate and untruthful related to some of the same incidents at issue in the original Tenure Charges The disciplinary withholding action and the underlying incidents that formed the basis for the withholding were referenced in the original Tenure Charges and Statement of Evidence, but because there was no indication of when the arbitrator's decision would be forthcoming, the

[1] The District has made the Undersigned aware of an Order to Confirm Arbitration Award involving the parties: SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION GLOUCESTER COUNTY DOCKET NO. GLO-C-55-20, Civil Action ORDER TO CONFIRM ARBITRATION AWARD. Therein, Judge Robert Becker on February 12, 2021 issued an Order in which, *inter alia*, as to the Undersigned, Judge Becker ordered that the Undersigned give preclusive effect to the Opinion and Award of Arbitrator Arnold H. Zudick dated April 1, 2020. Mr. Janicki has also made the Undersigned aware that he has filed a Motion for Reconsideration of the Court's February 12, 2021 Order which is scheduled to be heard on March 26, 2021.

original Tenure Charges were filed prior to the final decision on the disciplinary arbitration. Subsequently, the District noted, the Undersigned denied its request to supplement the original Statement of Evidence to include the written Zudick Award, under what the District described as a strict interpretation of N.J.S.A. 18A:6-17.1(b)(3) of the TEACHNJ Act, and reserved for a later date a determination of whether to treat the substantive findings of the Zudick Award with preclusive effect.

The District further described the contents of its A/STC 256-12/20 as also including, second, additional information uncovered in the course of interviewing witnesses in preparation for the tenure arbitration hearing in TC 52-2/20, reporting that it was unknown to the District at the time the original Tenure Charges were filed that Mr. Janicki had admitted to a colleague that he committed the primary offense noted in Charge I of A/STC 256-12/20 and lied about it to the administration, and made other comments to a colleague that further illustrated his animus toward the LGBTQ community.

In support of the District's filing of its A/STC 256-12/20, it notes that nothing in the TEACHNJ Act precludes a District from filing tenure charges whenever a tenured employee exhibits unbecoming conduct. While newly uncovered evidence of unbecoming conduct may not be used to supplement the record in a case already pending before an arbitrator, the District argues that there is no bar to such new evidence forming the basis for additional charges and such is not without precedent, as in Sch. Dist. of Asbury Park v. Bd. of Educ. of Asbury Park, 1985 N.J. Super. Unpub. LEXIS 7 at *4 (App. Div. July 17, 1985) ("Asbury Park"), wherein a school district that was unable to produce certain evidence to support its tenure charges in discovery because that evidence was being used for a criminal proceeding against the respondent and would not be made available until after it had been presented to a grand jury, the tenure case was placed on the inactive list until the grand jury evidence was available for inspection. When the district later uncovered additional evidence it sought to amend its tenure charges, but the request was denied by the Administrative Law Judge ("ALJ") who instead instructed the district to certify new tenure charges and move to consolidate the two tenure cases. Id. at 4.

The District argues that this is exactly the process it has taken in this matter after it uncovered additional evidence that is both relevant to the pending charges and also supports additional tenure charges and, precluded from supplementing its evidence

regarding the first charges, it is instead, certifying amended supplemental tenure charges to the Commissioner that are based, in part, on the Zudick Award and the newly-discovered evidence. Also, consistent with the ALJ's instruction in the Asbury Park case, the District asserts, it also requested that the Commissioner transmit these charges to the Undersigned, before whom the first tenure charges are currently pending, to allow for consolidation for economy, efficiency, and consistency.

January 11, 2021 - Mr. Janicki's MTD Regarding A/STC 256-12/20

In support of Mr. Janicki's January 11 MTD, he asserts that the District seeks to Amend/Supplement the original Tenure Charges in TC 52-2/20 to negate rulings by the Undersigned that were arguably unfavorable to it, maneuverings that are transparent in an attempt to circumvent those rulings during a pending Hearing with its "new" filing, and argues that it is estopped from amending the charges in an attempt to "get around" unfavorable rulings and in essence vacate what it describes as the Undersigned's valid rulings and decisions. Accordingly, Mr. Janicki asserts, the Commissioner must dismiss A/STC 256-12/20.

In support of Mr. Janicki's assertions, he notes that the District did not consider or rely upon the contents of the A/STC 256-12/20 when the tenure charges in TC 52-2/20 were prepared, certified and served on Respondent, a choice and plan of action the District made.

As to the Zudick Award, Mr. Janicki next notes the Undersigned's rulings on August 24 and December 1, 2020 to the effects that

> August 24: "[t]he undersigned finds that the clear language of NJSA 18A6-17.1b(3) establishes without doubt that the District is precluded from supplementing its evidence after its Statement of Evidence has been submitted. In that regard, the Undersigned finds that the exceptionalism that the District's argument attempt to attach the April 1 arbitration award [the Zudick Award] is insufficient to overcome the meaning and intent of the statute's crystal clear language, which establishes a razor sharp cutoff of additional evidence after the District's evidence has been submitted."
>
> And
>
> December 1: "The Undersigned first notes that the matter of the District withholding an increment from Mr. Janicki is included among the charges upon which it relies herein in establishing just cause for his tenure removal. The Undersigned next notes that the arbitration award - upon which the District relies in its argument that an award has issued in an arbitration

> proceeding that is final and binding upon the parties - was the subject of a prior determination by the Undersigned on August 24, 2020 in which he did not grant the District's request to supplement its Statement of Evidence with that award and did not accord the award arbitral notice because the award issued after the District's submission of its Statement of Evidence. As a result, the award has not been received into evidence in this proceeding."

As to the additional information that the District reports it uncovered in the course of interviewing witnesses, Mr. Janicki next notes the Undersigned's rulings on November 13, 2020 when the District attempted to call and elicit testimony from WTEA Building Representative and District employee Jennifer Wisor after Mr. Janicki objected to the scope and relevancy of the District's questioning of Ms. Wisor, regarding which the Undersigned repeatedly sustained objections that such was an attempt to elicit testimony outside of the scope of the tenure charges and statement of evidence and outside of the scope of the summary of anticipated testimony detailed on Respondent's witness list. The Undersigned precluded Ms. Wisor's anticipated testimony insofar as its substance was not referenced or a part of the tenure charges and statement of evidence and was not relied upon by the District when it certified the charges; ruling that rather,

> this additional evidence is perhaps permissible for the purposes of impeachment, that question is more reasonably resolved once we know what we are impeaching. . . . [T]o put meat on those bones, that means after Mr. Janicki has testified.

Mr. Janicki further objects that the District was aware of the outstanding grievance arbitration at the time it decided to prepare and serve Respondent with a sworn copy of TC 52-2/20 and made the decision to move forward with it almost simultaneously to the increment grievance arbitration; it knew exactly what it was doing when it filed the tenure charges before a decision had been issued in the increment grievance arbitration, although it had the option to await the arbitrator's decision therein before proceeding with TC 52-2/20. Whatever the District's strategy or motivation may have been, it moved forward without awaiting the Arbitrator's increment withholding opinion and award. Consistent with the tenure law, neither the District nor the assigned Arbitrator may rely upon an arbitration decision which was not provided and had not even been issued upon the referral of this case for arbitration or relied upon by the District at the time it certified the tenure charges. N.J.S.A. 18A:6-17.1(b). It was not included in the charges or statement of evidence or relied upon by the District at the time it certified the charges.

In support, Mr. Janicki cites In the Matter of Tenure Hearing of Noel Gordon, School

District of the City of Englewood, Bergen County, Agency Docket No. 24-1/18, Decision on Motion to Dismiss, issued August 13, 2018 ("Englewood"):

> N.J.A.C. 6A:3-5.1(b) places the onus on a board of education to line up all its ducks before it commences the local processing of charges. The sworn tenure charges must align with the sworn statement of evidence and the sworn statement of evidence must include all documents identified therein.

Mr. Janicki urges that the District is estopped from amending the charges at this time in an attempt to get a "third bite at the apple" on that issue and vacate the two prior rulings on the issue by the Undersigned. In that regard, Mr. Janicki objects to the District's reliance upon Asbury Park in support of its position that the filing of supplemental and additional tenure charges based upon newly discovered evidence and subsequent consolidation with an already-pending case record is appropriate in this matter. Mr. Janicki argues that the cited case law is not at all analogous to the case at hand in that therein, a County Prosecutor's Office denied the Board permission to use evidence necessary in support of the initial tenure charges while criminal proceedings were pending, whereas, herein, the District was obviously aware of the pending increment withholding arbitration decision at the time it decided to proceed with the tenure charges and made the strategic decision to certify tenure charges when it did; later, faced with unfavorable and evidential rulings, it wants to change paths and proceed in a different way. This is not simply a matter of the District not being aware of the documentary evidence, but rather a strategic decision to move forward with the original Tenure Charges without the increment withholding arbitration award; now, it wishes to vacate the Undersigned's rulings and ignore the statutory requirements of N.J.S.A. 18A:6-17.1(b)(3). Moreover, Mr. Janicki further asserts, Asbury Park did not decide the point of law of whether the District has the ability to amend tenure charges but rather, it addressed entitlement to salary during the tenure process.

Mr. Janicki also object to the District's attempt to circumvent the Undersigned's rulings as causing unnecessary delay to the pending proceedings, an increased expense to all and a waste of judicial resources, asking: "Moreover, what if every District, on every certified tenure charge, was permitted to proceed in this fashion?" to which he answers: "Absolute uncertainty, chaos and no finality, and a waste of time, expense and resources."

Mr. Janicki also argues that the Undersigned's procedural and evidentiary rulings during the hearing were entirely within the purview of the arbitrator and consistent with N.J.S.A. 18A:6-

10 *et al.* and the AAA Rules of Arbitration such that there is no legal basis for setting aside the rulings.

January 22, 2021 - District's Response to Mr. Janicki's MTD

In the District's January 22 Response to Mr. Janicki's MTD, it asserts that it is not seeking to overturn the adverse rulings against it, but rather in pursuing A/STC 256-12/20, it is ensuring that the procedural safeguards put in place by the Legislature to protect the process of removal of tenured teachers from employment are followed as closely as the Legislature, and as the Undersigned intended, by coming through the Commissioner to certify additional tenure charges based on newly acquired evidence. The District asserts that the filing of amended tenure charges based on new evidence, or the re-filing of charges after previous charges have been dismissed without prejudice, has been recognized as a legitimate exercise of the Commissioner's jurisdiction over tenure proceedings under the NJTEACH Act. Further, by requesting that the matter be transmitted to the Undersigned for consolidation, the District asserts, it is seeking the most expeditious resolution of the matter possible that upholds concepts of judicial economy, continuity and fairness.

As to the Zudick Award, the District notes that the Undersigned denied the District's request to admit it into evidence based on his interpretation of N.J.S.A. 18A:6-17.1(b)(3), which he determined to establish a "razor sharp cut off date" for any additional evidence. Significantly, the District asserts, the Undersigned made no mention of, nor did he preclude the District from, filing amended tenure charges with the Commissioner. After the District asked the Undersigned to give preclusive effect to the decision under the principle of res judicata, collateral estoppel, issue preclusion and/or authoritative precedent to prior final and binding arbitration awards, he reaffirmed his decision on the introduction of the written Zudick Award, but reserved decision on the preclusion issue and held it "in abeyance until such time as such a ruling may become relevant and therefore necessary."

As to the testimony of Ms. Wisor, the District notes that at the November 13, 2020 Hearing, it reported that it had recently became aware of statements by Mr. Janicki to Ms. Wisor about which it had no knowledge until after the original tenure charges were filed. The District notes that the Undersigned was concerned with Ms. Wisor's factual testimony not being included in the District's original Statement of Evidence, along with her being the WTEA union

representative, but, recognizing that Ms. Wisor's testimony may be warranted for impeachment purposes, depending upon what Mr. Janicki's testimony will be (assuming he testifies), the Undersigned ruled that:

> it really would be more appropriate for you [Betley] to be impeaching Mr. Janicki with this witness after he testifies .... I think we'll be in a better position to determine that after Mr. Janicki has testified
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> And
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> I think to put meat on the bones, that means after Mr. Janicki has testified. Then we know the purposes-how to assess whether you are entitled to additional evidence to impeach Mr. Janicki's testimony.

The District also notes the Undersigned made no mention of, nor did he preclude it from, filing amended tenure charges with the Commissioner concerning the Wisor testimony, even in the face of its specifically referencing the option of filing amended charges.

Based upon these considerations, the District presents a two-prong argument that Mr. Janicki's MTD should be denied, the first being that the Commissioner should send A/TSC 256-12/20 to the Undersigned[2] and second, that nothing in the TEACHNJ Act precludes its filing of amended or supplemental tenure charges whenever there is newly discovered evidence of unbecoming conduct by a tenured employee.

As to whether nothing in the TEACHNJ Act precludes the District's filing of amended or supplemental tenure charges whenever there is newly discovered evidence of unbecoming conduct by a tenured employee, it notes Asbury Park and Englewood in support, Asbury Park, as it did in support of its filing of A/STC 256-12/20,[3] for the principle that the filing of additional tenure charges based upon newly-discovered evidence and subsequent consolidation with an already-pending case has been specifically recognized and authorized, and Englewood for the principle that a district can be given multiple chances to perfect its charges through refiling.

As to Asbury Park, the District notes that the school district therein was unable to produce certain evidence to support its tenure charges in discovery because that evidence was being used

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[2] A request that the Commissioner has granted by virtue of the referral of A/STC 256-12/20 to the Undersigned, based upon which development the Undersigned does not present or discuss herein much of the District's series of arguments in support of the referral. Also, as a result of the Commissioner's referral, the Undersigned does not present or discuss herein the Simadiris case, presented in support of the Commissioner taking such action, in the District's January 29 Supplemental Brief in opposition to the MTD.

[3] See Pp. 3-4 herein.

for a criminal proceeding against the respondent, and would not be made available until after it had been presented to a grand jury. The tenure case was placed on the inactive list until the grand jury evidence was available for inspection. When the district later uncovered additional evidence, it sought to amend its tenure charges, but the request was denied. Instead, the ALJ instructed the district to certify new tenure charges and move to consolidate the two tenure cases. Id. at 4.

Regarding Englewood, wherein the board was given multiple chances to perfect its charges through refiling, the District notes that it does not seek to imply that the process outlined in N.J.S.A. 18A:6-10 *et al* is a revolving door of unlimited visitations. However, the District asserts that it suggests that a local board of education can go back to the Commissioner to perfect existing charges that were dismissed without prejudice, and to file amended charges, if the circumstances are warranted (as is the case here with the newly discovered evidence of Mr. Janicki's conversations with Ms. Wisor and the Zudick Award that did not exist at the time of the original charges) and there is no evidence of abuse or violation of due process.

As to Mr. Janicki's MTD, the District asserts that his arguments should be disregarded, including the argument in the MTD that the District chose to go forward without waiting for the Zudick Award; the District argues that it referenced in its Statement of Evidence that a decision from Arbitrator Zudick was forthcoming and included its brief to him in its tenure charges. Under Asbury Park, the District argues, it should be permitted to include it in A/STC 256-12/20.

The District also argues that the Zudick Award and the testimony of Ms. Wisor support new, additional charges of unbecoming conduct that only came to light after the filing and transmittal of the currently-pending charges. The fact the Award and the testimony of Ms. Wisor also support those other charges is irrelevant, because the bearing of particular evidence on one proceeding does not disqualify the District from relying on that same evidence for other charges.

The District further argues that it has every right to introduce the Zudick Award through the filing of the Amended Charges with the Commissioner and is not seeking to vacate the rulings of the Undersigned that established a strict cut-off date for evidence for the tenure charges that were in front of him, since nothing prevents the District from going through the tenure charge process seeking an amendment of the charge given the timing of the issuance of the Zudick Award. Mr. Janicki's argument in support of preventing the District from amended the charge to include the Zudick Award is an overly technical, procedural sleight of hand at its best and disingenuous at

its worst, the District asserts, and procedural niceties and technical obstructionism should not be encouraged when the end result is to cover up a highly relevant arbitration decision that is at the core of the Amended Charges: it is pure sophistry to argue that the District has a lifetime ban on introducing the Award because it decided to proceed with the original tenure charge while the parties were awaiting the decision from Arbitrator Zudick, with the timing of its issuance unknown and unpredictable. The District contends that it could not possibly include the Zudick Award at the time TC52-220 was filed with the Commissioner in March 2020 since the Award was not issued until April 1, 2020. Mr. Janicki's logic places the District in a classic Catch 22 situation. To suggest that the District should have waited an unknown amount of time before the Zudick Award was issued before it filed the original Tenure Charges (all the while having to pay Mr. Janicki while on this administrative leave) is specious, since the District did not control Mr. Zudick's calendar, and to wait an indefinite amount of time to file the Tenure Charges would have exposed the District to a timeliness/laches argument by Mr. Janicki. Plus, the District asserts, Mr. Janicki ignores discussion of the aftermath if Arbitrator Zudick sustained the grievance. If the increment withholding were reversed, and the District moved forward with the tenure charges based on the same set of operative facts at issue in the increment withholding, would Mr. Janicki be arguing that the Award doesn't exist because of the District's tactical decision? Of course not. Conversely, the District argues, it should not have the "thrill of victory" over the favorable arbitration award finding just cause for the discipline, be taken away and substituted with the "agony of defeat" in not being able to have the Zudick Award see the light of day (and thus being forced to retry the underlying incidents relevant to the increment withholding), simply because of a timing issue.

The District also argues that forcing a school district to delay the filing of additional tenure charges creates a circumstance where current and/or future arbitrators may render decisions on incomplete information, and where finality in a tenure matter is delayed for an extended period of time. It also needlessly extends the process of severing the employee/employer relationship by requiring that, in the event the first-in-time tenure proceedings are decided in the respondent's favor, he or she could immediately face additional tenure charges that had been held in abeyance before they can return to work. On the other hand, if the tenure charges are upheld and an appeal follows, the school district is faced with a potentially extended delay before filing the additional charges. While it is obvious to see why Mr. Janicki would like to delay the filing of additional

tenure charges in the instant case, the holding of additional charges in abeyance is not consistent with the tenure law, and cannot have been intended by the Legislature when it crafted the procedure

In addition, the District notes that it made specific and detailed references to the pending arbitration and the facts leading up to the arbitration in the original Statement of Evidence, and included its post-arbitration brief in the initial disclosures to counsel that were sent on March 18, 2020. All of the underlying events and factual allegations that are part of the arbitration proceedings before Arbitrator Zudick were incorporated into TC 52-2/20. The purpose of having the District gather and produce all of its evidence early on in the tenure dismissal proceeding, and specifically upon the referral of the case to arbitration as set forth in N.J.S.A. 18A:10-17(b)(3), is to prevent surprise and to give the employee against whom tenure charges have been filed a full and fair opportunity to know the evidence that supports the charges. Mr. Janicki was provided with a full and complete summary of the evidence that led to the increment withholding and the factual basis as to why those facts that were central to the prior arbitration are relevant to the within Tenure Charges. Again, obstructionism, and not allowing the Arbitrator to see the full range of facts, is the motivation of the Respondent.

January 29, 2021 Mr. Janicki's Reply to District's January 22 Response to the MTD

In support of Mr. Janicki's January 29 Reply Brief to the District's January 22 Response, he noted that in his view, the District, in opposing the MTD, is continuing with its "fast and loose" approach, asserting that it "has every right to introduce the Zudick Award through the filing of the amended charges with the Commissioner," without addressing that it was issued on April 1, 2020, eight months before it certified A/STC 256-12/20 to include it, while the parties engaged in seven hearing dates in TC 52-2/20 during which there were rulings adverse to the District on those issues. The District had the opportunity to gather proofs in support of TC 52-2/20 at the time the charges were considered, prepared, and filed. In Mr. Janicki's view, the District then decided to revisit the substance of its underlying charges in TC 52-2/20 to see if it could supplement its evidence and charges, in an attempt to "make them better," which it now attempts to do with in TC 52-2/20. In view of these circumstances, Mr. Janicki disputes the District's assertion that he has not made any showing of surprise, prejudice or lack of due process.

As to whether the Undersigned did not specifically preclude the District from filing amended tenure charges concerning the arbitration award or Ms. Wisor's testimony, Mr. Janicki

notes that the issue was never presented to him, formally or informally, yet the District thinks it has a "green light" to seek to supplement its tenure charges, more than half way through the underlying tenure hearing, contending that it is simply supplementing its original charges with new evidence discovered in good faith after the charges were submitted. Mr. Janicki also points to Asbury Park and Englewood, distinguishing the former as involving a district that was precluded from submitting evidence being used for a criminal proceeding and unavailable until after it had been presented to a grand jury and the latter as a case where numerous procedural mistakes allowed a District to perfect its filing with the Commissioner, whereas the instant matter is a pending tenure matter wherein the District is seeking to circumvent the rulings of the Undersigned without a basis in law at this juncture and for this purpose. Mr. Janicki objects that a ruling in favor of the District on the MTD would have devastating consequences on all tenure proceedings going forward, allowing a District to hit the reset button on its proofs and charges well into a tenure hearing and after adverse evidential rulings, noting that the TEACHNJ Act places the onus on a school district to gather evidence in support of its tenure charges and be confident that its evidence, if true, is sufficient to warrant the dismissal or reduction in salary of a tenured teacher.

Here, Mr. Janicki notes, the Zudick Award is not subsequently-discovered evidence nor evidence that did not exist at the time of the filing of TC 52-2/20 in that the District, having participated in an increment withholding arbitration, knew it followed that an award would be forthcoming and decided to proceed with prior to the receipt of the Zudick Award and then waited eight months and participated in seven hearing dates before certifying A/STC 256-12/20.

As to the anticipated testimony of Ms. Wisor, Mr. Janicki asserts that it is also not subsequently- or newly-discovered evidence, but rather, testimony it seeks to offer to bolster its case in chief, in the midst of its case in chief, to circumvent the Undersigned's ruling, actions that are working against the interests of economy, efficiency, consistency and fairness. Mr. Janicki notes that the District had the opportunity to interview witnesses and secure statements prior to the preparation and filing of the underlying tenure charges and it is unduly prejudicial to him for the District to be permitted to continue an expedition for evidence in support of the underlying tenure charges during the pending tenure hearing.

Mr. Janicki also rejects the District's argument that it is prejudiced from filing additional tenure charges pending the finality of another tenure matter and offers the example of a proper

instance of such: In the Matter of the Arbitration between The State Operated School District of the City of Jersey City v. Gilda Nicole Harris, Agency Docket Nos. 342/11/14 & 379/12/14 ("Jersey City") wherein the District served the Respondent with two sets of tenure charges and the Commissioner consolidated the matters. In that instance, the first set of charges was served on September 23, 2014. On November 18, 2014, the District certified the charges to the Commissioner of Education. On November 21, 2014, the District issued a set of seven additional tenure charges. The Commissioner consolidated the two sets of charges prior to referring the matter to arbitration pursuant to N.J.S.A. 18A:6-16.

Here, by contrast, in the home stretch of TC 52-2/20, Mr. Janicki asserts, the District has taken uneconomical and time consuming steps to amend/supplement its charges in lieu of moving forward with the pending hearing, while asserting that it is Mr. Janicki who "would like to delay the filing of additional tenure charges in the instant cases." Yet it is the District, in Mr. Janicki's view, that is silent, while speaking to the efficiency of consolidating both matters before the Undersigned, as to the statutory rights which would be afforded to him if the newly filed tenure charges were permitted to proceed: consolidation of the two sets of charges and permitting the District to supplement its evidence would afford Mr. Janicki time to engage in discovery as permitted by statute. Otherwise, merely folding new charges and alleged evidence into the pending hearing, without protecting Mr. Janicki's statutory rights, would allow school districts the unfair opportunity to back door additional charges or evidence at any point during a pending proceeding, where discovery has already been exchanged between the parties and the respondent has already prepared his or her defense based on the District's prior statement of evidence.

In summary, Mr. Janicki asserts that it is uncontested that at the time that the District certified TC 52-2/20, it was aware of the outstanding Zudick Award and made the determination to proceed with the tenure charges as prepared, knowing that the Zudick Award could, in fact, be returned in its favor. Moreover, the District thereafter did not attempt to amend or supplement the charges with that award until eight months and seven hearing days had passed, with adverse rulings against the District as to it and the Ms. Wisor testimony, before it certified A/STC 256-12/20. Under these circumstances, Mr. Janicki asserts, there is nothing "overly technical," as the District alleges, regarding the uncontested timeline of events that now lead to his MTD that argues that the District should be estopped from proceeding with A/STC 256-12/20.

Summary

Above, the Undersigned has provided a comprehensive report of the Parties' submissions. As succinctly as practical, those submissions are summarized as follows:

The District contends that nothing in the TEACHNJ Act precludes filing tenure charges whenever a tenured employee exhibits unbecoming conduct, while conceding that newly uncovered evidence of unbecoming conduct may not be used to supplement the record in a case already pending before an arbitrator, it also argues that there is no bar to such new evidence forming the basis for its additional charges (A/STC 156-12/20), as was done in Asbury Park.[4] The District also argues that for economy, efficiency and consistency, the charges should be consolidated with TC 56-2/20 and transmitted to the Undersigned.

Mr. Janicki contends that the District did not consider or rely upon the contents of A/STC 256-12/20 when filing the tenure charges in TC 52-2/20; accordingly, he views the filing of A/STC 256-12/20 as contrary to N.J.S.A. 18A:6-17.1(b) of the TEACHNJ Act and a transparent maneuver to negate unfavorable rulings by the Undersigned in TC 52-2/20, as well as distinguishable from Asbury Park and contrary to the Court's holding in Englewood that "the onus [is] on a board of education to line up all its ducks before it commences the local processing of charges" and distinguishable from the facts in Asbury Park. Mr. Janicki notes that the District had the opportunity to interview witnesses and secure statements prior to the preparation and filing of the underlying tenure charges and it is unduly prejudicial to him for the District to be permitted to continue an expedition for evidence in support of the underlying tenure charges during the pending tenure hearing

Mr. Janicki also objects that the District's actions are causing unnecessary delay to the pending proceedings in TC 52-2/20, an increased expense to all and a waste of judicial resources, and asks: "Moreover, what if every District, on every certified tenure charge, was permitted to proceed in this fashion?" to which he answers: "Absolute uncertainty, chaos and no finality, and a waste of time, expense and resources."

The District responds that the evidence it submitted in A/STC 256-12/20 is newly acquired and the Undersigned made no mention of nor precluded it from filing amended tenure charges

[4] See Pp. 3-4 and 8-9 herein.

with the Commissioner. As to Englewood, wherein the board was given multiple chances to perfect its charges through refiling, the District argues that the holding therein suggests that a local board of education can go back to the Commissioner to perfect existing charges that were dismissed without prejudice, and to file amended charges, if the circumstances are warranted, as is the case here with newly discovered evidence, and the absence of evidence of abuse or violation of due process. The District also notes that it referenced in TC 52-2/20 that a decision from Arbitrator Zudick was forthcoming and included its brief to Mr. Zudick and it, along with the testimony of Ms. Wisor, support new, additional charges of unbecoming conduct that only came to light after the filing and transmittal of the currently-pending charges.

The District asserts that the purpose of having it gather and produce all of its evidence early on in the tenure dismissal proceeding, and specifically upon the referral of the case to arbitration as set forth in N.J.S.A. 18A:10-17(b)(3), is to prevent surprise and to give the employee against whom tenure charges have been filed a full and fair opportunity to know the evidence that supports the charges. In that regard, the District argues that Mr. Janicki was provided with a full and complete summary of the evidence that led to the increment withholding and the factual basis as to why those facts that were central to the prior arbitration are relevant to the Tenure Charges. Again, the District asserts, obstructionism, and not allowing the Undersigned to see the full range of facts, is the motivation of Mr. Janicki.

Lastly, the District asserts that it has every right to introduce the Zudick Award and the testimony of Ms. Wisor in that nothing prevents it from going through the tenure charge process seeking an amendment of the charge, given the timing of the issuance of the Zudick Award and its learning of Ms. Wisor's information. Contrary to Mr. Janicki's arguments, the District asserts, which is an overly technical, procedural sleight of hand at its best and disingenuous at its worst, the District argues that procedural niceties and technical obstructionism should not be encouraged when the end result is to cover up a highly relevant arbitration decision and it is pure sophistry to argue that it has a lifetime ban on introducing the Award.

ANALYSIS

As noted earlier herein, on February 8, 2021, the Commissioner referred A/STC 256-12/20 to the Undersigned and advised the parties that A/STC 256-12/20 had been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to the Undersigned's decision

on the MTD. The Commissioner noted that should the Undersigned deny the MTD, Mr. Janicki shall file an answer directly with the Undersigned, who shall then consider and address the merits of the A/STC 256-12/20.

In that regard, the Undersigned views his role in deciding the MTD, as referred to him by the Commissioner, to be to determine whether Mr. Janicki has provided in his MTD sufficient bases for dismissing the District's filing of A/STC 156-12/20 because, under all the circumstances present, based upon the District's arguments in support of its filing of A/STC 156-12/20 and Mr. Janicki's arguments in his MTD, the District's filing does not comport with the controlling authority herein: the TEACHNJ Act.

Discussion

The Undersigned first notes the District's opening argument, which underlies its entire set of arguments as to the reasons that it believes the MTD should be disregarded, in which the District argues that nothing in the TEACHNJ Act precludes filing tenure charges whenever a tenured employee exhibits unbecoming conduct, based upon which the District further argues that there is no bar[5] to such new evidence forming the basis for additional charges, such as A/STC 256-12/20, as was done in Asbury Park.

The Undersigned first notes that while it is literally a fact that nothing in the TEACHNJ Act precludes the filing of additional charges, the Undersigned finds less significant what the District contends is absent from the TEACHNJ Act than what the Act itself contains. In that regard, the Undersigned turns to the text of the TEACHNJ Act and notes that it provides an extensive set of procedures to accomplish its goals. Of strongest relevance herein are the procedures established in N.J.S.A. 18A:10-17(b), particularly its Paragraph (3), which recites the very specific steps to be taken by "an employing board of education" upon referral of a case for an arbitration hearing, to wit, the board

> shall provide all evidence, including but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses, with a complete summary of their testimony, and all other documents to the employee or the employee's representative. The employing board of education shall be

[5] The Undersigned also notes the District's extension of this line of argument to the Undersigned's having made no mention of, nor precluded it from, filing amended tenure charges. In the absence the District's presenting any argument herein as to the possible significance of whether the Undersigned did or did not make any such mentions, he does not consider the matter of his non-mentions further.

> precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses.[6]

The Undersigned particularly notes that the crafters of this provision described in detail what "all evidence" included and then continued with a portion of the provision that precluded both parties "from presenting any additional evidence at the hearing" - and then included an exception: "for purposes of impeachment of witnesses." Notably, to the Undersigned, the crafters did not provide any other exceptions, such as, for example, related or momentous or previously hidden evidence, regarding each of which an alternative approach might have prevailed - but did not. Instead, the crafters indicated their clear intentions by stating the preclusion was "from presenting *any* [emphasis added] additional evidence," with only the sole exception stated.

While the Undersigned considers the preceding excerpt from N.J.S.A. 18A:10-17(b)(3) of primary importance, also notable are other complementary provisions that are highly relevant to the instant matter. N.J.S.A. 18A:10-17(b)(1) provides that the hearing shall be held within 45 days of the assignment of the arbitrator to the case. N.J.S.A. 18A:10-17(d) provides that the arbitrator shall render a written decision within 45 days of start of the hearing. N.J.S.A. 18A:10-17(f) and (g) provide that the timelines set forth herein shall be strictly followed, absent the approval of the Commissioner.[7]

Therefore, notwithstanding that it is the case that, as the District asserts, nothing in the TEACHNJ Act precludes filing tenure charges whenever a tenured employee exhibits unbecoming conduct, based upon which the District further argues that there is no bar to such new evidence forming the basis for additional charges, such as A/STC 156-12/20, as it contends was done in Asbury Park, it is the view of the Undersigned that the Act's provisions demonstrate that the Act should be approached from a different perspective, that of its provisions, not of its nothings. To wit, in sum, the Undersigned notes that the cited portions of the Act put great emphasis upon the requirement of strict adherence to its comprehensive descriptions regarding the provision of evidence by both parties, following which both parties are precluded from presenting *any*

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[6] Identical requirements are imposed upon the employee, effective at least 10 days prior to the Hearing.

[7] The Undersigned notes that, as the Parties acknowledge, it has not been possible to meet these timelines in the instant matter from its outset during the pendency of the coronavirus disruption. However, the Undersigned also notes, his inability and that of the Parties to meet the timelines during the pendency of the coronavirus disruption has played no role in the Parties' arguments herein as to the disputed A/STC 156-12/20. Accordingly, the Undersigned considers the timeline goals of the Act, although suspended in the instant matter, fully applicable to his deliberations thereon.

[emphasis added] additional evidence at the hearing, with only one exception - for purposes of impeachment of witnesses. These provisions also emphasize the arbitrator's strictly timely start of the hearing after its assignment and his or her strictly timely completion of a written decision following the hearing's start, except otherwise as approved by the Commissioner. These timeliness requirements of course reflect the urgency that the crafters wished to communicate should be applied to the processing of tenure charges.

Accordingly, the Undersigned approaches the District's and Mr. Janicki's arguments regarding the MTD from the perspective of the crafters' emphases in the TEACHNJ Act.

Turning to the District's citation of Asbury Park in support of its view that it should be permitted to file A/STC 256-12/20, the Undersigned notes his report above as to the District's explanation of its position at Pp. 3-4 and 8-9, as well as Mr. Janicki's distinguishing of Asbury Park in that the board therein was denied permission to use evidence necessary in support of the initial tenure charges while criminal proceedings were pending, whereas, herein, the District was obviously aware of the pendency of the Zudick Award at the time it decided to proceed with the tenure charges and made the strategic decision to certify its tenure charges when it did. As to the Ms. Wisor testimony, Mr. Janicki cites the plain meaning of N.J.S.A. 18A:10-17(b)(3) and argues that after-acquired evidence is not to be accepted. Mr. Janicki notes that the District had the opportunity to interview witnesses and secure statements prior to the preparation and filing of the underlying tenure charges and it is unduly prejudicial to him, under the provisions of N.J.S.A. 18A:10-17(b)(3), for the District to be permitted to continue an expedition for evidence in support of the underlying tenure charges during the pending tenure hearing.

The Undersigned next notes that among the District's arguments, it did not discuss the differences between the circumstances of Asbury Park and those herein, in which a Hearing in TC 52-2/20 was already being held pursuant to the unique and strict evidentiary and timeliness requirements recited above of the TEACHNJ Act, which was enacted decades after the court's decision in Asbury Park. In addition, the Undersigned notes, the Asbury Park circumstances are also distinguishable, as Mr. Janicki argues, in their dependence upon evidence known by a party that was withheld from that party by a county prosecutor, whereas the District has failed to discuss whether, at the time the District filed its tenure charges in TC 52-2/20, either the Zudick Award or the proffered Ms. Wisor testimony were similar or different from the Asbury Park information,

which was under restraints. In addition, the Undersigned also notes, the posture of the matter when the consolidation was directed by the ALJ in Asbury Park and the matter's outcome are not provided by the District, making it impossible to determine its aptness.

Therefore, in view of these considerations, the Undersigned finds that the District has not provided adequate justifications for its assertion that the holding of Asbury Park supports its arguments that it should be permitted to file its charges in A/SC 256-12/20.

Turning to the Englewood decision, which Mr. Janicki cites for its holding that the onus is on a board of education to line up all its ducks before it commences the local processing of charges, the District argues that the board therein was given multiple chances to perfect its charges through refiling, suggesting that a board can go back to the Commissioner to perfect existing charges that were dismissed without prejudice, and to file amended charges, if the circumstances are warranted, as is the case here, the District asserts, with newly discovered evidence and the absence of evidence of abuse or violation of due process. However, once more, the Undersigned notes, the District's arguments fail to specify under what circumstances the Englewood holding would warrant permitting the District to engage in filing amended charges with newly discovered evidence, in the context of the unique and strict evidentiary and timeliness requirements of the TEACHNJ Act recited above. Instead, the District merely offers its speculation that the Englewood holding suggests that the District might be warranted to file amended charges. By contrast, Mr. Janicki distinguishes Englewood by providing an example of a far more compelling circumstance, one in which the Commissioner did consolidate two different sets of charges: Jersey City, wherein the Commissioner, *prior to referring the matter to arbitration*, consolidated the two sets of charges following the district's submissions therein of different charges on November 18 and November 21, 2014. As noted by the Undersigned above, of course, prior to the Commissioner's referral of the matter for arbitration, the cited strict evidentiary provisions of N.J.S.A. 18A:10-17(b)(3) have not gone into effect. Herein, of course, the arbitration hearings in TC 52-2/20 were already under way when the District filed A/STC 156-12/20 and sought consolidation with TC 52-2/20.

Therefore, the Undersigned finds that the District has not sufficiently distinguished Englewood's holding - that the onus is on a board of education to line up all its ducks *before* [emphasis added] it commences the processing of charges, a holding that also does not support the District's arguments that it should be permitted to file its charges in A/STC 256-12/20.

The Undersigned next notes that in the absence of support for the District's position from either Asbury Park or Englewood, the District's position relies essentially upon its contention that nothing in the TEACHNJ Act precludes filing its charges in A/STC 156-12/20. However, the Undersigned has described the reasons for his preference for viewing the provisions contained in the Act, rather than what is not contained, in determining the issues herein. In addition, the Undersigned finds, Mr. Janicki has provided a number of arguments in support of applying the Act's strict and comprehensive evidentiary provisions to preclude the acceptance of the subject matters in the District's filing of A/STC 256-12/20 after the start of the hearings herein, in particular, his arguments against admitting evidence that violates N.J.S.A. 18A:10-17(b)(3)'s preclusions of any additional evidence that was not provided by the District upon the Commissioner's referral of TC 52-2/20 for arbitration.

In addition, Mr. Janicki further argues against the District's actions in filing A/STC 256-12/20 with his assertion that such also causes unnecessary delay to the pending proceedings in TC 52-2/20, an increased expense to all and a waste of judicial resources, noting that if every board, on every certified tenure charge, was permitted to proceed as the District wishes herein, uncertainty, chaos and no finality, and a waste of time, expense and resources would ensue. The Undersigned finds that even in as regrettably delayed a proceeding as the instant matter, Mr. Janicki's concerns resonate; they illustrate that permitting the District's filing of A/STC 256-12/20, or similar filings, in the circumstances present herein would also be inconsistent with the TEACHNJ Act crafters' goal of achieving the normally strictly enforced 45 day timeliness parameters set forth in N.J.S.A. 18A:10-17(b)(1), N.J.S.A. 18A:10-17(d) and N.J.S.A. 18A:10-17(f) and (g) of the TEACHNJ Act, parameters with which we can expect to be required to achieve compliance once normal times have returned.

In sum then, the Undersigned finds that the District's position that its submission of its filing of A/STC 256-12/20 should be accepted has been rebutted by the arguments that Mr. Janicki makes in his MTD.

In this context, the Undersigned lastly turns to the District's concern that the Zudick Award and assertedly unbecoming conduct by Mr. Janicki will escape the view of the Undersigned if Mr. Janicki's overly technical and disingenuous procedural sleights of hand and procedural niceties and technical obstructionism are accepted. Notwithstanding the District's expressed concern, the

Undersigned's view, as discussed above, is that, rather, the provisions of the TEACHNJ Act lead to the conclusions determined herein as to whether to permit the additional submissions sought by the District in A/STC 256-12/20.

Conclusions

Under all the circumstances described above, the Undersigned concludes that none of the arguments or case authorities cited by the District supports its assertion that its filing of A/STC 256-12/20 should be permitted under the provisions of the TEACHNJ Act. Rather, under the circumstances present herein, the Undersigned finds that in Mr. Janicki's MTD, he has persuasively argued that permitting the District's filing of A/TSC 256-12/20 would be in substantial conflict with a number of provisions of the TEACHNJ Act. In the view of the Undersigned, that Act's N.J.S.A. 18A:10-17(b) provisions, as recited above, with their carefully crafted restrictions and unique and strict evidentiary and timeliness requirements, dictate the determinations made herein and are not subject to being overridden by the exigencies of a particular case or situation.

Therefore, for the reasons discussed above herein, the Undersigned finds that Mr. Janicki has supported his MTD with meritorious bases and that it should be granted.

DECISION

The Undersigned grants Mr. Janicki's Motion to Dismiss the District's Amended/Supplemental Charges in A/STC 256-12/20.

DATE: March 25, 2021

Gary T. Kendellen
GARY T. KENDELLEN

STATE OF NEW JERSEY:
SS:
COUNTY OF UNION:

I hereby affirm pursuant to CPLR Sec. 7507 that I am the individual described in and who executed this instrument, which consists of my Decision.

DATE: March 25, 2021

Gary T. Kendellen
GARY T. KENDELLEN

ARBITRATION PROCEEDINGS

BEFORE ARBITRATOR GARY T. KENDELLEN

In the Matter of the Tenure Hearing Gregory Janicki School District of the Township of Washington, Gloucester County Agency Docket No. 256-12/20	**ADDENDUM TO ARBITRATOR'S DECISION ON MOTION TO DISMISS AMENDED/ SUPPLEMENTAL CHARGES**

COUNSEL:

For the District — Joseph L. Betley, Esq.
Capehart Scatchard, P.A.

For Gregory Janicki: — Matthew B. Wieliczko, Esq.
Zeller & Wieliczko, LLP

ADDENDUM

Based upon the Undersigned's granting on March 25, 2021 of Mr. Janicki's Motion To Dismiss the District's Amended/Supplemental Charges in A/S1C 256-12/20, the Undersigned dismisses the Amended Supplemental Charges in A/STC 256-12/20.

DATE: March 29, 2021

Gary T Kendellen
GARY T. KENDELLEN

STATE OF NEW JERSEY:
SS:
COUNTY OF UNION:

I hereby affirm pursuant to CPLR Sec. 7507 that I am the individual described in and who executed this instrument, which consists of my Decision.

DATE: March 29, 2021

Gary T Kendellen
GARY T. KENDELLEN

75-21

OAL Dkt. No. EDU 05471-20
Agency Dkt. No. 113-5/20

New Jersey Commissioner of Education

Final Decision

W.B. and D.B., on behalf of minor child, B.B.,

Petitioners,

v.

Board of Education of the Township of Wayne, Passaic County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that that Board did not act in an arbitrary, capricious, or unreasonable manner when it denied petitioners' request to allow their minor child to attend Wayne Valley High School while the family resided in the attendance zone for Wayne Hills High School.

According, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 5, 2021
Date of Mailing: April 9, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 05471-20
AGENCY DKT. NO. 113-5/20

W.B. AND D.B., ON BEHALF OF MINOR CHILD, B.B.,
Petitioner,
v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,
Respondent.

W.B. and **D. B.**, petitioners pro se

John G. Geppert, Jr., Esq., for respondent Wayne Township Board of Education (Scarinci Hollenbeck, attorneys)

Record Closed: February 10, 2021 Decided: February 18, 2021

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

W.B. and D.B. (petitioners) appeal the Board of Education for the Township of Wayne's (Board) determination that their son, B.B., is not entitled to attend Wayne Valley High School because he is not residing within that attendance zone. Petitioners

claim their move from that attendance zone, albeit still within Wayne Township, was due to a hardship and has caused their son anxiety in addition to his learning issues.

The Board notified petitioners of its determination on May 11, 2020. [J-8.] They filed their petition of appeal directly with the Commissioner of Education on May 20, 2020. The Board filed its answer on June 10, 2020, and the matter was then transmitted to the Office of Administrative Law for determination as a contested case on June 17, 2020. The matter was assigned to me on or about July 17, 2020. Several case management conferences have been held in order to allow the parties to review new information. Thereafter, the hearing was scheduled and held on February 10, 2021, through the use of Zoom remote technology because of the continued New Jersey State of Emergency for the coronavirus pandemic. Insofar as the petitioners were not represented by counsel and the case was presented thoroughly by both sides, I determined that I did not need post-hearing submissions and I closed the record at the end of the hearing.

FINDINGS OF FACT

Based upon due consideration of the pleadings and the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following facts:

Petitioners testified on their own and their son's behalf. They opened their case by remarking as to how proud they are of the progress B.B. has made in the Wayne school system and how amazing the teachers have been working with his Individualized Education Plan (IEP). B.B. is classified as having a specific learning disability and has needed some reading and test-taking accommodations. His grades have improved, he has a good group of friends as a support network with whom he has attended school for many years, and intends to proceed to college.

In January 2019, petitioners faced a hardship that required them to move from their home. They relocated to a residence inn for almost nine months, which further stressed their financial situation, so that B.B. could remain in his school. They then

moved to an apartment, but it was on the other side of Wayne. They tried very hard to find an apartment within the same "attendance zone" as their house had been located but having a dog made finding such difficult, if not impossible. As a result, B.B. was technically within the attendance zone for Wayne Hills instead of Wayne Valley, but he was refusing to attend and was showing signs of anxiety. Prior to the start of the 2019-2020 school year, petitioners requested the Board to allow B.B. to remain for his eighth-grade year at the Wayne Valley middle school. [J-3.] The Board approved this request so that B.B. could complete middle school where he had always attended. [J-4.]

As was true for most students, B.B. began to engage in remote learning once the Covid pandemic emergency spread over New Jersey. Learning then was conducted under the hybrid model. In the spring of 2020, petitioners anticipated their son's entry into high school in the fall and extended their request that he be permitted to remain with his friends from his former neighborhood and attendance zone. [J-5.] At that time, their request was denied (J-6), on the basis of the Board's Policy #5120. At the same time that petitioners continued to argue in favor of an exception being made for B.B., as they viewed many others having been afforded that right, they also made the difficult decision to split up the household. D.B. had a girlfriend who offered her and B.B. a place to stay within the Wayne Valley attendance zone, while W.B. and their dog remained in the apartment they had all moved into earlier in the year. Petitioners also testified that it had been suggested that they take B.B. to a psychiatrist to assist him with the difficult adjustment, but they did not do so.

On cross examination, petitioners acknowledged that D.B. and B.B. will stay living and sharing expenses with her girlfriend if that is what is required so that B.B. can attend the high school he prefers. They also acknowledged that his IEP could be implemented at either high school and that he does not require special services only available at Wayne Valley. W.B. wanted the record to reflect his disappointment that the Superintendent, Dr. Toback with whom he had had a personal conversation and who promised that he would personally follow-up, never did return those communications.

Donna Reichman testified on behalf of the Board. She has been an employee with the Wayne district for seventeen years as a teacher, principal, and now Assistant Superintendent. Reichman reviewed the history of the petitioners' requests and the Board's responses, that were largely delegated to her, especially after Covid when everyone was overwhelmed with the "new normal" and an excessive number of personal requests by staff and pupils. She further stated that petitioners' request in May 2020 contained the argument that B.B. had always looked forward to playing football for Wayne Valley High School, which by state athletic standards, could not be taken into consideration.

With respect to other reasons provided by petitioners, Reichman explained that Policy #5120 supported the Board's decision to grant the request for eighth grade because it prevents disruption in one's last year before a graduation and also supported the denial for B.B.'s freshman year of high school. Policy #5120 specifically, and in pertinent part, states:

> Pupils shall generally attend the school located in the attendance area of their residence. The Superintendent may assign a pupil to a school other than that designated by the attendance area when such an exception is justified by circumstances and/or is in the best interests of the pupil.

Reichman focused on the fact that either high school within Wayne could implement B.B.'s IEP and that it was clear that he could succeed at either. She also noted that the middle school he attended was the only one in the district to have a mix of kids from the two high school attendance zones such that some of his friends might also be heading to Wayne Hills.

When questioned about the frequency with which the Board has granted exceptions under Policy #5120, Reichman stated that out of a student population of over 2400, there had been approximately three who were granted it because they were in their final year and three who were granted it because of IEP implementation issues. On cross-examination, she estimated that forty students make these requests a year. The policy is applied mostly to pupils who are medically fragile or severely disabled. With respect to relocations, she agreed that no one wants to see a student go to two

different schools within two months. Reichman also assured petitioners that if new information became available, such as a current psychiatric evaluation, that it would be considered.

ANALYSIS AND CONCLUSIONS OF LAW

The issue in this matter is whether B.B. was entitled to attend Wayne Valley High School, notwithstanding that his parents moved out of that attendance zone but remained within the Township.

Generally speaking, domicile is the place of a person's abode where he or she has the present intention of remaining and to which, if absent, he or she intends to return. Mercadante v. City of Paterson, 111 N.J. Super. 35, 39 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). A person may have multiple residences, but only one domicile at a time; as such, the residence may coincide with domicile, but does not alone determine domicile. State v. Benny, 20 N.J. 238, 251 (1955). The question of domicile is one of fact and must be determined on a case-by-case basis. Lea v. Lea, 18 N.J. 1, 7 (1955).

In the present matter, there is evidence that petitioners established themselves in the Wayne Hills attendance zone prior to B.B.'s last year in middle school and before the commencement of high school. Thereafter, the petitioners purposely separated, not for marital reasons, but in order to re-establish B.B. in the Wayne Valley attendance zone, with D.B. and B.B. moving in with a friend. They seek a determination herein that the Board should exercise its discretion under its Policy #5120 to allow B.B. to attend Wayne Valley even if they reunite the family at the current residence of W.B. outside that zone.

As set forth above, Policy #5120 states:

> Pupils shall generally attend the school located in the attendance area of their residence. The Superintendent may assign a pupil to a school other than that designated by the attendance area when such an exception is justified by circumstances and/or is in the best interests of the pupil. [J-2.]

Based on the preponderance of the credible facts, I **CONCLUDE** that B.B. is residing in the attendance zone of Wayne Valley High School only so long as he and a parent reside in that zone. I further **CONCLUDE** that the Board has properly applied its Policy #5120 and did so herein in a fair, reasonable, and nonarbitrary manner. The evidence clearly demonstrates that the Board has applied Policy #5120 in an even-handed manner in general and specifically for B.B. In his last year of middle school, B.B. was permitted to finish school in the Wayne Valley attendance zone, as it typically did for pupils in their last year at a school. The Board also carefully considered whether attendance at Wayne Valley High School was required in the best interests of the pupil and determined that B.B. could obtain all the services he needs at either high school, and at either, he would be entering his first year and was likely to succeed.

I **CONCLUDE** that the Board was correct in deciding that petitioners' circumstances do not come within the school assignment policy exceptions. If the family choses to reside as an entire family unit in the current apartment of W.B., B.B. will be required to attend Wayne Hills High School. I recognize that economic or other hardships which befall parents often have unintended consequences for their child(ren). Nevertheless, these events happen in life and we all have to adjust within the system that governs all similarly situated pupils.

ORDER

Based upon the foregoing, it is **ORDERED** that the petition of appeal of W.B. and D.B. on behalf of B.B. should be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties. of any exceptions must be sent to the judge and to the other parties.

Gail M. Cookson

February 18, 2021
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 2/18/21

Date Mailed to Parties: 2/18/21

id

APPENDIX

WITNESSES

For Petitioner:

W.B.

D.B.

For Respondent:

Donna Reichman

LIST OF EXHIBITS IN EVIDENCE

Joint Exhibits:

J-1 B.B. Individualized Education Plan, dated February 4, 2020

J-2 Wayne Township Board of Education District Policy #5120

J-3 Letter to Donna Reichman from petitioners, dated August 31, 2019

J-4 Letter to petitioners from Donna Reichman, dated September 4, 2019

J-5 Letter to Dr. Mark Toback from petitioners, dated February 20, 2020

J-6 Letter to petitioners from Donna Reichman, dated February 25, 2020

J-7 Letter to Dr. Mark Toback from petitioners, dated May 1, 2020

J-8 Letter to petitioners from Donna Reichman, dated May 11, 2020

J-9 Residency documents of petitioners

J-10 Email exchanges between petitioners and Board, various dates

For Petitioner:

None.

For Respondent:

None.

76-21

OAL Dkt. No. EDU 11443-20
Agency Dkt. No. 222-10/20

New Jersey Commissioner of Education

Decision

S.K.S., on behalf of minor child, S.H.,

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon review, the Commissioner agrees with the Administrative Law Judge (ALJ) that petitioner has abandoned this appeal because petitioner's attorney failed to appear at five telephone prehearing conferences without providing an explanation. Accordingly, the Initial Decision is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed with prejudice.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 6, 2021
Date of Mailing: April 6, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 11443-20
AGENCY DKT. NO. 222-10/20

S.K.S. ON BEHALF OF MINOR CHILD, S.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Corinne Mullen, Esq. for petitioner (The Mullen Law Firm, attorneys)

Jessika Kleen, Esq. for respondent (Machado Law Group, attorneys)

BEFORE **KELLY J. KIRK**, ALJ:

Petitioner S.K.S. on behalf of minor child, S.H., appeals from the suspension imposed upon S.H. by respondent, Jersey City Board of Education.

In June 2020, S.H. was suspended from school for seven days. Petitioner appealed the suspension, and the Board held a hearing on July 9, 2020. On July 15, 2020, the Board deliberated in closed session and thereafter notified petitioner that the suspension was upheld. Petitioner filed a request for reconsideration. By letter dated

September 25, 2020, the Board notified petitioner that the request for reconsideration was denied. Petitioner filed a Petition of Appeal on October 14, 2020. Respondent filed an Answer to Petition of Appeal on December 9, 2020. The matter was transmitted by the Department of Education (Department) to the Office of Administrative Law (OAL), where it was filed on December 11, 2020 for determination as a contested case.

By notice dated January 11, 2021, a telephone prehearing conference was scheduled for January 19, 2021 at 3:00 p.m. By 3:15 p.m., Ms. Mullen still had not called in for the conference. Respondent's attorney was able to reach Ms. Mullen's office and was advised that Ms. Mullen would be available for the conference on January 20, 2021 at 9:00 a.m. By notice dated January 19, 2021, the telephone prehearing conference was rescheduled for January 20, 2021 at 9:00 a.m. However, by 9:15 a.m., Ms. Mullen still had not called in for the conference. By email dated January 20, 2021, respondent's attorney's assistant advised that she had spoken to Ms. Mullen and that Ms. Mullen would be available for the conference at 2:00 p.m. Accordingly, on January 20, 2021, an email was sent to the parties confirming that the telephone prehearing conference was rescheduled for 2:00 p.m. However, by 2:15 p.m., Ms. Mullen still had not called in for the conference. Thereafter, on January 20, 2017, the parties were notified by email that since Ms. Mullen could not be reached for telephone prehearing conference, it was rescheduled for January 27, 2021 at 9:00 a.m. However, by 9:15 a.m. Ms. Mullen still had not called in for the conference. Ms. Mullen did not contact the OAL to explain any of these failures to appear.

Finally, on January 27, 2021, a notice of mandatory telephone prehearing was sent to the parties, accompanied by a letter that stated follows:

> This matter has been scheduled for a telephone prehearing conference four times, but Ms. Mullen has failed to participate. Accordingly, please be advised that the telephone prehearing conference has been rescheduled for **February 16, 2021** at **9:00 a.m.** A notice of telephone prehearing conference is enclosed. Please mark your calendars. The telephone number to call at the time of the conference is (877) 336-1839 and the access code is 6486063.

> Participation in this telephone prehearing conference is **MANDATORY**. If Ms. Mullen fails to call at the time of the telephone prehearing conference on February 16, 2021 at 9:00 a.m., it will be presumed that her client does not wish to pursue this matter **and the appeal will be dismissed, and the file will be returned to the Department of Education**. Therefore, if either party is unavailable for this telephone conference, please notify my assistant, Maria, at maria.montaner@oal.nj.gov within seven (7) days of the date of this letter, in order that the conference may be promptly rescheduled.

By email dated January 27, 2021, Ms. Mullen confirmed that "[c]ounsel for plaintiffs will be on the call." However, by 9:15 a.m. on February 16, 2021, Ms. Mullen still had not called in for the conference, and she has not contacted the OAL.

N.J.A.C. 1:1-14.4(a) provides as follows:

> If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall, unless proceeding pursuant to (d) below, direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

Further, N.J.A.C. 1:1-14.14(a) provides that for unreasonable failure to comply with any order of a judge or with any requirements of the Uniform Administrative Procedure Rules, the judge may (1) dismiss or grant the motion or application; (2) suppress a defense or claim; (3) exclude evidence; (4) order costs or reasonable expenses, including attorney's fees, to be paid to the State of New Jersey or an aggrieved representative or party; or (5) take other appropriate case-related action.

Petitioner's attorney failed to appear for the telephone prehearing conference four times prior, and even after notice that the February 16, 2021 telephone prehearing conference was mandatory and that failure to participate would result in dismissal of this matter, petitioner's attorney failed to appear for a fifth time and did not contact the OAL

thereafter with any explanation for the nonappearance. Accordingly, I **CONCLUDE** that petitioner has failed to appear and the petition of appeal should be **DISMISSED**. I further **CONCLUDE** that the Clerk should return this matter to the Department of Education.

It is **ORDERED** that this matter is **DISMISSED** and that the Clerk return this matter to the Department of Education for appropriate disposition.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10. Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Kelly J Kirk

February 18, 2021

DATE

KELLY J. KIRK, ALJ

Date Received at Agency:

Date Mailed to Parties:

77-21

77-21

New Jersey Commissioner of Education

Final Decision

In the Matter of the Teaching Certificates of Ryan Collins, Board of Trustees of Camden's Promise Charter Schools, Camden County.

Synopsis

This matter was opened before the Commissioner of Education in November 2020, by way of an Order to Show Cause served by the petitioner, the Board of Trustees of Camden's Promise Charter School (Board) upon the respondent, Ryan Collins, requiring respondent to show cause why an order should not be entered suspending his teaching certificates for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 after he resigned his position without giving the sixty-day (60) notice required by his contract with the petitioner. Respondent was duly advised that – pursuant to *N.J.A.C.* 6A:3-1.5(e) – failure to respond would cause each allegation raised by the Board to be deemed admitted and might result in summary decision by the Commissioner. The respondent failed to answer the order, despite ample opportunity to do so.

There being no response to the order to show cause, the Commissioner concluded that the allegations, which respondent has chosen not to deny, may be deemed admitted and justify suspension of respondent's certificates. Accordingly, respondent's certificates were suspended for a period of one year from the date of the filing of this decision – a copy of which was forwarded to the State Board of Examiners for the purpose of effectuating this order.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

77-21

Agency Dkt. No. 236-11/20

New Jersey Commissioner of Education

Final Decision

In the Matter of the Teaching Certificates of Ryan Collins, Board of Trustees of Camden's Promise Charter Schools, Camden County.

The record of this matter has been reviewed. The Board of Trustees of Camden's Promise Charter Schools filed a petition seeking the suspension of respondent Ryan Collins' teaching certificates pursuant to *N.J.S.A.* 18A:28-8 after he resigned without providing the Board with the requisite statutory notice. The Commissioner issued an Order to Show Cause on November 24, 2020, which the Board served on respondent on November 25, 2020. Respondent did not respond to the Order to Show Cause, despite being given multiple opportunities to do so. Accordingly, the Commissioner finds that the respondent's certificates should be suspended pursuant to *N.J.S.A.* 18A:28-8, and further finds that a one-year suspension of the respondent's certificates is the appropriate penalty.

Accordingly, the respondent's teaching certificates are suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 6, 2021
Date of Mailing: April 6, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

78-21

78-21

OAL Dkt. No. EDU 00055-19
Agency Dkt. No. 284-11/18

New Jersey Commissioner of Education

Final Decision

Angela Gonzo,

Petitioner,

v.

Board of Education of the Carlstadt-East Rutherford Regional School District, Bergen County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 6, 2021
Date of Mailing: April 6, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 00055-19

AGENCY DKT. NO. 284-11/18

ANGELA GONZO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,

Respondent.

Kathleen Naprstek Cerisano, Esq., for petitioner (Zazzalli, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Dennis McKeever, Esq., for respondent (Sciarrillo, Cornell, Merlino, McKeever & Osbourne, attorneys)

Carol R. Smeltzer, Esq., for intervenors Jonna Calvanico and Robert DiDomenico

Record Closed: February 15, 2021 Decided: February 17, 2021

BEFORE **MARGARET M. MONACO**, ALJ:

On or about November 28, 2018, petitioner Angela Gonzo filed a Verified Petition with the Commissioner of Education alleging that respondent Board of Education of the Carlstadt-East Rutherford Regional School District (the Board) violated her tenure and seniority rights when it terminated of her employment as a supervisor. On or about December 17, 2018, the Board filed an Answer to the Petition of Appeal, and the Department of Education transmitted the matter to the Office of Administrative Law, where it was filed for determination as a contested case. On November 25, 2019, the undersigned issued an Order permitting Jonna Calvanico and Robert DiDomenico to intervene in this matter. Following prior adjournments of the hearing, counsel for petitioner advised that the parties had reached a settlement. Under letter dated February 15, 2021, counsel for respondent forwarded the attached Settlement Agreement and Release, indicating the terms of agreement between the parties, and the attached resolution of the Board accepting the Settlement Agreement and Release.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit

is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

February 15, 2021
DATE

MARGARET M. MONACO, ALJ

Date Received at Agency: 2-23-21

Date Mailed to Parties: 2-23-21

jb

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN, P.C.
570 Broad Street, Suite 1402
Newark, New Jersey 07102
(973) 623-1822
Attorneys for Petitioner

ANGELA GONZO Petitioner, v. BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW Agency Dkt. No. 284-11/18 OAL Dkt. No. EDU 00055-19 **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and General Release ("Settlement Agreement") is entered into by and between the Petitioner Angela Gonzo ("Petitioner" or "Ms. Gonzo") and the Respondent Board of Education of the Carlstadt-East Rutherford Regional School District ("Respondent" or "District"), both of whom are collectively referred to as "the Parties."

WHEREAS the Petitioner Angela Gonzo ("Ms. Gonzo") has been employed as a teacher by the Respondent Board of Education of the Carlstadt-East Rutherford Regional School District ("District") since March 1990; and

WHEREAS Ms. Gonzo was also employed by the District in the supervisory position of Department Chairperson from the 2013-14 school year through the 2017-18 school year for which she received additional compensation; and

WHEREAS just prior to the start of the 2018-19 school year the District advised Ms. Gonzo that she was not assigned to the supervisory position of Department Chairperson for the 2018-19 school year, but only to her teaching position; and

WHEREAS the District assigned another individual to the supervisory position of Department Chairperson which Ms. Gonzo had previously held and paid that individual the additional compensation which Ms. Gonzo had previously received; and

WHEREAS Ms. Gonzo filed a Petition of Appeal against the District challenging the District's actions terminating her assignment to the supervisory position of Department Chairperson and reducing her compensation by no longer paying to her the additional compensation for that position; and

WHEREAS the Parties have engaged in settlement negotiations throughout this matter through their respective counsel; and

WHEREAS, as a result of the settlement negotiations the Parties have reached the within Settlement Agreement;

NOW THEREFORE, it is agreed by and between the Parties hereto as follows:

1. Respondent agrees to pay to Petitioner the sum of $7,930.00 as back pay for the additional compensation payable for the supervisory position of Department Chairperson during the 2018-19 school year, less applicable payroll taxes.

2. Respondent agrees to pay to Petitioner the sum of $12,500.00 as back pay for the additional compensation payable for the supervisory position of Department Chairperson during the 2019-20 school year, less applicable payroll taxes.

3. Respondent shall be liable to the Division of Pensions and Benefits and/or Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) for the payment of Respondent's

share of Petitioner's pension contributions for the additional back pay for the 2018-19 and 2019-20 school years, as set forth in paragraphs 1 and 2 above. Any and all other deductions or pension contributions shall be deducted from the payments to Petitioner.

4. The Parties understand that Respondent cannot assure that Petitioner will receive pension credit or any amount of a specific pension credit because that determination must be made by the Division of Pensions and/or the Board of Trustees of the TPAF. Respondent agrees to take all reasonable actions to assist Petitioner in acquiring pension credit for the additional back pay for the 2018-19 and 2019-20 school years.

5. Respondent also agree to pay to Petitioner the sum of $30,000.00. This payment shall be for the relinquishment of any and all tenure, seniority and other employment rights that she may have or may claim hereafter with regard to a supervisory, rather than teaching, position with the District, and shall not be considered back pay.

6. Respondent shall issue all payments due to Petitioner and the Division of Pensions, pursuant to paragraphs 1,2, 3, and 5 above, within thirty (30) days following approval of this Settlement Agreement by the NJ Office of Administrative Law and the Commissioner of Education.

7. Petitioner hereby agrees to provide an irrevocable letter of resignation from the District effective June 30, 2021. Said letter shall be appended to this Settlement Agreement. Petitioner's separation from employment shall be deemed to be a voluntary retirement in good standing. Respondent shall provide Petitioner with a favorable reference letter signed by Superintendent Sforza, which Petitioner may use in her future employment endeavors. Respondent will provide oral references consistent with the letter to Petitioner's prospective employers upon provision of written authorization from Petitioner at the time such references are requested.

8. Upon receipt of the total sum of $50,430.00, Petitioner shall withdraw the Petition of Appeal currently pending before the NJ Office of Administrative Law and the Commissioner of Education, with prejudice.

9. Nothing in this Settlement Agreement shall constitute evidence of a past practice on the part of the District, nor shall it be binding upon the District with respect to any other employee of the Carlstadt-East Rutherford Regional School District. The District and Ms. Gonzo have entered into this Settlement Agreement based upon the particular facts and circumstances unique to Ms. Gonzo.

10. By signing this Settlement Agreement, the Parties certify that they have had the opportunity to discuss this Agreement with counsel. They are fully satisfied with the services of their counsel with respect to both this Settlement Agreement and all other aspects of this case and they enter into this Settlement Agreement knowingly, willingly, and without any coercion or improper inducements.

11. The Parties agree that this Settlement Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

12. This Settlement Agreement is subject to the approval of the NJ Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received.

13. By entering into this Settlement Agreement, Ms. Gonzo releases and discharges all claims or rights Ms. Gonzo may have against the Board and its members, the Superintendent, and any and all other Board officers, including specifically, intervenors Jonna Calvenico & Robert DiDomenico. employees, representatives, agents, successors, and assigns,

(collectively, the "Released Parties") for anything which has happened up until the date that this Settlement Agreement is executed by all parties. This includes without limitation, any and all

actions, claims and liabilities of whatsoever kind or character, in law or equity, now known or unknown, suspected or unsuspected, directly or indirectly related to the Petitioner's employment with the Respondent that exist as of the date of this Agreement. It specifically includes without limitation, all claims which the Petitioner may have regarding withholding of increment, discrimination on any basis, any federal or state civil rights law, claims under the Civil Rights Act of 1964, 42 U.S.C. §2000(e) *et seq.* as amended, 42 U.S.C. §1981 through 1988, the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, of 1990, the New Jersey Law Against Discrimination, N.J.S.A. 10:501 *et seq.*, the Family and Medical Leave Act, 29 U.S.C. §2601 *et seq.*, the New Jersey Family Medical Leave Act, N.J.S.A. 34:19-1, *et seq.*, and any other federal or state civil rights claims, including claims of age discrimination and other rights and claims arising under the Age Discrimination in Employment Act and the Older Workers' Benefits Protection Act, Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Rehabilitation Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law: the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act: the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, the retaliation provisions of the New Jersey

Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to her employment, any claims arising under common law, including but not limited to, theories of tort or contract (express or implied), assault, battery, defamation, discrimination, negligent supervision, intentional or negligent infliction of emotional distress, negligent hire/retention/supervision, tortious interference with an economic or prospective advantage, wrongful termination, breach of implied covenant of good faith and fair dealing, or a violation of public policy.

13. Notwithstanding Paragraph 12 of this Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the Released Parties, or any of them, based upon any of the above-released claims in Paragraph 12, Ms. Gonzo agrees not to seek or accept any resulting relief.

14. As of the effective date of her resignation, all of Ms. Gonzo's employment rights, including but not limited to salary. insurance coverage, tenure and seniority, will permanently end, except for any benefits to which she may lawfully be entitled under the Workers' Compensation Act or the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") or N.J.S.A. 18A:66-39, 40 and 41.

15. Ms. Gonzo agrees that she will not apply for reemployment with the Board at any time after June 30, 2021. Specifically. Ms. Gonzo will be considered to have permanently resigned from her tenured position as a result of this Agreement. If Ms. Gonzo does apply for

reemployment with the Board and is approved for employment, the terms of this Agreement shall control and be grounds for immediate termination of Ms. Gonzo's employment.

16. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Ms. Gonzo of the legal requirements of that Act, and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Ms. Gonzo acknowledges that she: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given twenty-one (21) days within which to consider this Agreement; and (v) has seven (7) days from the date of the execution of this Agreement to revoke it. Ms. Gonzo understands that she may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven-day period. In the event of such rescission, the Board may, in its sole discretion, pursue any and all available relief against Ms. Gonzo including but not limited to termination of her employment by way of a tenure charge of inefficiency, unbecoming conduct, and/or other just cause, and Ms. Gonzo waives any right to any objection or defense based on the timeliness of such charge.

17. The Parties hereto agree that this Settlement Agreement may not be modified, altered, or changed except by written agreement signed by the Parties hereto. The Parties further acknowledge that this constitutes the entire agreement between them, superseding all prior written and oral agreements. If any provision of this Settlement Agreement is held to be invalid, the remaining provisions shall remain in full force and effect.

18. The Parties have not relied upon any representations, promises, or agreements of any kind made to them in connection with this Settlement Agreement, except for those set forth in this Settlement Agreement.

19. This Settlement Agreement is made and entered into the in the State of New Jersey, and shall in all respects be interpreted, enforced and governed under the law of the State of New Jersey.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year written below.

[SIGNATURE PAGE TO FOLLOW]

Witnessed or Attested by:

ANGELA GONZO

Dated: 1/14/2021

Witnessed or Attested by:

JONNA CALVANICO

Dated:

Witnessed or Attested by:

ROBERT DiDOMENICO

Dated:

Witnessed or Attested by:

BOARD OF EDUCATION OF THE
CARLSTADT-EAST RUTHERFORD
REGIONAL SCHOOL DISTRICT
By:

Dated:

20 Hunters Run
Oakland, NJ 07436-2331
January 8, 2021

Dr. Dario Sforza, Superintendent
Carlstadt-East Rutherford Regional School District
120 Paterson Avenue
East Rutherford, NJ 07073

Re: Letter of Resignation

Dear Dr. Sforza:

I hereby submit my irrevocable letter of resignation from all employment with the Carlstadt-East Rutherford Regional School District, effective June 30, 2021, and consistent with and contingent upon the terms and conditions of the Settlement Agreement and Release between myself and the District to which this Letter of Resignation is appended.

Very truly yours,

Angela Gonzo

Angela Gonzo

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN, P.C.
570 Broad Street, Suite 1402
Newark, New Jersey 07102
(973) 623-1822
Attorneys for Petitioner

ANGELA GONZO Petitioner, v. BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW Agency Dkt. No. 284-11/18 OAL Dkt. No. EDU 00055-19 SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and General Release ("Settlement Agreement") is entered into by and between the Petitioner Angela Gonzo ("Petitioner" or "Ms. Gonzo") and the Respondent Board of Education of the Carlstadt-East Rutherford Regional School District ("Respondent" or "District"), both of whom are collectively referred to as "the Parties."

WHERRAS the Petitioner Angela Gonzo ("Ms. Gonzo") has been employed as a teacher by the Respondent Board of Education of the Carlstadt-East Rutherford Regional School District ("District") since March 1990; and

WHERRAS Ms. Gonzo was also employed by the District in the supervisory position of Department Chairperson from the 2013-14 school year through the 2017-18 school year for which she received additional compensation; and

WHEREAS just prior to the start of the 2018-19 school year the District advised Ms. Gonzo that she was not assigned to the supervisory position of Department Chairperson for the 2018-19 school year, but only to her teaching position; and

WHEREAS the District assigned another individual to the supervisory position of Department Chairperson which Ms. Gonzo had previously held and paid that individual the additional compensation which Ms. Gonzo had previously received; and

WHEREAS Ms. Gonzo filed a Petition of Appeal against the District challenging the District's actions terminating her assignment to the supervisory position of Department Chairperson and reducing her compensation by no longer paying to her the additional compensation for that position; and

WHEREAS the Parties have engaged in settlement negotiations throughout this matter through their respective counsel; and

WHEREAS, as a result of the settlement negotiations the Parties have reached the within Settlement Agreement;

NOW THEREFORE, it is agreed by and between the Parties hereto as follows:

1. Respondent agrees to pay to Petitioner the sum of $7,930.00 as back pay for the additional compensation payable for the supervisory position of Department Chairperson during the 2018-19 school year, less applicable payroll taxes.

2. Respondent agrees to pay to Petitioner the sum of $12,500.00 as back pay for the additional compensation payable for the supervisory position of Department Chairperson during the 2019-20 school year, less applicable payroll taxes.

3. Respondent shall be liable to the Division of Pensions and Benefits and/or Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) for the payment of Respondent's

share of Petitioner's pension contributions for the additional back pay for the 2018-19 and 2019-20 school years, as set forth in paragraphs 1 and 2 above. Any and all other deductions or pension contributions shall be deducted from the payments to Petitioner.

4. The Parties understand that Respondent cannot assure that Petitioner will receive pension credit or any amount of a specific pension credit because that determination must be made by the Division of Pensions and/or the Board of Trustees of the TPAF. Respondent agrees to take all reasonable actions to assist Petitioner in acquiring pension credit for the additional back pay for the 2018-19 and 2019-20 school years.

5. Respondent also agree to pay to Petitioner the sum of $30,000.00. This payment shall be for the relinquishment of any and all tenure, seniority and other employment rights that she may have or may claim hereafter with regard to a supervisory, rather than teaching, position with the District, and shall not be considered back pay.

6. Respondent shall issue all payments due to Petitioner and the Division of Pensions, pursuant to paragraphs 1,2, 3, and 5 above, within thirty (30) days following approval of this Settlement Agreement by the NJ Office of Administrative Law and the Commissioner of Education.

7. Petitioner hereby agrees to provide an irrevocable letter of resignation from the District effective June 30, 2021. Said letter shall be appended to this Settlement Agreement. Petitioner's separation from employment shall be deemed to be a voluntary retirement in good standing. Respondent shall provide Petitioner with a favorable reference letter signed by Superintendent Sforza, which Petitioner may use in her future employment endeavors. Respondent will provide oral references consistent with the letter to Petitioner's prospective employers upon provision of written authorization from Petitioner at the time such references are requested.

8. Upon receipt of the total sum of $50,430.00, Petitioner shall withdraw the Petition of Appeal currently pending before the NJ Office of Administrative Law and the Commissioner of Education, with prejudice.

9. Nothing in this Settlement Agreement shall constitute evidence of a past practice on the part of the District, nor shall it be binding upon the District with respect to any other employees of the Carlstadt-East Rutherford Regional School District. The District and Ms. Gonzo have entered into this Settlement Agreement based upon the particular facts and circumstances unique to Ms. Gonzo.

10. By signing this Settlement Agreement, the Parties certify that they have had the opportunity to discuss this Agreement with counsel. They are fully satisfied with the services of their counsel with respect to both this Settlement Agreement and all other aspects of this case and they enter into this Settlement Agreement knowingly, willingly, and without any coercion or improper inducements.

11. The Parties agree that this Settlement Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

12. This Settlement Agreement is subject to the approval of the NJ Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received.

13. By entering into this Settlement Agreement, Ms. Gonzo releases and discharges all claims or rights Ms. Gonzo may have against the Board and its members, the Superintendent, and any and all other Board officers, including specifically, intervenors Jonna Calvenico & Robert DiDomenico. employees, representatives, agents, successors, and assigns,

(collectively, the "Released Parties") for anything which has happened up until the date that this Settlement Agreement is executed by all parties. This includes without limitation, any and all

actions, claims and liabilities of whatsoever kind or character, in law or equity, now known or unknown, suspected or unsuspected, directly or indirectly related to the Petitioner's employment with the Respondent that exist as of the date of this Agreement. It specifically includes without limitation, all claims which the Petitioner may have regarding withholding of increment, discrimination on any basis, any federal or state civil rights law, claims under the Civil Rights Act of 1964, 42 U.S.C. §2000(e) *et seq.* as amended, 42 U.S.C. §1981 through 1988, the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, of 1990, the New Jersey Law Against Discrimination, N.J.S.A. 10:501 *et seq.*, the Family and Medical Leave Act, 29 U.S.C. §2601 *et seq.*, the New Jersey Family Medical Leave Act, N.J.S.A. 34:19-1, *et seq.*, and any other federal or state civil rights claims, including claims of age discrimination and other rights and claims arising under the Age Discrimination in Employment Act and the Older Workers' Benefits Protection Act, Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Rehabilitation Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law: the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act: the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, the retaliation provisions of the New Jersey

Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to her employment, any claims arising under common law, including but not limited to, theories of tort or contract (express or implied), assault, battery, defamation, discrimination, negligent supervision, intentional or negligent infliction of emotional distress, negligent hire/retention/supervision, tortious interference with an economic or prospective advantage, wrongful termination, breach of implied covenant of good faith and fair dealing, or a violation of public policy.

13. Notwithstanding Paragraph 12 of this Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the Released Parties, or any of them, based upon any of the above-released claims in Paragraph 12, Ms. Gonzo agrees not to seek or accept any resulting relief.

14. As of the effective date of her resignation, all of Ms. Gonzo's employment rights, including but not limited to salary. insurance coverage, tenure and seniority, will permanently end, except for any benefits to which she may lawfully be entitled under the Workers' Compensation Act or the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") or N.J.S.A. 18A:66-39, 40 and 41.

15. Ms. Gonzo agrees that she will not apply for reemployment with the Board at any time after June 30, 2021. Specifically. Ms. Gonzo will be considered to have permanently resigned from her tenured position as a result of this Agreement. If Ms. Gonzo does apply for

reemployment with the Board and is approved for employment, the terms of this Agreement shall control and be grounds for immediate termination of Ms. Gonzo's employment.

16. To comply with the Older Workers Benefit Protection Act of 1990. if applicable, this Agreement advises Ms. Gonzo of the legal requirements of that Act, and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Ms. Gonzo acknowledges that she: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given twenty-one (21) days within which to consider this Agreement; and (v) has seven (7) days from the date of the execution of this Agreement to revoke it. Ms. Gonzo understands that she may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven-day period. In the event of such rescission, the Board may, in its sole discretion, pursue any and all available relief against Ms. Gonzo including but not limited to termination of her employment by way of a tenure charge of inefficiency, unbecoming conduct, and/or other just cause, and Ms. Gonzo waives any right to any objection or defense based on the timeliness of such charge.

17. The Parties hereto agree that this Settlement Agreement may not be modified, altered, or changed except by written agreement signed by the Parties hereto. The Parties further acknowledge that this constitutes the entire agreement between them, superseding all prior written and oral agreements. If any provision of this Settlement Agreement is held to be invalid, the remaining provisions shall remain in full force and effect.

18. The Parties have not relied upon any representations, promises, or agreements of any kind made to them in connection with this Settlement Agreement, except for those set forth in this Settlement Agreement.

19. This Settlement Agreement is made and entered into the in the State of New Jersey, and shall in all respects be interpreted, enforced and governed under the law of the State of New Jersey.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year written below.

[SIGNATURE PAGE TO FOLLOW]

Witnessed or Attested by:

_____ ANGELA GONZO

Dated:

Witnessed or Attested by:

JONNA CALVANICO

Dated: 1/14/21

Witnessed or Attested by:

ROBERT DiDOMENICO

Dated: 1/14/21

Witnessed or Attested by:

BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL SCHOOL DISTRICT
By: President

CARLSTADT-EAST RUTHERFORD
REGIONAL BOARD OF EDUCATION

120 PATERSON AVENUE
EAST RUTHERFORD, N.J. 07073

NICHOLAS ANNITTI
BUSINESS ADMINISTRATOR/
BOARD SECRETARY

TELEPHONE: (201) 935-4940
FAX: (201) 935-3047

H.P. BECTON REGIONAL HIGH SCHOOL
120 PATERSON AVENUE
EAST RUTHERFORD, N.J. 07073

FINANCE: (Mr. Anderson)

F8. Approve the following Settlement Agreement and accept Letter of Resignation for the purpose of retirement:

Moved: Mr. Anderson Second: Mr. Young Approved: Unanimous

CARLSTADT-EAST RUTHERFORD BOARD OF EDUCATION

RESOLUTION No. 292 – 21 - 22

WHEREAS, be it resolved, the Board of Education hereby accepts the Settlement Agreement and Release in the matter of Employee # 4017 (Angela Gonzo) v. Carlstadt-East Rutherford Board of Education, Docket No.: EDU 00055-19.

WHEREAS, upon the recommendation of the Superintendent, the Board of Education hereby accepts the irrevocable Letter of Resignation of Employee No. 4017 effective June 30, 2021.

NOW THEREFORE, BE IT RESOLVED, the Board of Education hereby accepts the Settlement Agreement and Release in the above-referenced matter.

BE IT FURTHER RESOLVED, the Board of Education hereby accepts the irrevocable Letter of Resignation for Employee No. 4017.

Dated: 2/11/2021

Nicholas Annitti,
Business Administrator/Board Secretary

MEMBER	YES	NO	MEMBER	YES	NO
Mr. Anderson	X		Dr. Lahullier	X	
Mr. Bulger	X		Ms. Landolfi	X	
Mr. DeLizio	X		Ms. Wiebe	X	
Mr. Grabowski	X		Mr. Young	X	
Mr. Kandiel	X		Ms. Fukushima	X	

CERTIFICATION:

I, Nicholas Annitti, Board Secretary/Business Administrator of the Carlstadt-East Rutherford Regional Board of Education do hereby certify that the above is an extract from the minutes of the February 10, 2021 regular public meeting of the Carlstadt - East Rutherford Regional Board of Education.

Nicholas Annitti
Board Secretary/Business Administrator
Dated: February 11, 2021

79-21

New Jersey Commissioner of Education

Decision

Stephen Klapach,

Petitioner,

v.

Board of Education of the Borough of Fort Lee, Bergen County,

Respondent.

Synopsis

Petitioner, a science teacher in the respondent Board's school district, appealed the Board's decision to affirm the results of a harassment, intimidation, and bullying (HIB) investigation into petitioner's conduct. The HIB investigation concluded that the petitioner committed an act of HIB against a student when he read a confidential email from the student's parent to pupils in another of his classes. The Board affirmed the findings of the investigation, which stemmed from discipline the petitioner had threatened to impose upon three students after they allegedly misbehaved during a lesson with a substitute teacher. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the issue for determination in this case is whether the petitioner's reading of the confidential email in front of a classroom of students was reasonably perceived as being motivated either by any actual or perceived characteristic of student J.W.; Fort Lee's HIB policy is substantially similar to *N.J.S.A.* 18A:37-14; the Board's letter to petitioner informing him that the HIB charge had been sustained failed to state how his reading of L.C.'s email was motivated by an actual or perceived characteristic of J.W.; and the Board's argument that petitioner's status as a teacher created an imbalance of power which was the perceived characteristic is without merit. The ALJ concluded that power imbalance is not a perceived or actual characteristic defined in Fort Lee's HIB policy, nor in the relevant statutes and regulations; the Board failed to establish that there was an act of HIB motivated by an actual or perceived characteristic; and the Board's sustaining of HIB charges against petitioner was therefore arbitrary and unreasonable. Accordingly, the ALJ granted summary decision in favor of the petitioner and denied the Board's cross motion.

Upon comprehensive review, the Commissioner agreed with the ALJ findings and conclusion, affirmed the Initial Decision of the OAL, reversed the Board's determination that the petitioner committed an act of HIB, and directed the Board to remove any reference to the HIB investigation and findings from the petitioner's personnel file. In so doing, the Commissioner noted that if the incident reported herein is included in petitioner's personnel file for other reasons, such as violations of Board policies other than its HIB policy, this decision does not extend to those references, as the only issue presently before the Commissioner is the HIB finding. The Commissioner further noted that she in no way condones petitioner's conduct discussed herein. Teachers are placed in a position of trust by the Board and the community. Petitioner in this matter demonstrated extremely poor judgment in singling out J.W. in front of other students and sharing information from an email written by J.W.'s mother that should have remained confidential.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

79-21

OAL Dkt. No. EDU 5069-20
Agency Dkt. No. 79-4/20

New Jersey Commissioner of Education

Decision

Stephen Klapach,

Petitioner,

v.

Board of Education of the Borough of Fort Lee, Bergen County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by both parties pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply to respondent's exceptions[1] have been reviewed.

This matter concerns an alleged act of harassment, intimidation, and bullying (HIB) by petitioner, a science teacher employed by the Fort Lee Board of Education (Board). Following his absence from school on October 18, 2019, petitioner received a note from the substitute teacher indicating that three students in his seventh period class had not behaved well. On October 21, 2019, the next school day, petitioner informed these students that he might decrease their class participation grades as a result. That night, J.W.'s mother, L.C., emailed petitioner, stating that the substitute teacher was misinformed about J.W.'s behavior. The following morning, petitioner read L.C.'s email aloud to his first period class, and one of the students in that class informed J.W., who became nervous about going to class and asked her

[1] Respondent did not file a reply to petitioner's exceptions.

mother to pick her up from school. J.W. was switched to another science class, and an HIB investigation was opened against petitioner. The Board found that petitioner had committed an act of HIB. Petitioner appealed, and the parties filed cross motions for summary decision. The Administrative Law Judge concluded that the Board's decision was arbitrary and unreasonable because it did not establish an HIB act motivated by an actual or perceived characteristic. The ALJ found that the power imbalance between a teacher and a student is not an actual or perceived characteristic listed in the Board's HIB policy, or the applicable statute or regulations.

In its exceptions, the Board argues that *N.J.A.C.* 6A:16-7.7(a)(2)(iii) provides that bullying is "unwanted aggressive behavior that may involve a real or perceived power imbalance,"[2] and that the Board properly considered the power imbalance between a teacher and a student – an imbalance that exists because of the very nature of the relationship – in reaching its conclusion that petitioner committed an act of HIB. The Board cites to precedents establishing that distinguishing characteristics are not limited to those enumerated in the statute, which applies to a broad range of characteristics. According to the Board, the power differential is a method of distinguishing the motivating characteristics of the aggressor relative to a perceived status of power – or lack thereof – of the victim. The Board contends that a teacher abuses his power over students when he uses the imbalance to disrupt the student's learning environment. The Board argues that petitioner's conduct was motivated by J.W.'s challenge to his authority – an action that distinguished her.

In reply, petitioner argues that the regulatory addition of language indicating that bullying may involve a power imbalance does not eliminate or replace the statutory requirement that an act of HIB be motivated by a distinguishing characteristic of the student. Petitioner

[2] Throughout its summary decision briefs and exceptions, the Board refers to this language as part of a 2018 amendment to the Anti-Bullying Bill of Rights Act. However, this language does not appear in the Act, but rather in the Department of Education's implementing regulations, in a provision outlining the required elements of district HIB policies.

therefore urges the Commissioner to accept the ALJ's conclusion that the Board failed to set forth any distinguishing characteristic, as required by the Act.

Petitioner also filed exceptions of his own, asking the Commissioner to not only affirm the Initial Decision and reverse the Board's decision, but also to rescind and expunge any reference to the HIB investigation and decision from petitioner's personnel file.

Initially, the Commissioner agrees with the ALJ that summary disposition is appropriate. Upon review, the Commissioner also concurs with the ALJ that the Board's decision, finding that petitioner committed an act of HIB, was arbitrary, capricious, and unreasonable because it did not establish any distinguishing characteristic of the alleged victim that motivated, or could reasonably be perceived to have motivated, the petitioner's conduct.[3]

The Anti-Bullying Bill of Rights Act (the Act) defines HIB as follows:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or

[3] Although the Commissioner concludes that the Board's decision must be reversed, the Commissioner in no way condones petitioner's conduct, or minimizes J.W.'s feelings regarding the incident. Teachers are placed in a position of trust by the Board and the community. Petitioner demonstrated extremely poor judgment in singling out J.W. in front of other students and sharing information from an email written by her mother that should have remained confidential.

> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> *N.J.S.A.* 18A:37-14.

Therefore, a finding of HIB requires three elements.[4] First, the conduct must be reasonably perceived as being motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. The third condition is that one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex County*, Commissioner Decision No. 51-20 (decided February 4, 2020).

Beginning with the first element required by the Act – that the conduct be reasonably perceived as being motivated by a distinguishing characteristic – the Act "has not limited 'distinguishing characteristic' to those specifically enumerated, but it has consistently required such a perceived motivation." *K.L. v. Evesham Twp. Bd. of Educ.*, 423 *N.J. Super.* 337, 351 (App. Div. 2011). While HIB can be found based on a broad range of distinguishing characteristics, the Commissioner finds that the power imbalance inherent in the relationship between a teacher and a student cannot, by itself, be a distinguishing characteristic sufficient to prove an act of HIB. Because only students can be the victims of HIB under the Act, status as a student cannot be sufficient to substantiate an HIB finding, or there would be no reason to include an additional requirement that the conduct be reasonably perceived as being motivated by a distinguishing characteristic. *See J.E. and R.E. v. Hunterdon Central Regional Bd. of Educ.*, OAL Dkt. No. EDU 188-14 (Initial Decision, Sept. 28, 2017), *aff'd*, Commissioner Decision No.

[4] The statute also requires that the conduct take place on school property, at a school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3. The parties do not contest that this requirement has been met in this matter.

366-17 (decided Dec. 21, 2017) (finding, among other things, that a baseball coach's comments did not constitute HIB because the alleged target's status as a student was not a sufficient distinguishing characteristic to support such a finding).

When the Department of Education updated its HIB regulations in 2018, it added a requirement that district HIB policies include a statement that "bullying is unwanted, aggressive behavior that may involve a real or perceived power imbalance." *N.J.A.C.* 6A:16-7.7(a)(2)(iii). In response to public comments regarding the inclusion of power imbalance in the rule, the Department stated, "The intent of the proposed rule is to assist school officials in identifying HIB within the context and relative positions of the alleged aggressor and target, rather than focusing *solely* on the real or perceived characteristics." (emphasis added). 50 *N.J.R.* 155(b) (2018). The Department also noted that, for an incident to be deemed HIB, it must fulfill the criteria at *N.J.A.C.* 6A:16-3, which mimics the criteria of the Act set forth above and includes that the act be reasonably perceived as being motivated by a distinguishing characteristic. *Ibid.* Notably, the Department further stated, "The mere existence of a real or perceived power imbalance without fulfilment of the other criteria is insufficient to find an incident of HIB." *Ibid.* It is clear from the Department's statements that a power imbalance can be a consideration in HIB determinations, but it cannot be the sole basis for a finding of HIB, and all other criteria, including the existence of a distinguishing characteristic of the alleged target, must be established.

Nor does the Commissioner find that J.W.'s "challenge" to petitioner's authority distinguished her in the manner required by the Act. The series of events at issue here – alleged misbehavior by J.W. with the substitute teacher, petitioner's remarks about decreasing participation grades, L.C.'s email in response, and petitioner's in-class reading of and response to that email – are in the nature of a conflict, not bullying. As the Appellate Division has noted,

"harmful or demeaning conduct motivated only by another reason [other than a distinguishing characteristic], for example, a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation, does not come within the statutory definition of bullying." *K.L. supra*, 423 *N.J. Super.* at 351.

This matter is substantially similar to *M.R., o/b/o minor child, M.R. v. Bd. of Educ. of the Ramapo Indian Hills Regional High School District, Bergen Cty.*, Commissioner Decision No. 426-16 (decided Dec. 21, 2016). In that case, M.R. texted her cheerleading coach to inform him that she could not attend a basketball game due to other plans, and the coach responded that she was off the team. During a game after M.R. returned to the team, the coach told the team that he wanted his conversations with them kept private and not reported to parents. M.R. felt that she was being targeted and that the team was a hostile environment. In that case, the Board found, and the ALJ and Commissioner affirmed, that the coach did not commit an act of HIB because his actions were not motivated by a distinguishing characteristic of M.R. While the *M.R.* decision predates the addition of the "power imbalance" language to the Department's regulations, that language does not alter the requirements of the Act, for the reasons stated above, and does not warrant a different outcome in this matter. Here, petitioner's authority status was similar to that of the coach in M.R., and he engaged in similar conduct, including imposing a consequence for misbehavior and discussing the issue with other students. Here, too, there is no evidence that petitioner's conduct could reasonably be perceived as being motivated by a distinguishing characteristic of J.W., and so he has not committed an act of HIB. [5]

[5] The Initial Decision, as well as the parties' arguments, focused on whether petitioner's conduct was actually motivated by any distinguishing characteristic of J.W. However, the plain language of the statute requires an analysis of how the actor's motivation is perceived and whether that perception is reasonable. It does not require an analysis of the actual motivation of the actor. *Wehbeh, supra.* Certainly, evidence that the actor was motivated by a distinguishing characteristic would meet the standard of this section of the Act, but evidence that the actor was not so motivated does not end the analysis. Here, because the Board failed to establish any distinguishing characteristic, the Commissioner does not reach the issue of reasonable perception and raises it solely for the purposes of clarifying

The Commissioner is mindful of the applicable standard of review, such that when a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 N.J. Super. 288, 294 (App. Div. 1960). However, because the Board has not provided any evidence of a distinguishing characteristic of J.W, which is required by the Act, the Commissioner concludes that the Board's decision finding that petitioner committed an act of HIB was arbitrary and unreasonable.

Accordingly, the Initial Decision is affirmed, and the Board's determination that petitioner committed an act of HIB is reversed. The Board shall remove any references to the HIB investigation and findings from petitioner's personnel file.[6]

IT IS SO ORDERED.[7]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 6, 2021
Date of Mailing: April 9, 2021

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the criteria of the Act. Similarly, the Commissioner does not reach the issues of the second and third elements required to prove an act of HIB.

[6] However, if the incident is included in petitioner's personnel file for other reasons, such as violations of Board policies other than its HIB policy, this decision does not extend to those references, as the only issue before the Commissioner is the HIB finding.

[7] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 5069-20
AGENCY DKT. NO. 79-4/20

STEPHEN KLAPACH,
Petitioner,
v.
FORT LEE BOARD OF EDUCATION,
Respondent.

Albert J. Leonardo, Esq. for Petitioner (Zazzali, Fagella, Nowack, Klienbaum & Friedman, Attorneys)

Raina Pitts, Esq., for Respondent, (Methfessel & Werbel, Attorneys)

Record Closed: February 3, 2021 Decided: February 19, 2021

BEFORE **KIMBERLY A. MOSS**, ALJ:

This mater having been opened to the Court by respondent, Fort Lee Board of Education (Fort Lee) and petitioner Stephen Klapach (Klapach) on a motion for summary decision on February 1, 2021. Respondent filed opposition to petitioner's motion on February 16, 2021. Petitioner filed a reply to the respondent's motion on

February 16, 2021. By way of background, the petition was filed at the Office of Administrative Law on June 2, 2020.

FACTUAL DISCUSSION

Having reviewed submissions in support of and opposition to the within motion, I **FIND** the following **FACTS** in this case.

Klapach is a science teacher at the Lewis F. Cole school in Fort Lee, New Jersey. He was absent from school on October 18, 2019. A substitute teacher handled his class on that day. Klapach was informed by the substitute teacher that his seventh period class did not behave well. He was informed that three students including J.W. were playing music from their computers during class, talking during class and ignoring directives to turn off the music. On October 21, 2019, Klapach told the three students that he was informed that they had misbehaved, and he may be decreasing their class participation grade. That night J.W. informed her mother, L.C. about the decreased class participation grade. L.C. emailed Klapach on October 21, 2019, stating that the substitute teacher was misinformed about J.W.'s behavior.

On October 22, 2019, in Klapach's first period class, he read the email L.C sent him to the class. J.W. was not in that class. J.W. was informed by a student that Klapach had read her mother's email to the class. J.W. became nervous about going to class and asked L.C. to pick her up. L.C. spoke to the vice principal Joseph Finizio about the incident. J.W. was switched to a different science class.

On October 23, 2019 an HIB investigation was opened against Klapach. The Board concluded that Klapach had committed the following act of harassment, intimidation and bullying: "Student fearful to return to class, reading confidential email aloud to other students.

LEGAL ANALYSIS AND CONCLUSION

Respondent and petitioner seek to summary decision. The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. These provisions mirror the language of Rule 4:46-2 and the New Jersey Supreme Court's decision in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

There is no genuine issue of material fact in this matter.

N.J.S.A. 18A 37-14 defined Harassment intimidation and bullying as:

> Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3),

that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:

a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
b. has the effect of insulting or demeaning any student or group of students; or
c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

N.J.A.C. 6A; 16-7.7(a) (i) (ii) & (iii) provides

Each district board of education shall have control over the content of the policy, except that the policy shall contain, at a minimum, the following components:
i. A statement prohibiting harassment, intimidation or bullying of a student;
ii. A definition of harassment, intimidation or bullying no less inclusive than that set forth in the definition at N.J.S.A. 18A:37-14 and N.J.A.C. 6A:16-1.3;
iii. A statement that bullying is unwanted, aggressive behavior that may involve a real or perceived power imbalance.

Fort Lee defines Harassment, Intimidation and bullying as:

Harassment, Intimidation and bullying means any unwanted aggressive gesture, written, verbal or physical act or any electronic communication, as defined in N.J.S.A. 18A: 37-14, whether it be a single incident or series of incidents that may involve a real or perceived imbalance of power and:

1. Is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic

2. Takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in N.J.S.A.18A:37-15.3,

3. Substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:

a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the

student's property, or placing a student in reasonable fear of physical or emotional harm to his/her person or damage to his/her property;

b. Has the effect of insulting or demeaning any student or group of students; or

c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

In this matter, the issue is whether Klapach reading the email of L.C. was reasonably perceived as being motivated either by any actual or perceived characteristic of J.W. The Fort Lee HIB policy is substantially similar to N.J.S.A. 18A 37-14. Respondent in its letter to Klapach to informing him that the HIB charges were sustained did not state how Klapach's conduct of reading the email of L.C. was motivated by an actual or perceived characteristic of J.W. Fort Lee argues the fact that Klapach was a teacher and therefore there was an imbalance of power is the perceived characteristic. It bases this argument on the imbalance of power between teacher and student. However, the Fort Lee policy, N.J.S.A. 18A:37-14 and N.J.A.C. 6A; 16-7.7(a) (i) (ii) & (iii) do not include a power imbalance as an actual or perceived characteristic. It is to be considered regarding the incident or series of incidents.

I **CONCLUDE** that power imbalance is not a perceived or actual characteristic as defined in the Fort Lee policy, N.J.S.A. 18A:37-14 and N.J.A.C. 6A; 16-7.7(a) (i) (ii) & (iii).

In order to establish an act of HIB there must be an incident motivated by an actual or perceived characteristic. The reading of the letter was not motivated by a perceived or actual characteristic. Fort Lee did not establish that there was an act of HIB motivated by an actual or perceived characteristic.

I **CONCLUDE** that Fort Lee's sustaining HIB charges against Klapach was arbitrary and unreasonable because it did not establish an HIB act motivated by an actual or perceived characteristic.

Based on the foregoing, the Board's determination that Klapach had committed acts of harassment, intimidation and bullying by reading a letter must be **REVERSED**. Accordingly, it is **ORDERED** that the Summary Decision motion of petitioner is **GRANTED**, and the Summary Decision of respondent be and is hereby **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 19, 2021

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: February 19, 2021

Date Mailed to Parties: February 19, 2021

ljb

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OAL Dkt. No. EDU 01855-21
Agency Dkt. No. 29-2/21

New Jersey Commissioner of Education

Order on Emergent Relief

MD Farook Hossain,

Petitioner,

v.

Board of Education of the City of Atlantic City, Atlantic County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the recommended order – that petitioner has demonstrated entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL, granting petitioner's application for emergent relief, is adopted. As the Board has taken no action to remove petitioner from his position as a board member in accordance with *N.J.S.A.* 18A:12-3, his voting rights must be reinstated. To the extent that petitioner's votes have been recorded but not counted since January 11, 2021, the Board is directed to count petitioner's votes. This case shall

continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 9, 2021
Date of Mailing: April 9, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 01855-21

AGENCY DKT. NO. 029-02/21

MD FAROOK HOSSAIN,

Petitioner,

v.

BOARD OF EDUCATION
OF THE CITY OF ATLANTIC CITY,
ATLANTIC COUNTY,

Respondent.

William F. Koy, Esq., for petitioner (William Koy, L.L.P., attorneys)

Tracy L. Riley, Esq., for respondent (Riley & Riley, attorneys)

Record Closed: March 3, 2012 Decided: March 11, 2021

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

MD Farook Hossain (petitioner) filed an emergent application seeking to be reinstated as a voting member of the Board of Education of the City of Atlantic City (respondent or "Board").

PROCEDURAL HISTORY

On February 19, 2021, petitioner filed a petition for due process with the Office of Controversies and Disputes of the New Jersey Department of Education, along with a request for emergent relief. On February 22, 2021, the emergent matter was filed, along with the due process request, with the Office of Administrative Law (OAL). The emergent relief request was scheduled for oral argument, which was held on March 3, 2021.

FACTUAL DISCUSSION

In this emergent matter, petitioner, seeks an order reinstating him as a voting member of the Board. Petitioner began his tenure as a member of the Board in January 2019, and is currently in his third year as a sitting Board member. At the Board reorganization meeting held on January 11, 2021, the Board solicitor announced that she had received a letter from the Atlantic County Prosecutor's office advising that as a result of an ongoing investigation, they discovered that petitioner has not resided at his Atlantic City address since at least June 2020. The solicitor advised that petitioner had given up his right to be a Board member and instructed the Board to permit petitioner to attend Board meetings but that his vote would not be counted. As of the time of oral argument held in this case, the Board has taken no action to remove petitioner or contest his residency within the city. Petitioner has attended all meetings since January 11, 2021, and his votes on agenda items have been recorded but not counted or used for official business of the Board since prior to the January 11, 2021, meeting. (Motion for Emergent Relief.)

In his certification attached to his application for emergent relief, petitioner asserts that his is a resident of the City of Atlantic City and he has been continuously since before he was elected to the Board. While his driver's license, voter registration, mortgage documents and tax records list him as residing on Rxxx Avenue (Exhibits A-E attached to petitioner's certification, dated February 17, 2021), he has permitted a friend to reside at that location during the COVID-19 pandemic. For convenience, petitioner has been residing in an apartment within the city limits. His wife has been residing in Egg Harbor Township, in a home that she purchased. While petitioner asserts that he stays at that location on occasion, he does not reside at that location.

The Board asserts that petitioner has not resided in Atlantic City since at least June 2020, based on correspondence received from the Atlantic County Prosecutor's office. (Exhibit Q attached to respondent's opposition to Emergent Relief.) The Board also asserts that petitioner's wife purchased a home in Egg Harbor Township in 2018 and an investigation performed by the prosecutor's office revealed that petitioner and his entire family have been living at that home since March 2020. The prosecutor's investigation report is not available at this time. The Board also asserts that petitioner has falsified his financial disclosure forms required to be submitted annual by all Board members and falsified several applications for free and reduced school meals for his children. Specifically, the Board asserts that petitioner failed to disclose rental income for his property at Rxxx Avenue which he has been receiving since January 2020, and that himself, his children and his wife are listed as residing at the Rxxx Avenue address even though his certification attached to the emergent application certifies that his wife is residing in Egg Harbor Township. The Board solicitor has been unable to obtain approval by the Board to take formal action against petitioner but has notified the County Superintendent to the situation and has asked that office to intercede. (Exhibit "S" attached to respondent's opposition to Emergent Relief.)

In his brief in support of the application for emergent relief, petitioner contends that the Board actions have caused severe harm to him as well as to the public citizens of Atlantic City by removing a qualified member of the Board without proof that he is not qualified to serve in that position. He asserts that his due process rights have been violated by the actions of the Board solicitor. (Petitioner's Brief, at 2.) In response, the Board argues that the voting public cast votes for individuals that were qualified to serve as Board members and that the confidence and trust that has been cast by those votes has been betrayed. (Board's Opposition, at 17.)

LEGAL DISCUSSION

The standards which must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 1:1-12.6 and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;

2. The legal right underlying the petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

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.

The petitioner must satisfy all four prongs of the Crowe test.

"Irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33. In addition, the irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). However, pecuniary damages may sometimes be inadequate because of the nature of the injury or the right affected. Crowe, 90 N.J. at 133. For example, in Crowe the Court determined neither an unwarranted eviction nor reduction to poverty could be compensated adequately by monetary damages awarded after a distant hearing. Ibid.

Petitioner argues that he "will suffer irreparable harm if immediate relief is not granted because the Board has refused to recognize his vote at Board meetings. According to petitioners, no quantum of damages can be calculated to redress the harm occasioned by this violation of his right to due process. Respondent argues that irreparable harm will occur if the relief is granted since votes will be registered for an individual that does not have the right to be on the Board. In this case, however, whether petitioner is a resident of Atlantic City has not yet been determined. While respondent submits several documents aimed to show that petitioner no longer resides within the city limits, petitioner has provided a certification and documents of his own to support his claim that he still resides in Atlantic City. This is a factual determination that can only be made a plenary hearing on the merits. Furthermore, as explained at oral argument and outlined in respondent's opposition papers, the Board has not officially taken any action, disciplinary or otherwise, against petitioner at his time. This is a result of either a lack of quorum or meetings being cut short before a discussion can be had regarding petitioner's residency. It is also clear that neither the

Commissioner of Education nor the County Superintendent has taken any action in this regard.

For the foregoing reasons, I **CONCLUDE** that petitioner has demonstrated that he will suffer irreparable harm if emergent relief is not granted.

In order to grant a motion for emergent relief in advance of a plenary hearing, a judge must be satisfied that "[t]he legal right underlying petitioner's claim is settled." N.J.A.C. 6A:3-1.6(b)(2). In other words, a judge "must not grant an injunction in cases when the principal of law on which it depends is disputed and has not been settled in this state." Stevens v. Paterson & N. R. Co., 20 N.J. Eq. 126, 132 (Ch. 1869).

In the present matter, petitioner claims that he is a resident of the City of Atlantic City and that his suspension of his voting rights is arbitrary and capricious. I **CONCLUDE** that the legal right underlying petitioner's claim is settled in that if he is a resident of Atlantic City, he is entitled to be a voting member of the Board as it has not been disputed that petitioner is otherwise ineligible to be a school board member. Accordingly, I **CONCLUDE** that petitioner has met this requirement.

However, in order to obtain emergent relief, a petitioner must also demonstrate a likelihood that they will prevail on the merits of the underlying claim. Based on petitioner's certification, if taken as truthful, petitioner asserts that he is a resident of Atlantic City. While the documents submitted by respondent are compelling to show that this fact may not be the case, petitioner will prevail if it cannot be proven that petitioner no longer resides in Atlantic City. That determination can only be made after a plenary hearing where the credibility of witness testimony can be gauged.

Considering these reasons, I **CONCLUDE** that petitioner has demonstrated a likelihood of succeeding on the underlying petition. It is stressed that this analysis does not represent a conclusion that either party is more or less likely to prevail at hearing, but only articulates that certain questions of law are settled to a point that petitioner is deemed, for purposes of emergent relief, sufficiently likely to succeed at hearing, but litigation of the underlying petition will be helpful in resolving these issues.

As to the fourth and final prong, each party argues that they will suffer greater harm if they do not prevail on the question of emergent relief. When the equities and interests of the parties are balanced, petitioners will suffer greater harm than the Board will suffer if the requested relief is not granted. Petitioner was elected to his position on the Board and he is entitled to vote as a member of the Board until such time as it has been proven that he is no longer eligible to retain his seat. Accordingly, I **CONCLUDE** that the balance of equities argument favors petitioner and he has satisfied this prong.

Consequently, the petitioner's request for emergency relief is **GRANTED**.

ORDER

Having **CONCLUDED** that petitioner is entitled to the requested emergent relief, it is hereby **ORDERED** that the petitioners' request for emergency relief be **GRANTED**. Petitioner shall be permitted to have his vote recorded on all upcoming School Board resolutions and motions. It is **FURTHER ORDERED** that to the extent that the Board secretary has recorded petitioner's vote on action items coming before the Board of Education since January 11, 2021, those votes shall be counted. The matter will now be scheduled for plenary hearing on the underlying due process petition.

This order on application for emergency relief may be adopted, modified or rejected by the **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 the **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.



March 11, 2021
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: _____

Date Sent to Parties: _____

/dm

81-21

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

April 9, 2021

VIA EMAIL ONLY

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Laurie Fichera, DAG
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Re: *In the Matter of the Certificates of Elizabeth Sheehy*, State Board of Examiners
Dkt. No. 1718-158, Commissioner Appeal Dkt. No. 1-1/21A

Dear Parties:

I have reviewed the materials filed in connection with appellant Elizabeth Sheehy's Motion to Stay the decision of the State Board of Examiners (Board) suspending appellant's teaching certificates for one year.

Pursuant to *N.J.A.C.* 6A:4-3.3(a), a motion for a stay of a decision by the Board must first be made to the Board. Appellant did so here, but the Board declined to consider the motion because it was untimely under *N.J.A.C.* 6A:9B-4.16, which requires a motion for a stay to be filed within 30 days of the mailing date of the Board's decision. While appellant argues that no such time limitation applies to a motion for a stay made to the Commissioner, the Commissioner concludes that the 30-day time limitation would be rendered meaningless if an appellant were permitted to circumvent it by moving for a stay before the Commissioner after failing to meet the deadline before the Board. The Board's decision was dated October 29, 2020 and mailed on November 4, 2020. Appellant did not file her motion for a stay before the Board until February 10, 2021, well beyond the 30-day time limit. Appellant offers no explanation for the delay in filing the motion before the Board. She has been represented by

counsel throughout the proceedings below and was able to file a notice of appeal of the Board's decision within 30 days, on the same date that a motion for stay before the Board was due. Accordingly, the motion for stay is denied as untimely.

Furthermore, even if the Commissioner relaxed the time limitations, appellant's motion must be denied. Pursuant to *N.J.A.C.* 6A:4-4.1(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that appellant has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

Upon review of the parties' submissions, I find that appellant has failed to meet this standard. Specifically, appellant has failed to demonstrate that the legal right underlying her claim is settled. Appellant argues that the right to appeal a Board decision is well established, but that argument misses the point, as this prong of the standard must consider her underlying claim – that she did not engage in unbecoming conduct warranting a suspension of her teaching certificates. Such as inquiry is intensely fact sensitive, depends on credibility determinations regarding the testimony of the witnesses in each case, and must be viewed in light of various precedents related to the conduct of teachers. For this reason, the Commissioner cannot conclude that appellant has demonstrated that the right underlying her claim is settled.

In light of the fact that all of the Crowe prongs must be met in order for a stay to be granted, it is not necessary to analyze the three remaining factors. Accordingly, appellant's request for a stay of the State Board of Examiner's October 29, 2020 Order of Suspension is hereby DENIED.

Sincerely,



Angelica Allen-McMillan, Ed.D.
Acting Commissioner

81-21L

82-21

82-21E

OAL Dkt. No. EDU 02205-21
Agency Dkt. No. 32-3/21

New Jersey Commissioner of Education

Order on Emergent Relief

D.S.,

Petitioner,

v.

Board of Education of the Township of Hamilton, Mercer County,

Respondents.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to each of the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL, denying petitioner's application for emergent relief, is adopted. This case shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 13, 2021
Date of Mailing: April 13, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 02205-21
AGENCY REF. NO. 32-03/21

D.S.,

Petitioner,

v.

BOARD OF EDUCATION OF
THE TOWNSHIP OF HAMILTON,
MERCER COUNTY,

Respondent.

D.S., petitioner, pro se

Patrick F. Carrigg, Esq., for respondent (Lenox Law, LLC, attorneys)

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner currently has a due process appeal before this court, in the matter of D.S. on behalf of minor child M.S. v. Township of Hamilton Board of Education (Board) (EDU 07830-20), as a result of seven counts of harassment, intimidation or bullying (HIB) allegedly committed by student M.S. against another student at Hamilton High School West (HHSW), charged by the respondent Board. Related to that appeal was an

emergent appeal filed by the within petitioner, D.S. on behalf of minor child M.S. v. Township of Hamilton Board of Education (EDU 09096-20), which was denied.[1] Additionally, the within petitioner filed a motion for the Hon. Jeffrey N. Rabin, ALJ to recuse himself from EDU 07830-20, which motion was denied.

The within motion for emergent relief was filed by petitioner on March 2, 2021, with the New Jersey Department of Education (DOE), Office of Controversies and Disputes (OCD), with D.S. alleging that she was harassed, intimidated and bullied by employees of the Board. The parties have not advised this court of any other issues that would remain once the emergent relief matter is resolved. The motion for emergent relief was transmitted to the OAL on March 3, 2021. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Due to the Covid-19 pandemic, an emergent hearing in this matter took place via Zoom on March 9, 2021.

FINDINGS OF FACT

Based on petitioners' Petition for emergent relief and testimony, and the documentation, videos and testimony proffered by respondent, and solely for the purpose of deciding this emergent appeal, I **FIND** the following to be the undisputed facts:

1. Petitioner, D.S., is the parent of minor child, M.S., a tenth grade student at HHSW. She had been defending charges of HIB against her daughter M.S., and at various times had spoken derogatory and accusatory language against Principal Smith during the public portion of public school board meetings and in correspondence to various parties, included publicly

[1] Petitioner sought to use that emergent appeal to assert charges against her daughter's school principal, Brian Smith, accusing him of continuing harassment of both mother, D.S., and student, M.S. As a result, respondent opened an investigation into petitioner's charges against Principal Smith on or about September 30, 2020. Because the underlying petition associated with that emergent appeal was transmitted by the Office of Controversies and Disputes (OCD) to OAL only as an appeal of the Board's HIB decision of September 23, 2020, regarding HIB #6813, and because the statutorily-required investigation by the Board was still ongoing, those charges against Principal Smith were not heard as part of that emergent appeal The within motion for emergent relief was not filed as part of that prior investigation from September 30, 2020.

accusing Principal Smith of being a racist. Because of these issues, and because of the litigation between the parties, Dr. James Altobello (the Board's Director of Secondary Education), in conjunction with the Board superintendent, created interventions to ensure that D.S. and Smith did not have direct interaction.

2. On February 26, 2021, petitioner went to the HHSW gym to watch the HHSW girls' basketball team. Her daughter, M.S., was not playing in the game and was not in attendance because she was at her grandparents' house quarantining from a recent trip to Florida. Seating areas at the school gym had been arranged so as to comport with social distancing requirements.
3. Petitioner sat down in the endline bleachers near one of the baskets, directly next to Principal Brian Smith. Smith asked petitioner to move to the seating area designated for parents. Petitioner refused to move, and then used her cell phone to file a report with school administration claiming that Principal Smith had verbally harassed her. Petitioner stayed at that seat for the remainder of the first half, before walking outside.
4. Principal Smith left the seats to take a cell phone call. He walked to a table manned by the school nurse and the school Athletic Director, John Constantini. Petitioner then walked towards those three persons and brushed against Principal Smith as she continued to walk down the hallway towards the exit. Principal Smith yelled at petitioner that she had pushed him and Constantini stopped Smith from speaking further. Petitioner left the building and, when she tried to return, Hamilton Township police officer Sgt. Gray intervened.
5. By letter dated March 1, 2021, school board counsel Patrick F. Carrigg advised D.S. that she was no longer permitted to enter school property through the end of the current school year, pursuant to Board Policy 9150. Carrigg also denied petitioner's request that a Harassment, Intimidation and Bullying (HIB) investigation be commenced against Principal Smith, stating that the school HIB policy and New Jersey statutes did not mandate investigations into complaints on behalf of non-students.

Testimony:

For petitioner:

D.S. served as her own counsel and as a witness. Her testimony was not credible. Twice she indicated that her memory was suspect because she was still on medications prescribed subsequent to the death of her son. She specifically indicated that she did not recall previous discussions when she was informed as to the importance of the Crowe test for emergent relief, despite several conversations, a Zoom hearing and petitioner's motion for recusal which contained a full recounting that petitioner had been advised as to the Crowe test.

Petitioner testified that she sat in the same bleacher seats for over 150 ballgames, and that 3 people—the referee, an African-American student, and a parent—had all witnessed her sitting in that same seat; however, petitioner failed to obtain sworn affidavits from those persons and did not call them as witnesses. She called respondents liars, and disagreed with respondent's claim that she sat directly next to Principal Smith, later claiming she sat at least 6 feet away; the video (Incident #1 Video), however, disproved her testimony, by showing Principal Smith sitting all alone in a bleacher section that had seating for approximately 100 people (with a woman standing on the floor beside the bleachers next to Smith), and petitioner walking directly up to Principal Smith and sitting right next to him.

As a pro se litigant, D.S. was given unlimited time during the hearing to make her case, and her case-in-principle lasted fifty minutes. She called as a witness her daughter, sixteen-year-old M.S. At no time did petitioner state or ask the witness if M.S. had overheard the two encounters between petitioner and Principal Smith. Despite sending emails disputing the Board's decision to ban her from school property, these emails never asserted that M.S. had witnessed or overheard the encounters between D.S. and Smith. During direct examination, M.S. never testified that she overheard the conversations between D.S. and Smith. However, after the respondent Board later completed its case-in-principle, petitioner asked to have M.S. speak again. After a five-minute break, M.S. was recalled to the virtual witness stand and testified, for the first time, that she had

overheard what Principal Smith had said to D.S., because she was on FaceTime with her mother so as to watch the ballgame. M.S. never mentioned what D.S. was saying to Smith. M.S. also indicated that her internet connection for her FaceTime call with D.S. was going in and out during the first encounter and therefore she did not hear the entire first encounter between D.S. and Smith. During cross-examination, witness M.S. stopped answering questions from respondent-counsel and this court when the questions became more probing and walked away from the Zoom hearing without being excused. As this line of testimony only happened after petitioner had an off-Zoom conversation with her daughter, and because petitioner failed to provide recordings or other evidence of such FaceTime conversations, it is clear that any testimony about M.S. overhearing the encounters between D.S. and Smith was not credible.

M.S. was not a credible witness. She never mentioned overhearing the encounters between D.S. and Smith on FaceTime until the end of the hearing and after an off-Zoom conversation with her mother. Her subsequent answers seemed coached, and when the questioning became probing, M.S. simple muted herself and refused to answer any more questions. Even though she was purportedly on FaceTime with her mother in order to watch the girls' basketball game, she only testified to what she thought Principal Smith had said, and never testified as to her mother's part of the conversation. M.S. never recounted Smith's full statements, but merely testified that she heard cursing from a man she positively knew to be Principal Smith. M.S. also indicated that there had been technical difficulties with FaceTime during the encounter in the bleachers, which impeached the credibility of her testimony as to the encounters between her mother and Principal Smith.

<u>For respondent:</u>

Dr. James Altobello served as the Board's Director of Secondary Education, supervising township principals and administrative staff. He was the liaison between a principal and the Township superintendent. Altobello spoke clearly, calmly and with authority regarding Board procedures and this case in particular. He had firsthand

knowledge of the issues between petitioner and the school. I found his testimony to be credible.

LEGAL ANALYSIS

The issue is whether petitioner has proven by a preponderance of the evidence that she has met the standard for emergent relief, and that she is entitled to relief.

Nowhere in petitioner's motion for emergent relief is there a prayer for relief. She stated in page one of her Pro Se Petition of Appeal that she is "appealing the correspondence received from Patrick Carrigg in the harassing incident that occurred to me on 2/26/21 in the gymnasium;" that statement, combined with her testimony at the hearing, led this court to proceed as if petitioner wanted a reversal of the Board's prohibition of her being on school property for the remainder of the 2020-21 school year.

N.J.S.A. 18A:6-9 authorizes the Commissioner of Education to consider controversies between a parent and a school board. OAL is the appropriate venue for hearing an appeal of a school board findings and OCD properly forwarded this matter to OAL for this emergent appeal to be heard.

Pursuant to N.J.A.C. 6A: 3-1.6 and the case of Crowe v. DeGioia, 90 N.J. 126 (1982), a petitioner must show by a preponderance of the evidence that four prongs/prerequisites have been met in petitioner's favor in order to be eligible for emergent relief. The form of Petition executed and filed by petitioner on September 24, 2020, contained a Section VI clearly setting forth petitioner's obligation to demonstrate that the four prongs have been met, and providing petitioner with the four-prong test and legal citations to the regulatory code section and Crowe.

Per N.J.A.C. 6A: 3-1.6 and Crowe, emergent relief may be granted if the judge determines from the proofs that the following four prongs have been met:

i. The petitioner will suffer irreparable harm if the requested relief is not granted;

ii. The legal right underlying the petitioner's claim is settled;

iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

iv. 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.

Petitioner had been advised by this court, during telephone calls and Zoom hearings on October 1 and 5, 2020, that the Crowe test was an integral part of any motion for emergent relief. Further, Section VI of the Pro Se Petition of Appeal filed by petitioner required that a petitioner's appeal be accompanied by a memorandum addressing the four-pronged Crowe standard for relief. Petitioner attached a memorandum to her petition entitled "Section VI: RE: Seeking Relief on an Emergent Basis." However, petitioner failed to address the Crowe standard for emergent relief in her memorandum. There was no mention of the Crowe test, nor were any of the four prongs discussed at all. Further, despite being reminded of the importance of the Crowe test at the within hearing, petitioner still did not address any of the Crowe prerequisites for emergent relief.

Conversely, respondent addressed the Crowe test in its letter brief dated March 8, 2021, and at the hearing.

1. The petitioner will suffer irreparable harm if the requested relief is not granted.

Petitioner failed in her memorandum and at the hearing to offer any evidence of irreparable harm to M.S. resulting from Principal Smith's behavior towards D.S.

It must be stated that if a parent were to prove that a school employee, such as a school principal, had directed towards her the same foul, curse-laden language which petitioner claims Smith used, it would be of great concern to all involved. No parent or student should ever be treated with disrespect by anyone, particularly school employees. However, petitioner failed to show by a preponderance of the evidence that Principal

Smith had used foul language during their two encounters on February 26, 2021, and the evidence indicated that it was petitioner D.S. who acted in a disrespectful and provocative manner by sitting right next to Principal Smith in the bleachers and by brushing against him in the hallway at halftime of the basketball game.

Student M.S. was not present during the alleged harassing encounters. While these incidences could be embarrassing to M.S., petitioner failed to assert any irreparable harm suffered by M.S. as a result, and provided no evidence such as a doctor's report or teacher's report indicating that M.S. was suffering or would suffer lasting emotional or educational effects from having her mother banned from her ballgames or school property. When asked about the incidents on February 26, 2021, M.S. merely testified that the principal's behavior towards her mother made her upset and angry, with no claim of harm. Petitioner specifically failed to provide evidence as to any harm to M.S. which would be caused by D.S.'s inability to attend future basketball games; in fact, the girls' basketball season had ended and there would not be any more games which petitioner could attend. D.S. testified that M.S. would be playing softball in spring 2021, without offering proof of same, and without ever asking M.S. how she would be affected by her mother not being able to attend her ballgames. The fact that M.S. would move on from basketball and start playing softball indicated that her mother's attendance at her games would not have a negative effect on her educational, social or emotional well-being. Additionally, M.S. was a virtual student, and was not attending classes on school property, so there would actually be no reason for D.S. to be on school property with regard to M.S. except to attend ballgames.

Accordingly, I **CONCLUDE** that petitioner failed to show that this first prong of the Crowe test for emergent relief had been met in favor of the petitioner.

2. The legal right underlying the petitioner's claim is settled.

Petitioner did not address the legal right underlying her claim in either her Petition and accompanying memorandum or during the hearing, but merely stated that the Board's decision banning her from school property was wrong. Petitioner did not state

any legal grounds for her position that the Board's decision should be overturned. In fact, petitioner's Petition failed to state a claim for relief.

Respondent was correct in asserting that a non-student is not entitled to the protections of the New Jersey HIB statutes or the Board's HIB policy. N.J.S.A. 18A:37-13 et seq. establishes that its protections against Harassment, Intimidation and Bullying are there to protect students from the actions of other students or school employees. Nowhere are there protections for parents. The form petitioner attached to her Petition, the "Hamilton Township School District Harassment, Intimidation and Bullying (HIB) Report," specified the definition of HIB, and indicated that the person filing the complaint must establish that there was HIB against a pupil, or HIB that disrupted or interfered with the orderly operation of the school or the rights of pupils, or HIB that had insulted or demeaned a pupil or created a hostile educational environment for the pupil or pupils.

Not only is petitioner herself not a pupil, this motion for emergent relief was filed "on behalf of M.S." in name only; D.S. filed this on behalf of D.S. The incident alleged by petitioner happened directly against her, as set forth in the email complaint filed by petitioner at 5:13 p.m. on February 26, 2021 (attached by petitioner to her motion). Nowhere in the pleadings was any harm suffered by M.S. claimed. Rather, D.S. filed this emergent motion due to alleged behavior directed at her. As D.S. was not a student, she could not claim redress under the New Jersey HIB statutes or the Board's HIB policy. As D.S. could not claim protections under the New Jersey HIB statutes or the Board's HIB policy, the legal right underlying petitioner's claim is settled in favor of the respondent Board.

Petitioner also did not dispute the Board's right to control who is allowed on school property and offered no proof that the Board decision banning her from school property was arbitrary or capricious. Respondent correctly cited N.J.S.A. 18A:202-20 as authority for a school board to control use of its land and buildings, and discussed the ongoing history between petitioner and the school, which made the Board's decision banning petitioner necessary. Having no recourse under HIB law, and without challenging the Board's statutory right to control who is and is not permitted on school lands and in school

buildings, the legal rights claimed by petitioner are not settled in her favor, but are settled in favor of respondent.

Accordingly, I **CONCLUDE** that petitioner failed to show that the second prong of the Crowe test for emergent relief had been met in favor of the petitioner.

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim.

Petitioner did not address her likelihood of prevailing on the merits of the underlying claim. Because her claim is based on HIB statutes, there would appear to be no likelihood of success on the underlying claim because, as stated above, the HIB statutes do not protect non-students. Petitioner attempted to rely on the same statutes and policies that were used against her daughter M.S. in the ongoing underlying due process matter of D.S. on behalf of minor child M.S. v. Township of Hamilton Board of Education (Board) (EDU 07830-20). These protections cover students but do not protect parents from alleged harassment by school staff.

Even if petitioner was protected by these HIB statutes, she failed to prove that incidences of HIB had taken place against her.

Petitioner claimed that there were two incidences—the principal yelling at her as she sat next to him in the seating area, and later a verbal exchange after the principal claimed she pushed him. Petitioner offered nothing but her own version of those two incidences on February 26, 2021, with no sworn witness affidavits or credible witness testimony at the hearing other than that of M.S., who was not present at the basketball game. Nothing supported petitioner's claim that she was sitting in the same seat as always at the games (which she claimed the referee could vouch for), and she failed to address whether there was in fact a parental seating area. She did not address changes in seating due to Covid-19 pandemic social distancing protocols. She did not state whether Principal Smith always sat in the seat right next to hers. She mentioned that a woman sitting on the other side of the principal overheard Smith use foul language, but she was not produced as a witness and there is no sworn statement from her.

Most importantly, the video of Incident #1 clearly showed D.S. walking into a section of bleachers where there were approximately 100 seats available, occupied by only one person—Principal Smith—then taking the seat immediately to the left of Principal Smith, instead of any of the other available seats. The school had taken efforts to keep petitioner and Principal Smith apart, because petitioner frequently made public accusatory and derogatory remarks about Principal Smith during the public portion of school board meetings, including statements that he was a racist. Petitioner also sent correspondence to various people asserting these same accusatory and derogatory statements, and therefore the school administration had an interest in keeping D.S. and Smith away from each other. It would not be a far reach to conclude that D.S. sitting down directly next to Smith, then later brushing against him in the hallway, were threatening gestures against the school principal, and that she provoked whatever response Principal Smith may have offered.

Petitioner failed to provide evidence that she had not pushed Principal Smith, but the Incident #2 Video showed petitioner walking through a door, then walking directly at Principal Smith, then brushing against him as she walked away. Petitioner failed to state with any specificity what language Smith used during the second incident or how that incident constituted HIB. Therefore, it would be more likely that respondent would prevail on the underlying claim.

Accordingly, I **CONCLUDE** that petitioner failed to show that the third prong of the Crowe test for emergent relief had been met in favor of the petitioner.

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.

Petitioner failed to address this fourth prong of the Crowe test. Most difficult in addressing this prong without input from the petitioner is that petitioner in her formal Petition failed to state a claim upon which relief could be granted, and failed to indicate what, if any, harm had been suffered by M.S.

Even if there were some harm that were to befall M.S. as a result of D.S.'s encounters with Principal Smith on February 26, 2021, the fact that M.S. was not currently taking classes at HHSW would indicate that her education would be unaffected by her mother being banned from school property through the end of the school year. M.S. would continue to take classes virtually, as she had been doing earlier in the school year. M.S. was proceeding from basketball season to softball season, without any hindrance from the encounters of February 26, 2021.

Conversely, there would be harm to the Board if their decision was reversed at this time or any injunction should be issued allowing D.S. back onto school property this semester. The Board pointed out its responsibility towards protecting students, which included controlling who would be permitted on school lands and buildings. In the instant matter, the Board was hoping to prohibit a woman from school grounds who had been involved in numerous incidences with school personnel, resulting in the filing of at least two reports of improper behavior by school employees, and numerous unproven public allegations against Principal Smith, including publicly stating that Smith was a racist. While petitioner insisted that she would never harm students if she were allowed back on school property this semester, it was petitioner herself who was responsible for two incidences of aggressive behavior on February 26, 2021, by sitting right next to Smith and later walking into him. A balancing of equities favors the Board.

It must be noted that it is far from an ideal situation where a parent and school are seemingly at war with each other, and not hard to imagine that there could be some effect upon the student's educational, emotional, and social well-being. However, petitioner failed to prove such harm or effect as part of this emergent hearing; fortunately for her, these issues are ripe for evaluation in the context of a full due process hearing. Unfortunately for petitioner, I must **CONCLUDE** that petitioner failed to show that the fourth prong of the Crowe test for emergent relief had been met in favor of the petitioner.

Therefore, I **CONCLUDE** that petitioner failed to show by a preponderance of the evidence that she met any of the four prongs of the Crowe test for emergent relief. I **CONCLUDE** that petitioner failed to prove that she was entitled to emergent relief in this matter.

ORDER

The petitioner's motion for emergent relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who 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 the **COMMISSIONER 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.

March 10, 2021
DATE

JEFFREY N. RABIN, ALJ

JNR/dw

APPENDIX

BRIEFS/EXHIBITS

For petitioner:

Petitioner's Pro Se Petition of Appeal and accompanying Section VI: RE: Seeking Relief on an Emergent Basis memorandum dated March 2, 2021

For respondent:

Petitioner's letter brief, dated March 8, 2021
Incident #1 and Incident #2 videos from February 26, 2021

WITNESSES

For petitioner:

D.S., pro se litigant and witness
M.S., petitioner's minor-student daughter

For respondent:

Dr. James Altobello

83-21

83-21

New Jersey Commissioner of Education

Decision

Township of Wantage, Sussex County, Borough of Sussex, Sussex County, Borough of Branchville, Sussex County, Township of Lafayette, Sussex County, Ronald Bassani, Edward Meyer, Anthony Frato, Sr., and Richard Hughes,

Petitioners,

v.

New Jersey Department of Education, Board of of the High Point Regional School District, Sussex County, and Board of Education of the Township of Montague, Sussex County,

Respondents.

Synopsis

The petitioning municipalities and taxpayers sought relief in regard to the 2020-2021 budget of the High Point Regional School District (HPRSD), arguing, *inter alia*, that the meaning of the pertinent statute – *N.J.S.A.* 18A:7F-39(e) – is uncertain, and that the tax rate for petitioners and all other taxpayers in the district for the 2020-2021 budget year was improperly inflated as a result. The respondents contended that the language of *N.J.S.A.* 18A:7F-39(e) is clear and unambiguous, and that the development of HPRSD's budget for the 2020-2021 year comported with the statute.

The ALJ found, *inter alia*, that: the operative statute is *N.J.S.A.* 18A:7F-39(e), which allows HPRSD to add to its adjusted tax levy, in any one of the next three succeeding budget years, the amount of the difference between the maximum allowable amount to be raised by taxation for the current school budget year and the actual amount to be raised by taxation for the current school budget year; the First Amended Petition in this matter reflects that HPRSD added to one of the next three succeeding budget years (2020-2021) the amount of the difference between the maximum allowable amount and the actual amount to be raised; while HPRSD's actions resulted in an increase for 2020-2021 that was higher that 2%, its actions resulted in lower percentages in the preceding years; the language of *N.J.S.A.* 18A:7F-39(e) is clear and unambiguous; and the respondents did not act in an arbitrary, capricious or unreasonable manner in developing HPRSD's 2020-2021 budget. As such, the ALJ concluded that petitioners' remedy in this matter is political, not legal, and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ that the petition must be dismissed. Accordingly, the Initial Decision of the Office of Administrative Law was adopted as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

83-21

OAL Dkt. No. EDU 05439-20
Agency Dkt. No. 129-6/20

New Jersey Commissioner of Education

Final Decision

Township of Wantage, Sussex County,
Borough of Sussex, Sussex County,
Borough of Branchville, Sussex County,
Township of Lafayette, Sussex County,
Ronald Bassani, Edward Meyer,
Anthony Frato, Sr., and Richard Hughes,

Petitioners,

v.

New Jersey Department of Education,
Board of Education of the High Point
Regional School District, Sussex County,
and Board of Education of the Township
of Montague, Sussex County,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.[1]

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the petition of appeal should be dismissed. Accordingly, the Initial Decision of the

[1] However, following the issuance of the Initial Decision, petitioners submitted correspondence to the Commissioner attempting to withdraw the petition of appeal. There is no provision in the applicable statutes or regulations permitting the withdrawal of a petition of appeal following the issuance of an Initial Decision.

OAL is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 13, 2021
Date of Mailing: April 13, 2021

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 05439-20
AGENCY DKT. NO. 129-6/20

TOWNSHIP OF WANTAGE, SUSSEX COUNTY, BOROUGH OF SUSSEX, SUSSEX COUNTY, BOROUGH OF BRANCHVILLE, SUSSEX COUNTY, TOWNSHIP OF LAFAYETTE, SUSSEX COUNTY, RONALD BASSANI, EDWARD MEYER, ANTHONY FRATO, SR., AND RICHARD HUGHES,

Petitioners,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY, AND BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,

Respondents.

Stephen J. Edelstein, Esq., for petitioners (Weiner Law Group, attorneys)

David Kalisky, Deputy Attorney General, for respondent New Jersey Department of Education (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Marc G. Mucciolo, Esq., for respondent High Point Regional High School District Board of Education (Methfessel & Werbel, attorneys)

Sean M. McBratnie, Esq., for respondent Montague Township Board of Education (Comegno Law Group, attorneys)

Record Closed: November 9, 2020 Decided: March 1, 2021

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

Petitioning municipalities and taxpayers seek relief regarding the 2020–2021 budget of High Point Regional High School District (HPRHSD).

PROCEDURAL HISTORY

On June 10, 2020, petitioners Township of Wantage, Sussex County (Wantage Township), Borough of Sussex, Sussex County (Sussex Borough), Borough of Branchville, Sussex County (Branchville Borough), Township of Lafayette, Sussex County (Lafayette Township), Ronald Bassani, Edward Meyer, Anthony Frato, Sr., and Richard Hughes filed with the New Jersey Department of Education a Verified Petition of Appeal (Verified Petition) and a motion for emergent relief, accompanied by a letter brief.

The Department of Education (Department) transmitted the case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the rules of procedure established by the Department of Education to hear and decide controversies and disputes arising under school laws, N.J.A.C. 6A:3-1.1 to -1.17. Jurisdiction is

conferred under N.J.S.A. 18A:6-9. The case was filed at the Office of Administrative Law (OAL) on June 11, 2020.

On June 23, 2020, HPRHSD filed a letter brief and the Department filed a letter brief and Certification of Neil Cramer in opposition to petitioners' motion for emergent relief. Montague Township did not submit opposition. On June 23, 2020, petitioners filed a reply letter brief, accompanied by the Certification of Stephen Edelstein with four exhibits, and Certification of Dieter Lerch with two exhibits.

On June 23, 2020, petitioners also filed a motion for leave to take the deposition of HPRHSD superintendent Scott Ripley and the deposition of any expert who might issue a report on behalf of HPRHSD, accompanied by the Certification of Stephen Edelstein.

Oral argument was held on the motion for emergent relief on June 24, 2020. By order dated June 26, 2020, the motion for emergent relief was denied.[1]

On July 2, 2020, the Department filed a motion to dismiss, accompanied by a letter brief.

On July 3, 2020, HPRHSD filed its Answer to the Verified Petition.

During a July 8, 2020, telephone conference petitioners requested to file a motion to amend the petition, so it was determined that the Department's motion to dismiss would be held in abeyance until the petitioners' motion to amend was decided.

On July 13, 2020, petitioners filed a motion to amend the petition, accompanied by the proposed First Amended Verified Petition of Appeal, and Certification of Stephen Edelstein, Esq. On July 30, 2020, the Department filed a letter brief in opposition to the motion to amend, and HPRHSD filed a letter brief in opposition to the motion to amend

[1] The Order denying emergent relief was adopted by the Department on August 7, 2020.

and in opposition to the motion for leave to take the deposition of superintendent Scott Ripley. On August 6, 2020, petitioners filed a letter brief in reply to the Department's and HPRHSD's opposition.

On August 19, 2020, petitioners filed a motion to compel discovery from HPRHSD and the Commissioner of Education relative to demands served on July 6, 2020, accompanied by a letter brief and Certification of Stephen Edelstein, Esq.

By Order dated September 1, 2020, petitioners' motion to amend was granted, the Department's July 2, 2020, motion to dismiss was denied as moot, petitioners' motion for leave to take depositions was denied, and petitioners' motion to compel discovery was denied. Petitioners were directed to file the proposed First Amended Verified Petition of Appeal[2] and respondents were directed file answers to the First Amended Verified Petition of Appeal, unless a motion to dismiss was re-filed/filed by respondent(s) prior thereto.

Petitioners filed the First Amended Verified Petition of Appeal on September 3, 2020. The First Amended Verified Petition of Appeal (First Amended Petition) states, in part, the following:

> Petitioners, municipalities located in Sussex County, New Jersey, and taxpayers located in Sussex County, New Jersey, state for their First Amended Petition of Appeal as follows:
>
> **JURISDICTION**
>
> 1. Pursuant to N.J.S.A. 18:6-9, the Commissioner of Education, as the chief officer of the New Jersey Department of Education, has jurisdiction to hear this matter and all ancillary issues. In addition, and as a separate cause of action, the Petitioners seek a declaratory ruling pursuant to N.J.A.C. 6A:3-2.1 that N.J.S.A. 18A:7F-39 shall be construed so as to permit school districts to use, as banked cap, the unused portion of permissible increases for three succeeding

[2] Exhibit A to petitioners' motion to amend.

years, and not to include as banked cap any tax decreases during the same time period.

BACKGROUND

2. The High Point Regional High School District ("HPRHSD") is located in Sussex County, New Jersey and is comprised of five Sussex County communities: Wantage Township ("Wantage"), Sussex Borough, Branchville Borough ("Branchville"), Lafayette Township ("Lafayette"), and Frankford Township ("Frankford"). Four of the five constituent communities, as well as a Mayor, former Mayor, or committee member from each of the four, are Petitioners in this action.

3. This action is brought to obtain declaratory and other relief from the extraordinary and economically crushing burden on the Petitioners and their citizens of a 14% ($2,000,000) increase in local taxes imposed by the HPRHSD at the same time as an extreme financial crisis and unprecedented unemployment. This budget was approved by the HPRHSD on April 28, 2020, well after the impact of the COVID-19 crisis was well known and after Governor Murphy's first twenty-five (25) COVID-19-related Executive Orders (Nos. 104-129).

4. The Petitioner Ronald Bassani is a resident of, taxpayer in, and elected committee member of Wantage. He brings this action as an individual.

5. The Petitioner Edward Meyer is a resident of, taxpayer in, and Mayor of Sussex Borough. He brings this action as an individual.

6. The Petitioner Anthony Frato, Sr., is a resident of, taxpayer in, and Mayor of Branchville. He brings this action as an individual.

7. The Petitioner Richard Hughes is a resident of, taxpayer in, and former Mayor of Lafayette. He brings this action as an individual.

8. Respondent Dr. Lamont Repollet ("Dr. Repollet" or "Commissioner") is the Commissioner of Education for the State of New Jersey ("DOE"). In his capacity as Commissioner of Education, Dr. Repollet serves as the head of the New Jersey Department of Education, which reviews and approves all school district annual budgets.

9. Montague Township School District ("Montague") is a K–8 school district located in Montague, New Jersey. Montague has a send-receive relationship with HPRHSD and pays tuition on a per student basis. Although no relief is sought against Montague, it is named because it may be impacted by the outcome of this Verified Petition and, therefore, may wish to be heard.

10. Sussex County has suffered from COVID-19 disproportionately to the State of New Jersey. According to the Sussex County Division of Health, the death rate from coronavirus in the County as of the beginning of May was 12%, based on known infections, compared to a Statewide average of 6.25%.

11. Aid to Sussex County has been less than that to other New Jersey counties. As of April, of $82,202,575 in federal grants to New Jersey from the federal government for COVID-19 relief, only 17 counties will receive funds. Four counties—Sussex, Warren, Hunterdon, and Salem—received nothing.

12. The school budget approval process in New Jersey is well established for Type II school districts. For those Type II Districts which hold school elections in April, the budget is submitted to the voters for approval at the same time as the election of board members. For those Type II districts which hold elections in November, the budget is not submitted to the voters for approval.

13. HPRHSD is a Type II school district with November elections.

14. Instead of placing the proposed budget on a public ballot, Type II school districts with November elections follow a budget approval process provided for by statute, as follows:

a. First, the District must develop and adopt a Tentative Budget, which is submitted to the Executive County Superintendent for Review. N.J.S.A. 18A:7F-5 and 7F-6. This year, the due date for that action was March 20, 2020.

b. Next, the Executive County Superintendent must review and approve the budget in time for it to be publicly advertised. See N.J.A.C. 6A:23A-9.1; N.J.S.A.

19A:22-10, 11, and 12. This year, the due date for that action was April 20, 2020.

c. Following administrative approval and advertising, there must be a public hearing on the budget. N.J.S.A. 18A:22-10. This year, the earliest date for such a public hearing was April 24, 2020 and the latest date was May 7, 2020.

d. The deadline for Board of Education adoption of the budget this year was May 14, 2020. N.J.S.A. 18A:22-32.

15. The HPRHSD approved its Tentative Budget on March 17, 2020.

16. The HPRHSD advertised its budget on April 24, 2020, which was a Friday.

17. On Tuesday, April 28, 2020—only four days after it advertised the budget and more than two weeks before it was required to act—the HPRHSD conducted the public hearing and approved the budget. The meeting was virtual, and that fact, exacerbated by the unnecessary acceleration by the HPRHSD of the budget approval process by sixteen (16) days, essentially eliminated public scrutiny and participation.

18. At the April 28 public hearing, HPRHSD Superintendent Ripley reviewed the budget, with the aid of a power point presentation.

19. During his presentation, Superintendent Ripley repeatedly stressed that the Board of Education had been "fiscally responsible" over the past three years and that the 14% tax increase was needed to offset three years of State aid decreases.

20. In fact, neither of those statements is accurate. Instead, the HPRHSD has, as indicated in the chart below at Paragraph 24, refused year after year to confront losses in State aid for the 2016–2017, 2017–2018, 2018–2019, and 2019–2020 school years in the amount of $1,039,880; has ignored the need for fiscal planning; has inexplicably lowered the local tax levy by more than $1,100,000 over that same period of time, effectively doubling its loss of revenue during those years to more than $2.1 million instead of trying to reduce it; and has alternately increased and decreased its

operating budget by more than $1,000,000 every single year—going up more than $1,000,000 for the 2020–2021 budget—despite a declining enrollment. Since 2005, it has not sought public approval for a referendum for capital improvements.

21. If there is a now a [sic] fiscal problem at the HPRHSD at all, it is entirely self-created by the HPRHSD and self-inflicted by the HPRHSD, which is now looking to solve a problem that took four years for it to create in a single year, during the worst economic conditions in generations, and at a time when the Governor and the Legislature are focused on providing relief, rather than inflicting more pain. The history is as follows:

YEAR	LOCAL SHARE	STATE AID	OPER. BUDGET	ENR	LOCAL LEVY +/-	OPER. BUDGET +/-	TAX% +/-
2016–2017	15,401,826	(-70,324)	24,024,950	994			
2017–2018	14,356,619	(-128,000)	22,745,620	903	**(-1.045M)**	**(-1.4M)**	**(-6.7)**
2018–2019	14,256,964	(-362,989)	24,084,190	909	**(-99K)**	**+1.3M**	**(-.005)**
2019–2020	14,537,446	(-478,657)	22,244,421	866	**+280K**	**(-$1.8M)**	**+1.9**
2020–2021	16,572,880	(-753,678)	23,512,019	854	**+2.03M**	**+1.26M**	**+14**

22. Although local tax levy increases are statutorily capped at 2%, the proposed HPRHSD budget, which has been approved by the Executive County Superintendent, provided for an increase in the local tax levy of 14%, which is 12% higher than the presumptive 2% capped increase.

23. The BOE asserts that it is entitled to impose a 14% increase, rather than a 2% increase, because it is using "banked cap" in the amount of $1,744,688.

On October 2, 2020, the Department filed a motion to dismiss the First Amended Petition, consisting of a letter brief. On October 26, 2020, petitioners filed opposition to the motion, consisting of a letter brief and Certification of Stephen Edelstein, Esq. On November 9, 2020, the Department filed a reply letter brief in further support of its motion.

MOTION TO DISMISS

The Department's motion to dismiss argues that the First Amended Petition must be dismissed because: it fails to state a claim upon which relief can be granted; petitioners improperly sought a declaratory ruling; petitioners' claims are predicated on a facially incorrect interpretation of N.J.S.A. 18A:7F-39(e); and petitioners do not point to any "potential inefficiencies" in the "administrative operations" of HPRHSD.

It is evident from the "Jurisdiction" paragraph of the First Amended Petition, which states, "In addition, and as a separate cause of action, the Petitioners seek a declaratory ruling pursuant to N.J.A.C. 6A:3-2.1 that N.J.S.A. 18A:7F-39 shall be construed as to permit school districts to use, as banked cap, the unused portion of permissible increases for three succeeding years, and not to include as banked cap any tax increases during the same time period," and from "Background" paragraph 3, which states, "This action is brought to obtain declaratory and other relief," that petitioners seek not only a declaratory ruling, but also seek other relief. More specifically, the First Count of the First Amended Petition is as follows:

> **FIRST COUNT**
> **(Declaratory Ruling)**
>
> 24. The Petitioners repeat the allegations of Paragraphs 1–23 as if set forth a [sic] length.
>
> 25. The statute which permits the use of banked cap by a Board of Education is N.J.S.A.18A:7F-39(e), which states in relevant part:
>
> > A school district that has not been granted approval to exceed the cap pursuant to

> subsection c. of this section, may add to its adjusted tax levy in any one of the next three succeeding budget years, the amount of the difference between the maximum allowable amount to be raised by taxation for the current school budget year and the actual amount to be raised by taxation for the current school budget year.

This is the same standard contained in N.J.S.A. 40A:4-45.45.

26. On June 23, 2010, the Senate Budget and Appropriations Committee issued a Statement regarding the proposed "levy cap banking" provision which was being considered as Senate Bill No. 29 (now N.J.S.A. 18A:7F-39(e)).

27. The Committee stated, in part:

> The bill would also permit levy cap "banking" of any portion of the *permitted 2.9% increase*[3] under the property tax cap levy that is not used by a county or municipality in any budget year. **In the case of a school district it would allow cap banking of any portion of the *permitted 2.9% increase* plus applicable adjustments not used by the school district in a budget year . . . .**
>
> **Under the bill, the cap is being reduced, but any *unused permissible increase amount* under the reduced levy cap limit could be used in any one of the next three succeeding budget years.** This concept is similar to cap banking under the municipal and county appropriations cap law (N.J.S.A. 40A:4-45.1 et seq.). (emphasis added)

28. On July 14, 2010, which was the day after the amendment took effect, the Office of Legislative Services ("OLS") issued a Legislative Fiscal Estimate regarding Senate Bill No. 29 which evaluated the possible fiscal impact of the amendment. The OLS report summarized the amendment as follows: "Reduces school district, county, and municipal property tax levy cap from 4 percent to 2.0 percent and

[3] What was 2.9% is now 2%.

> permits *unused* school district, county, and municipal *increases* to be banked for three succeeding years." The OLS report also contained some of the same language from the Senate and Budget Appropriations Committee Statement, which described the amendment as allowing for the "banking" of the "permitted increase[s]" of the property tax levy.
>
> 29. The last page of the bill (Senate Bill No. 29) contained a one-sentence summary of the legislation: "Reduces school district, county, and municipal property tax levy cap from 4% to 2.0% and permits *unused* school district, county, and municipal *increases* to be banked for three succeeding years." (emphasis added) There is no reference to tax reductions coming into play in the formula.
>
> 30. The positions of the parties with regard to the proper construction of N.J.S.A.18A:7F-39(e) are adverse.
>
> 31. It is the position of the Petitioners that banked cap may include only the unused portion of increases, which construction would limit banked cap to a maximum of 2% per year.
>
> 32. It is the position of the Respondents that banked cap may include both the unused portion of increases plus the amount of any decreases, which construction would not limit banked cap to a maximum of 2% per year but. [sic]
>
> WHEREFORE, the Petitioners seek a Declaratory Judgment, on this First Count, that the banked cap provision of N.J.S.A. 18A:7F-39(e) be construed as permitting the inclusion as banked cap of only the unused portion of permissible increases, limited to a maximum of 2% per year, and awarding the Petitioners attorneys' fees, costs of this action, and such other relief as may be just and proper.

As set forth above, the First Count seeks "a Declaratory Judgment . . . that the banked cap provision of N.J.S.A. 18A:7F-39(e) be construed as permitting the inclusion as banked cap of only the unused portion of permissible increases, limited to a maximum of 2% per year," and "attorney's fees, costs of this action, and such other relief as may be just and proper." Further, there are three additional counts in the First Amended Petition. The Second Count (Breach of N.J.S.A. 18A:7F-39(e)), Third Count (Breach of N.J.A.C. 6A:23A-10.1), and Fourth Count (Breach of Fiduciary Duty) each demand the following:

> (a) That the HPRHSD budget for the 2020–2021 school year be revised and reduced in accordance with the maximum limitations of N.J.S.A. 18A:7F-39(e); and
>
> (b) That the tax rate for Petitioners and all other property tax payers in the Petitioning municipalities be adjusted to eliminate that portion of the property taxes which result from the improperly inflated HPRHSD budget for the 2020–2021 school year and that the Commissioner fashion a remedy to compensate those taxpayers for the overpayment which has taken place prior to this ruling; and
>
> (c) That the Commissioner retain jurisdiction and oversee over this matter to ensure that these Orders and declarations are carried out; and
>
> (d) Counsel fees and costs of this action;
>
> (e) Such other relief as may be just and proper.

The Department argues that the First Amended Petition should be dismissed because petitioners have improperly sought a declaratory ruling. N.J.A.C. 6A:3-2.1 governs petitions for declaratory ruling as follows:

> (a) Pursuant to N.J.S.A. 52:14B-8, any interested person(s) may petition the Commissioner for a declaratory ruling with respect to rights, responsibilities, and status arising from any statute or rule within the jurisdiction of the Commissioner. The determination to entertain such petitions for declaratory ruling shall be within the sole discretion of the Commissioner. If such request is granted, the matter shall proceed in accordance with this chapter as they pertain to petitions. A declaratory ruling shall be binding upon the Commissioner and all parties to the proceedings on the specific statement of facts set forth therein.
>
> 1. A request for a declaratory ruling shall reflect adverse positions on the statute or rule in question by the parties in interest, may not seek consequential relief beyond a declaration as to the meaning of the statute or rule, and may not be based on underlying facts that are future, contingent, uncertain, or disputed.

> (b) Except that the format of the petition shall be as set forth in this subchapter, the rules pertaining to filing, service and answer of petitions as set forth in this chapter shall apply to petitions for declaratory ruling.

Additionally, N.J.A.C. 6A:3-2.2 specifies the format of a petition for declaratory ruling, which format includes, inter alia, a caption that specifies that the petition is a "PETITION FOR DECLARATORY RULING"; language that "requests the Commissioner to render a declaratory ruling concerning the application of (N.J.S.A. 18A:_____, N.J.A.C. 6:_____, N.J.A.C. 6A:_____) to the controversy which has arisen between petitioner and respondent"; and language that "WHEREFORE, petitioner respectfully prays that the Commissioner shall construe the provisions of _____ and determine and declare _____."

The Verified Petition did not "reflect adverse positions on the statute or rule in question by the parties in interest," and it sought "consequential relief beyond a declaration as to the meaning of the statute or rule." Although the First Amended Petition, filed after the Department's first motion to dismiss, now reflects that the positions of the parties are adverse and states that it is "the position of the Petitioners that banked cap may include only the unused portion of increases, which construction would limit banked cap to a maximum of 2% per year," and "the position of the Respondents that banked cap may include both the unused portion of increases plus the amount of any decrease, which construction would not limit banked cap to a maximum of 2% per year," it nevertheless contains three other counts and requests for relief in contravention of N.J.A.C. 6A:3-2.1 and still does not comport with the format of N.J.A.C. 6A:3-2.2.

Additionally, the Verified Petition demanded, inter alia, a "declaration that the HPRHSD is not permitted to use banked cap for its 2020–2021 budget in a dollar amount which is greater than that which is equal to the difference between zero and the amount of tax increase actually imposed for each of the past three years, not to exceed two-percent for any one year, and that the budget shall be revised consistent with this declaration prior not later than June 30, 2020." In support of their position, the petitioners

cited to N.J.S.A. 40A:4-45.45, but the First Amended Petition instead seeks a declaratory judgment "that the banked cap provision of N.J.S.A. 18A:7F-39(e) be construed." While the underlying position of the petitioners—that the banked cap cannot be utilized in the manner in which it was utilized—remains the same, certainly no request for a declaratory ruling specific to N.J.S.A. 18A:7F-39(e) was ever filed with the Commissioner prior to the transmittal of the matter to the OAL, and therefore the Commissioner would not have been on notice.

Pursuant to N.J.A.C. 6A:3-1.10, at any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute, or other good reason. The Department's motion was filed after transmittal of the pleadings, but pursuant to N.J.A.C. 1:1-12.1(a), where a party seeks an order of a judge, the party shall apply by motion and state the grounds upon which the motion is made and the relief or order being sought. The judge may render any ruling or order necessary to decide any matter presented to him or her which is within the jurisdiction of the transmitting agency or the agency conducting the hearing. N.J.A.C. 1:1-14.6(h).

I **CONCLUDE** that the Verified Petition was not properly filed as a request for a declaratory ruling pursuant to N.J.A.C. 6A:3-2.1 and N.J.A.C. 6A:3-2.2, as it did not reflect adverse positions on the statute or rule in question by the parties in interest, it did not request that the Commissioner render a declaratory ruling concerning the specific statute or regulation, and it improperly sought consequential relief beyond a declaration as to the meaning of the statute or rule. If petitioners intended to have the Commissioner construe the provisions of the applicable statute -- which statute was changed in the First Amended Petition - and determine and declare that the respondents cannot utilize banked cap in the manner in which it was utilized, their petition should have been filed as a petition for declaratory ruling and it should have complied with the applicable requirements. Since it was not properly filed as a petition for a declaratory ruling and did not comply with the

applicable requirements, the Commissioner was not provided appropriate notice of a petition for a declaratory ruling and it was transmitted to the OAL instead as a contested case. Merely separating the request for a declaratory ruling into its own count in the First Amended Petition does not remedy the defects. Accordingly, I **CONCLUDE** that the First Count of the First Amended Petition should be dismissed.

Although petitioners argue that there are three total counts, the First Amended Petition contains four counts. The Second Count, Third Count, and Fourth Count are as follows:

> **SECOND COUNT**
> **(Breach of N.J.S.A. 18A:7F-39(e))**
>
> 33. Petitioners repeat the allegations of Paragraphs 1–32 as if set forth at length.
>
> 34. The use of banked cap by the HPRHSD so as to include the amount of property tax decreases, and the approval of that use by the Commissioner of Education, violated the provisions of N.J.S.A. 18A:7F-39(e).
>
> 35. The 2020–2021 HPRHSD school budget, which included increases in violation of 18A:7F-39(e), went into effect on July 1, 2020.
>
> 36. As a result of these statutory violations, the Petitioners, as well as all of the property tax owners in the Petitioning municipalities have been damaged by the requirement that they pay a property tax rate based, in part, on an improperly inflated HPRHSD school budget.
>
> WHEREFORE, the Petitioners demand:
>
> (a) That the HPRHSD budget for the 2020–2021 school year be revised and reduced in accordance with the maximum limitations of N.J.S.A. 18A:7F-39(e); and
>
> (b) That the tax rate for Petitioners and all other property tax payers in the Petitioning municipalities be adjusted to eliminate that portion of the property taxes which result from the improperly inflated HPRHSD budget for the 2020–2021

school year and that the Commissioner fashion a remedy to compensate those taxpayers for the overpayment which has taken place prior to this ruling; and

(c) That the Commissioner retain jurisdiction and oversight over this matter to ensure that these Orders and declarations are carried out; and

(d) Counsel fees and costs of this action; and

(e) Such other relief as may be just and proper.

THIRD COUNT
(Breach of N.J.A.C. 6A:23A-10.1)

37. The Petitioners repeat the allegations of Paragraphs 1–36 as if set forth at length.

38. The Executive County Superintendent of Schools supervises and administers the day-to-day functions of the County Office of Education as a representative of the State Commissioner of Education. The County Superintendent provides educational leadership to and general over-sight of the public school districts in the County pursuant to law and code. N.J.S.A.18A:7-l et seq.

39. N.J.A.C. 6A:23A-10.1 is titled "Unused tax authority (banked cap)." Subsection 3(e) of that Code provision states:

> The executive county superintendent may disapprove use of banked cap, pursuant to N.J.S.A. 18A:F-5, if he or she determines the district board of education has not implemented all potential efficiencies in the administrative operations of the school district.

40. Even if otherwise permissible, which it is not, the use of banked cap in the amount permitted in the HPRHSD 2020–2021 school budget should have been disallowed by the Executive County Superintendent pursuant to N.J.A.C. 6A:23A-10.1 because the HPRHSD did not implement all potential efficiencies in the administrative operations of the school district.

41. The failure by the Commissioner of Education, acting through the Executive County Superintendent, to disallow the questioned use of banked cap pursuant to N.J.A.C. 6A:23A-10.1 constituted a breach of that Code provision, an arbitrary action, and a violation of the Commissioner's duty.

WHEREFORE, ...[4]

FOURTH COUNT
(Breach of Fiduciary Duty)

42. The Petitioners repeat the allegations of Paragraphs 1–41 as if at length.

43. "The members of the board of education . . . are public officers holding positions of public trust. They stand in a fiduciary relationship to the people whom they have been appointed or elected to serve." Lawrence/Cranbury v. Bd. of Educ., 27 N.J. Super. 243, 248 (App. Div. 1953).

44. According to its own budget presentation, the HPRHSD is seeking, in one year, to offset the loss of $1.723 million in State aid by using $1.744 million in allegedly banked cap, thereby imposing a local tax levy increased by 14% rather than by 2%.

45. To use of banked cap in the fashion and in the amount that the HPRHSD has used it in its 2020–2021 budget flies in the face of recent actions by Governor Murphy.

46. The Governor's policy is not to permit exceptions to the cap law to avoid the impact of the loss of State aid. That is why, in January of 2020, on the last day of the Legislative Session, he returned unsigned a bill, S4289, which would have allowed school districts to exceed cap to offset losses in State aid.

47. The HPRHSD has, since the 2016–2017 school year, breached its fiduciary responsibilities over the past three years by permitting the short-term gratification of tax-cuts to outweigh the need for fiscal planning and, currently, by imposing a 14% tax increase.

[4] The WHEREFORE clause is identical to that of Count 2.

> 48. In so doing, the HPRHSD engaged in a manipulation of the local tax share.
>
> 49. By their actions, the HPRHSD and its members breached their fiduciary obligations pursuant to law.
>
> 50. As a consequence, the Petitioners and every property tax payer in the Petitioning municipalities has been harmed.
>
> WHEREFORE, ...[5]

The allegations in the Second Count and Third Count were not included in the Verified Petition and appear for the first time in the First Amended Petition. However, the allegations in the Fourth Count, with the exception of the allegations that "the HPRHSD engaged in a manipulation of the local tax share"; "[b]y their actions, the HPRHSD and its members breached their fiduciary obligations pursuant to law"; and "the Petitioners and every property tax payer in the Petitioning municipalities has been harmed," were included in the Verified Petition. Additionally, excepting the demands that "the Commissioner retain jurisdiction and oversight over this matter to ensure that these Orders and declarations are carried out" and for counsel fees and costs and such other relief as may be just and proper, the relief in the Second Count, Third Count, and Fourth Count of the First Amended Petition differs from that sought in the Verified Petition.

"It is within the Commissioner's authority to treat a motion to dismiss on the ground that 'no sufficient cause for determination has been advanced' as encompassing not only a claim that the petition on its face fails to set forth a basis for relief, but also that petitioners have failed to provide any factual support for the general allegations of their petition." Sloan v. Klagholtz, 342 N.J. Super. 385, 394 (App. Div. 2001). The entirety of the within controversy, including the requests for consequential relief, stems from a dispute over how the banked cap was utilized. Certainly, if HPRHSD's utilization of the banked cap was permissible, the various allegations in the Second Count (Breach of N.J.S.A. 18A:7F-39(e)), Third Count (Breach of N.J.A.C. 6A:23A-10.1), and Fourth Count (Breach of Fiduciary Duty) fail.

[5] The WHEREFORE clause is identical to that of Counts 2 and 3.

Accepting for purposes of this motion the "Background" facts set forth in petitioners' First Amended Petition, the HPRHSD approved its tentative budget on March 17, 2020 (before the March 20, 2020, deadline) and it was submitted to the executive county superintendent for review and approval; the executive county superintendent approved the tentative budget in time (before the April 20, 2020, deadline) for it to be publicly advertised; it was publicly advertised on April 24, 2020; there was a public hearing on the budget on April 28, 2020—which was after the earliest date for a public hearing (April 24, 2020) and before the latest date (May 7, 2020); and the Board of Education ultimately approved the budget. Although the public hearing was a virtual hearing, and the budget was approved days before the deadline by which the Board was required to act, there is no assertion of any procedural violation of N.J.S.A. 18A:22-10 to -13 and no assertion that the budget was not submitted to the executive county superintendent for review and approval in accordance with N.J.A.C. 6A:23A-9.1. Accordingly, the First Amended Petition reflects that the 2020–2021 budget was approved by way of the statutory process.

Notwithstanding the provisions of any other law to the contrary, a school district may not adopt a budget pursuant to N.J.S.A. 18A:7F-5 and N.J.S.A. 18A:7F-6 with an increase in its adjusted tax levy that exceeds, except as provided in N.J.S.A. 18A:7F-39, the tax levy growth limitation calculated as follows: the sum of the prebudget year adjusted tax levy and the adjustment for increases in enrollment multiplied by 2.0 percent, and adjustments for an increase in health care costs, increases in amounts for certain normal and accrued liability pension contributions. N.J.S.A. 18A:7F-38(a).

Petitioners argue—and there is no dispute—that the maximum allowable increase is 2 percent. The statute in question is N.J.S.A. 18A:7F-39(e), which states as follows:

> A school district that has not been granted approval to exceed the cap pursuant to subsection c.[6] of this section, may add to

[6] A school district may submit to the voters at the annual school election, or on such other date as is set by regulation of the commissioner, a proposal or proposals to increase the adjusted tax

> its adjusted tax levy in any one of the next three succeeding budget years, the amount of the difference between the maximum allowable amount to be raised by taxation for the current school budget year and the actual amount to be raised by taxation for the current school budget year.

Petitioners further argue that "[w]hat is uncertain is the meaning of the statute." Conversely, the Department argues that the statute is clear and unambiguous.

Within the First Count, petitioners cite to a June 23, 2010, Senate Budget and Appropriations Committee statement "regarding the proposed 'levy cap banking' provision which was being considered as Senate Bill No. 29 (now N.J.S.A. 18A:7F-39(e))" and to a July 14, 2010, OLS Legislative Fiscal Estimate regarding Senate Bill No. 29 "which evaluated the possible fiscal impact of the amendment." However, with respect to legislative intent, the Supreme Court of New Jersey stated as follows:

> The best evidence of that legislative intent is the statutory language, which is, accordingly, "the first place we look." Richardson v. Bd. of Trs., PFRS, 192 N.J. 189, 195, 927 A.2d 543 (2007). If the statute's plain language leads to a clearly understood result, the judicial inquiry is complete. Ibid.; Felix v. Richards, 241 N.J. 169, 179, 226 A.3d 937 (2020) (noting that when "language admits of only one clear interpretation," the interpretive task ends and the court enforces that meaning).
>
> "[I]t is not our function to rewrite a plainly written statute or to presume that the Legislature meant something other than what it conveyed in its clearly expressed language." Shipyard Assocs., LP v. City of Hoboken, 242 N.J. 23, 45, 230 A.3d 278 (2020) (quoting Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592, 46 A.3d 1262 (2012)). It is only when the statute's language is ambiguous that we consider legislative history and other extrinsic materials. Sanchez v. Fitness Factory Edgewater, LLC, 242 N.J. 252, 261, 231 A.3d 606 (2020);

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levy by more than the allowable amount authorized pursuant to section 3 of P.L.2007, c.62 (C.18A:7F-38). The proposal or proposals to increase the adjusted tax levy shall be approved if a majority of people voting shall vote in the affirmative. In the case of a school district with a board of school estimate, the additional adjusted tax levy shall be authorized only if a quorum is present for the vote and a majority of those board members who are present vote in the affirmative to authorize the additional adjusted tax levy. N.J.S.A. 18A:7F-39(c).

> Kean Fed'n of Tchrs. v. Morell, 233 N.J. 566, 583, 187 A.3d 153 (2018).
>
> [Branch v. Cream-O-Land Dairy, 2021 N.J. LEXIS 3, *31–32.]

The operative statute, N.J.S.A. 18A:7F-39(e), allows HPRHSD to add to its adjusted tax levy in any one of the next three succeeding budget years, the amount of the difference between the maximum allowable amount to be raised by taxation for the current school budget year and the actual amount to be raised by taxation for the current school budget year. The ramifications of such action aside, the First Amended Petition reflects that HPRHSD added to one of the next three succeeding budget years (2020–2021) the amount of the difference between the maximum allowable amount and the actual amount to be raised.

Specifically, petitioners' history chart reflects that the local share was $15,401,826 in 2016–2017. With a 2 percent increase, the local share in 2017–2018 could increase to a maximum of $15,709,862.52 ($15,401,826 plus a 2 percent increase of $308,036.52). However, the local share was lowered to $14,356,619 in 2017–2018—leaving a difference of $1,353,243.52 as "banked cap." Petitioners' history chart reflects that the local share was $14,356,619 in 2017–2018. With a 2 percent increase, the local share in 2018–2019 could increase to a maximum of $14,643,751.38 ($14,356,619 plus a 2 percent increase of $287,132.38). However, the local share was again lowered, to $14,256,964, in 2018–2019—leaving a difference of $386,787.38 as "banked cap." Petitioners' history chart reflects that the local share was $14,256,964 in 2018–2019. With a 2 percent increase, the local share in 2019–2020 could increase to a maximum of $14,542,103.28 (which is $14,256,964 plus a 2 percent increase of $285,139.28). However, the local share was again lowered, to $14,537,446, in 2019–2020—leaving a difference of $4,657.28 as "banked cap." Accordingly, the total "banked cap" for 2017–2018, 2018–2019, and 2019–2020 was $1,744,688.18 ($1,353,243.52 plus $386,787.38 plus $4,657.28).

Petitioners' history chart reflects that the local share was $14,537,446 in 2019–2020. With a 2 percent increase, the local share in 2020–2021 could increase to a maximum of $14,828,194.92 ($14,537,446 plus a 2 percent increase of $290,748.92). In fact, the local share was increased by 2 percent to $14,828,194.92, but HPRHSD opted, as is allowed by statute, to add to its adjusted tax levy ($14,828,194.92) the three years' banked cap ($1,744,688.18), which resulted in a local share of $16,572,880. While HPRHSD's actions resulted in a higher percentage for 2020–2021 than 2 percent, its actions resulted in lower percentages in the preceding years. To the extent that petitioners are dissatisfied with HPRHSD's budget, I concur with the Department that the remedy is political and not legal.

In sum, the statute's plain language is clear and unambiguous, and the First Amended Petition reflects that HPRHSD acted in accordance with the statute. It is not the function of the undersigned to rewrite the statute or to presume that its plain language does not comport with the legislative intent. As such, I **CONCLUDE** that no sufficient cause for determination has been advanced and the First Amended Petition should be dismissed.

In view of the foregoing, it is hereby **ORDERED** that the First Amended Petition is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 1, 2021

DATE

Kelly J Kirk

KELLY J. KIRK, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

84-21

84-21

New Jersey Commissioner of Education

Decision

J.B., on behalf of minor child, J.B.,

Petitioner,

v.

Board of Education of the Northern Valley Regional High School District, Bergen County,

Respondent.

Synopsis

Petitioner alleged that on multiple occasions, the soccer coach for the Northern Valley Regional High School (NVRHS) bullied her son, J.B., because of his commitment to academics, in violation of New Jersey's Anti-Bullying Bill of Rights Act (ABRA), *N.J.S.A.* 18A:37-13 to -37. Upon review of the HIB specialist's report of the incidents in question, the Board concluded that the HIB investigation failed to show that petitioner was a protected class member or possessed an actual or perceived distinguishing characteristic which served as motivation for the alleged bullying. Petitioner asserted that both J.B.'s commitment to academics and his status as a student are distinguishing characteristics. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the petitioner, J.B.'s mother, has standing in this case; petitioner's assertion that the District did not follow the 2016 Annual Report of the New Jersey Anti-Bullying Task Force (ABTF) is without merit, as failing to follow the ABTF does not provide a basis for appeal in this forum, and no evidence supports a finding that the Board's HIB Policy failed to include all required provisions; review of the alleged incidents in this case fail to reveal that the coach targeted J.B. for his academic commitment, as the now-former coach's questionable treatment of his players was largely universal; and J.B.'s status as a student alone is not a distinguishing characteristic under ABRA. The ALJ concluded that the Board did not act in an arbitrary, capricious, or unreasonable manner in finding that no HIB occurred against J.B. Accordingly, the ALJ granted summary decision in favor of the Board and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ findings and conclusion, for the reasons thoroughly detailed in the Initial Decision. Accordingly, the Initial Decision of the OAL was affirmed and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

84-21

OAL Dkt. No. EDU 04618-20
Agency Dkt. No. 51-2/20

New Jersey Commissioner of Education

Decision

J.B., on behalf of minor child, J.B.,

Petitioner,

v.

Board of Education of the Northern Valley Regional High School District, Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon review, for the reasons thoroughly detailed in the Initial Decision, the Commissioner concurs with the ALJ that the Board's decision was not arbitrary, capricious, and unreasonable. Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED. [1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 13, 2021
Date of Mailing: April 13, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 04618-20
AGENCY DKT. NO. 51-2/20

J.B. ON BEHEALF OF MINOR CHILD J.B.,

Petitioners,

v.

BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,

Respondent.

J.B., parent and power of attorney of J.B., pro se

Isabel Machado, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: January 28, 2021 Decided: March 8, 2021

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

Petitioner, JB, alleges that, on multiple occasions, the Northern Valley Regional High School (NVRHS) soccer coach bullied her son, J.B., because of his commitment to academics in violation of the Anti-Bullying Rights Act (ABRA), N.J.S.A. 18A:37-13 to -37. Yet, none of the coach's actions can be reasonably perceived as motivated by any actual or perceived distinguishing characteristic as required under ABRA. Is respondent entitled to summary decision? Yes. Under N.J.A.C. 1:1-12.5(b), summary decision is appropriate if no genuine issue of material fact exists and the moving party is entitled to prevail as a matter of law.

PROCEDURAL HISTORY

On February 27, 2020, petitioner filed a Verified Petition with the Commissioner of Education (Commissioner) challenging the Northern Valley Regional High School Board of Education's (Board or District) conclusion that no "harassment, intimidation, or bullying" ("HIB") violation occurred against her son, J.B.

The petition maintains that the Board improperly concluded that J.B. was not a protected class member and did not possess an actual or perceived distinguishing characteristic serving as motivation for bullying. Although the Board did not conclude a HIB violation under ABRA occurred, the Board found evidence of the impingement of J.B.'s rights, and a substantial disruption existed.

Specifically, the petition alleges that J.B., a senior in the District, was the systematic victim of verbal harassment, intimidation, and bullying at the hands of his varsity soccer coach, Jeremy Truppi, in violation of the ABRA. Petitioner also alleges that Coach Truppi was in a position of authority over J.B. as a coach and abused that power.

Moreover, petitioner disputes that J.B. has no distinguishing characteristics worthy of protection under ABRA and maintains that the District did not follow ABRA guidelines.

Instead, petitioner asserts that both J.B.'s commitment to academics and his student status are distinguishing characteristics.

The petition seeks a finding that:

1. J.B. was the target of HIB.
2. The process that allowed Coach Truppi to remain in his position despite other HIB violations must be changed.
3. The District did not take appropriate measures to address the abuse.

On March 18, 2020, the Board answered the petition, denying any wrongdoing on its part.

Soon after, the New Jersey Department of Education (NJDOE), Bureau of Controversies and Disputes, transmitted this case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -13, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. The OAL filed the case on May 11, 2020.

On June 16, 2020, I held a pre-hearing conference wherein I requested that petitioner further explain the relief sought. The Board also provided documentation requested by the petitioner. The parties attempted to resolve this case but were not successful, and I scheduled hearings on January 19, and 20, 2021.

On November 5, 2020, I conducted a pre-hearing conference, and the Board requested leave to file a motion for a summary decision.

On December 3, 2020, the Board filed its motion.

On December 23, 2020, petitioner filed her opposition, and on January 4, 2021, the Board replied.

Petitioner requested to submit an additional response, and I granted that request.

On January 14, 2021, petitioner responded to the District's reply, and on January 28, 2021, thce Board presented its sur-reply.

FINDINGS OF FACT

Based on the documents submitted in support of and in opposition to the motions for summary decision, when viewed in the light most favorable to the non-moving party, I **FIND** the following as **FACT** for purposes of these motions only:

J.B. is a former student of the District. At the time his mother, J.B., filed the petition on his behalf, J.B. was seventeen. J.B. is now eighteen and graduated in June 2020. After turning eighteen, J.B. provided his mother, J.B., with a power of attorney to act on his behalf in this case "conveying all the powers necessary to represent me and my interests" and to act in his name.

On October 8, 2019, the District received a verbal report of an alleged HIB violation against J.B. by Jeremy Truppi, the Varsity soccer coach at NVRHS.

On October 10, 2019, the District received a written complaint against Coach Truppi. Petitioner alleged that her son, then a senior, was "bullied, ostracized and singled out" because of his "bad behavior and commitment to academics." J.B. was enrolled in honors classes. J.B. quit the soccer team in the fall of 2019, in the last month of the soccer season.

The petition supplies instances of alleged bullying against J.B. because of his being intellectual and committed to academics:

- On several occasions, J.B. told Coach Truppi that he had a college-related meeting and would miss practice. In turn, Coach Truppi mocked J.B. and told him school should not be a priority. The Coach often told students that athletics should come first.
- Coach Truppi would blame JB for joining the team huddle last when he clearly wasn't the last one, for showing up to practice late when he had been there, and for being disrespectful when he was only asking questions. When another player got angry and threw a bottle, J.B. told the player to calm down. Coach Truppi told J.B. not to make other players feel bad encouraging poor behavior.
- During a drill, J.B. of running with his group onto the field at the wrong time, Coach Truppi looked at J.B. in anger and walked off the field, and other team members blamed J.B. J.B. texted Coach Truppi an apology, and Coach Truppi responded, "Let's talk tomorrow at 3:15. Bring your uniform." J.B. believed he would be kicked off the team.
- J.B. texted Coach Truppi that he could not attend practice due to a religious holiday and school closure. Coach Truppi texted the entire team that "Any freshman players who want to practice with varsity today, we would be happy to have you." J.B. asserts Coach Truppi repeatedly told the players he would replace them with freshman. J.B. was only permitted to play for thirty seconds in the game on the following day, unlike other games. J.B. felt punished.

The District no longer employs Coach Truppi. However, the District did retain Coach Truppi through at least November 2019 and the championship awards ceremony. Other allegations regarding another student led to a finding of HIB violations against Coach Truppi in or around October 2019.[1]

[1] Petitioner maintains the Board sustained one HIB, and for purposes of this motion, I viewed the facts in the light most favorable to petitioner. The Board did not address the nature of or the imposed consequences of other HIB violations and, arguably, cannot do so. See N.J.S.A. 47:1A-1.1 (information regarding grievances filed against a public employee are not public records); see also Family Educational Rights and Privacy Act, 20 U.S.C. 1232g, 34 C.F.R. Part 99 (a school district cannot release a student's personal identifying information absent specific exception). Yet, HIB violations against other students are not relevant to whether Coach Truppi bullied J.B.

At the time of the complaint, the District operated under an Anti-Bullying Policy (Policy) and had the appropriate personnel conduct HIB investigations to determine whether the alleged acts were a HIB violation.

Upon being notified of petitioner's complaint, Michael O'Malley, the lead counselor and NVRHS's Anti-Bullying Specialist, commenced a HIB investigation. O'Malley met with student witnesses, three coaches and reviewed written statements.

On Friday, October 18, 2019, O'Malley completed his investigation. On Monday, October 21, 2019, O'Malley issued his written report concluding that Coach Truppi's actions did not meet the definition of a HIB. Specifically, interviews and written statements were not "evidence to reasonably substantiate a distinguishing characteristic serving as motivation behind [Coach Truppi's] actions." (emphasis added). Thus, O'Malley noted that a key component to finding a HIB violation against J.B. was missing "despite there being evidence of substantial disruption due to the allegations."

O'Malley summarized the witness interviews as revealing consensus that Coach Truppi is "passionate" about "motivating his players to reach full potential as individuals and a team." However, at times, Coach Truppi was overly emotional, focusing "more on negatives than positives which can, at times, undermine the trust and confidence the players have in Coach Truppi as well as the team environment and culture." Yet, "there was also consensus among witnesses that Coach [Truppi] has not conducted himself in a manner different from the other coaches the players have played for in the past." Further, "there was growth in these areas" [of concern] throughout the three years of Coach [Truppi's] tenure leading up to the present."

The Superintendent prepared a report noting that no HIB occurred against J.B. The Board met and accepted that conclusion.

On October 31, 2019, the Board mailed the "NOT HIB" report to petitioner, noting the findings and identifying no imposition of discipline or penalty.

Petitioner challenged that determination, and on November 26, 2019, she and her son, J.B., appeared and provided testimony. Still, the Board denied the appeal affirming the finding that J.B. was not a target of HIB. However, the Board advised that it took appropriate measures to address the concerns raised.

The 2016 Annual Report of the New Jersey Anti-Bullying Task Force (ABTF)[2] recommended, in part, that the NJDOE provide guidance to assist practitioners in understanding the significance of power imbalance between adults and students in HIB. The Legislature established the ABTF to:

1. Provide guidance to school districts on available resources to assist in the implementation of the ABR.
2. Examine the implementation of the ABR.
3. Draft model regulations and submit them to the Commissioner of Education for use in promulgating regulations to implement provisions of the act.
4. Present any recommendations regarding the ABR deemed to be necessary and appropriate.
5. Prepare a report within 180 days of its organizational meeting and annually for the following three years on the effectiveness of the act in addressing bullying in schools.

The NJDOE's 2011 Guidance for Parents on ABRA[3] acknowledges that "students who appear to be intellectual or introverted" may be at greater risk for being bullied.

[2] https://www.nj.gov/education/students/safety/behavior/hib/task.shtml.
[3] https://www.nj.gov/education/students/safety/behavior/hib/ParentGuide.pdf

DISCUSSION AND CONCLUSIONS OF LAW

Summary-Decision Standard

A party may move for summary decision upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion shall be served with briefs, with or without affidavits. When the filed papers and discovery, together with any affidavits, show that no genuine issue of material fact exists and that the moving party is entitled to prevail as a matter of law, the judge may grant the motion. N.J.A.C. 1:1-12.5(b). When such a motion is made and supported, an adverse party, to prevail, must submit an affidavit setting forth specific facts showing that a genuine issue of material fact exists that can only be determined in an evidentiary proceeding. Ibid.

Even though a statute calls for a "hearing," where a motion for summary decision is made and supported by documentary evidence and where the objector submits no evidence to demonstrate that a genuine issue of material fact exists, the motion procedure constitutes the hearing and no trial-type hearing is necessary. Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120–21 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996). Disputes as to the conclusions drawn from the facts, as opposed to disagreements regarding the facts themselves, will not defeat a motion for summary judgment. Lima & Sons, Inc. v. Borough of Ramsey, 269 N.J. Super. 469, 478 (App. Div. 1994)).

To determine whether a genuine issue of material fact exists that precludes summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to demonstrate that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins., 142 N.J. 520, 540 (1995).

Moreover, even if the non-movant comes forward with some evidence, the court must grant summary judgment if the evidence is "so one-sided that [the movant] must

prevail as a matter of law." Ibid. at 536 (citation omitted). If the non-moving party's evidence is "merely colorable or is not significantly probative," the judge should not deny summary judgment. Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

The questions presented are whether the petitioner has standing, whether the case is moot, and if there is standing and the issue is not moot, whether the Board's "No HIB' determination was arbitrary, capricious, or unreasonable. Petitioner also asserts that this tribunal must determine whether the District failed to follow the 2016 ABTF report recommendations. In this case, no genuine issue as to the material facts exists. More pointedly, no genuine issue exists that petitioner is the parent of J.B. and has a power of attorney from J.B., that J.B. is now eighteen years of age, and graduated from NVHRS in June 2020. Moreover, the District no longer employs the coach accused of committing a HIB against J.B., and the District found other HIB violations against Coach Truppi concerning other students. J.B. took honor and A.P. classes while attending NVHRS and pursued college. Since these facts are clear and undisputed, I **CONCLUDE** that this case is ripe for summary decision.

Standing

A party must have standing to have the "ability or entitlement to maintain an action before the court." In re Baby T., 160 N.J. 332, 340 (N.J.,1999). Standing is "a threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal." In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super 61, 85 (App. Div. 2004).

New Jersey Courts set a relatively low threshold for standing that is more expansive than in the federal courts. In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super. at 85. Standing is even more liberal within the State's administrative system. Steven L. Lefelt, Anthony Miragliotta, & Patricia Prunty, 37 New Jersey Practice, Administrative Law and Practice § 7.4, (rev. 2d ed. 2000); see Osborne v. Township of Lakewood Board of Education, EDU 6348-02, Initial Decision (May 16, 2003), modified,

Comm'r. (August 26, 2003), http://njlaw.rutgers.edu/collections/oal (finding petitioner demonstrated a sufficient stake in the outcome of the proceedings to confer standing to pursue his claims).

Moreover, ABRA contemplates that a parent or guardian is involved in the HIB investigation process and disputes regarding a HIB determination. Specifically, parents or guardians are entitled to information about the investigation after the school district reports its investigation results to the board. N.J.S.A. 18A:37-15(b)(6)(d). The parent or guardian may then request a hearing before the board. Id. After the board determines whether to affirm, reject, or modify the superintendent's decision, parents or guardians may appeal the board's decision to the Commissioner of Education, under procedures outlined in law and regulation, "no later than 90 days after issuance of the board's decision." N.J.S.A. 18A:37-15(b)(6)(e).

Notably, when petitioner filed the case for J.B., her son was not eighteen years of age and enrolled in NVHRS. Petitioner asserts deficiencies in the investigation process and District's failure to consider her son's distinguishing characteristics in its determination through the "lens [of the] power imbalance" between the coach and her son.

Respondent primarily relies upon A.B. o/b/o/ E.R. v. Paterson Bd. of Educ. and Passaic County Technical Institute, EDS 16337-16, Final Decision (July 10, 2018), http://njlaw.rutgers.edu/collections/oal/, to support its position. In concluding that A.B. did not have standing for her eighteen-year-old son, E.R., the ALJ noted that A.B. would not have standing "unless she has in her position (sic) a transfer of those rights to her. A.B. has submitted no such evidence in response to his (sic) motion or this proceeding. E.R.'s interests, in this case, may very well differ from those of his mother." Here, J.B. testified at the Board hearing disputing the determination that Coach Truppi committed no HIB violation against him and took significant steps to provide his mother J.B. with all powers necessary to litigate this case.

Similarly, respondent relies upon I.C.W. o/b/o J.W. v. Board of Education of The Borough of Mountain Lakes, Morris County, EDU 05838-11, Comm'r Decision 432-11 (October 14, 2014), http://njlaw.rutgers.edu/collections/oal/. In I.C.W., the Commissioner concurred that where a parent files a matter for their minor child who turns eighteen before the case concludes, the ALJ can afford the now 18-year-old adult the option to file a Certificate of Substitution or appear before the ALJ. Such an appearance would inform the ALJ that he/she would like his parents to proceed as his agents on his/her behalf. Further, a signed statement by the child was not enough. Here, the District did not challenge standing until the motion for summary decision making those options unavailable to date. Moreover, J.B. presents a notarized power of attorney specific to this case, endeavoring to provide his mother all powers and authority to act in his name. J.B. participated at the Board hearing, evidencing his disagreement with the Board's determination and that his interests are not different from those of his mother. Therefore, I **CONCLUDE** that petitioner, J.B.'s mother, has standing in this case and for purposes of this motion.

Mootness

An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For judicial economy and restraint, it is appropriate to refrain from decision-making when an issue presented is hypothetical, when judgment cannot grant effective relief, or the parties do not have concrete adversity of interest. Anderson v. Sills, 143 N.J. Super 432, 437 (Ch. Div. 1976); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff'd, Comm'r (May 3, 1999),; https://njlaw.rutgers.edu/collections/oal/ S.J. v. Bd. of Educ. of Mountain Lakes, EDU 07081-03, Initial Decision (October 7, 2003), aff'd, Comm'r (Nov. 17, 2003), aff'd, St. Bd. (Feb. 3, 2004). https://njlaw.rutgers.edu/collections/oal/.

In R.S. o/b/o G.M. v. State-Operated School District of the City of Paterson, Comm'r Decision 17-17, (January 13, 2017), https://njlaw.rutgers.edu/collections/oal/, the Commissioner determined that a student's graduation from school does not make the

issue hypothetical. Petitioner challenged the HIB investigation on behalf of her minor child and sought to reverse the District's finding. Indeed, as here, "the challenge to the District's finding that the alleged conduct did not rise to the level of harassment or bullying" remained. See also, J.M. o/b/o T.M. v. Board of Education of the Town of Tinton Falls, Monmouth County, Comm'r Decision No. 39-14, (January 23, 2014), https://www.nj.gov/education/legal/commissioner/ (finding that although the district no longer employed the coach accused of HIB conduct, petitioner's request for a determination that the coach committed acts of HIB was not moot).

Similarly, in M.D.G. ex rel. C.J. v. Board of Education of Atlantic City, EDU 6450-04, Initial Decision (April 27, 2005), adopted, Comm'r (May 26, 2005), https://njlaw.rutgers.edu/collections/oal/, the ALJ concluded that a school board violated the HIB statute in failing to investigate an incident of bullying properly. During the appeal, the student was withdrawn from the school and enrolled in another school within the same district. While the ALJ noted that "there is no immediate remedy readily available to [the bullied student]," he ordered the board to comply with ABRA by "conducting staff in-service programs" to assure that district's students "will be protected from harassment, intimidation or bullying in the future."

Although the District does not employ Coach Truppi and J.B. graduated for NVRHS, these facts do not make the case moot. Whether petitioner's son has graduated from the District is not relevant to the issue of whether the alleged conduct constituted HIB or whether the District followed NJDOE guidelines for HIB determinations. Therefore, I **CONCLUDE** the issues, in this case, are not moot.

ABRA

The Legislature designed ABRA "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises." N.J.S.A. 18A:37-13.1(f).

Under the ABRA, "harassment, intimidation or bullying" (HIB) is defined as:

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14]

As such, an incident must satisfy all four separate elements to meet the definition of HIB under the ABRA. ABRA protects against HIBs directed at students regardless if "such conduct emanates from students, teachers, or school administrators." DeFalco v.

Bd. of Educ. of the Twp. of Hamilton, Mercer County, EDU 2365-18, Initial Decision (June 25, 2019), adopted, Comm'r (July 26, 2019).

Each school district must adopt a HIB policy that meets minimum statutory requirements but generally has "control over the content of the policy." N.J.S.A. 18A:37-15(a) and (b). The statutory requirements for a HIB policy include "a procedure for prompt investigation of reports of violations and complaints." N.J.S.A. 18A:37-15(b)(6).

Under this procedure, "the investigation shall be initiated by the principal or the principal's designee within one school day of the report of the incident and shall be conducted by a school anti-bullying specialist," and "[t]he investigation shall be completed as soon as possible, but not later than 10 school days from the date of the written report of the incident of [HIB]." N.J.S.A. 18A:37-15(b)(6)(a). The school anti-bullying specialist reports the investigation results to the superintendent who, in turn, must reports the results to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." N.J.S.A. 18A:37-15(b)(6)(b) and (c).

If parents request and participate in a hearing before the board, the board must issue a decision at the first meeting after its receipt of the investigation report. N.J.S.A. 18A:37-15(b)(6)(e). The board may affirm, reject, or modify the superintendent's decision. Ibid. A parent or guardian may appeal the board's decision to the Commissioner. Ibid.

Petitioner bears the burden of proof by a preponderance of the credible. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); DYFS v. M.R., 314 N.J. Super. 390, 414 (App. Div. 1998); In re Allegations of Sexual Abuse at E. Park High Sch., 314 N.J. Super. 149, 168 (App. Div. 1998). This tribunal must decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E.&A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v.

Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

Significantly, an action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious, or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). The Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). Indeed, the Commissioner will not overturn a local board's decision in the absence of a finding that the action below was arbitrary, capricious, or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008), http://njlaw.rutgers.edu/collections/oal/ (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)).

Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, to prevail, the petitioner must demonstrate that the Board "acted in bad faith, or utter disregard of the circumstances before it." G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014), (citation omitted), adopted, Comm'r (April 10, 2014), www.njlaw.rutgers.edu/collections/oal/.

O'Malley, who has no stake in finding HIB, conducted a thorough investigation but concluded that bullying was unsubstantiated against J.B. The superintendent recommended this finding to the Board. J.B. and his parents appealed, and the Board afforded a hearing but affirmed the conclusion that no HIB occurred. Thus, the Board

argues that it correctly followed all necessary procedures and determined that the conduct described and investigated did not rise to a HIB.

Initially, to satisfy the statutory definition of HIB, the conduct must be "reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic." N.J.S.A. 18A:37-14 (emphasis added). Yet, "[t]he statute has not limited 'distinguishing characteristic' to those specifically enumerated, but it has consistently required such a perceived motivation." K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 351 (App. Div. 2011). "The Legislature intentionally included a very open-ended phrase, 'any other distinguishing characteristic,' to signal that the Act would apply to a broad, unlimited range of distinguishing characteristics, so long as the distinguishing characteristic motivated the bully to harass the targeted student." L.P. and H.P. ex rel. L.P., EDU 04462-16, Initial Decision (June 10, 2016), adopted, Comm'r (July 25, 2016), http://njlaw.rutgers.edu/collections/oal/.

As the court reiterated in Evesham, the offending conduct must be motivated by a distinguishing characteristic for purposes of HIB. However, the statutory definition of HIB "does not include all violent or aggressive conduct against a student," but it has consistently required that the perceived motivation be a distinguishing characteristic. Id. at 350–51. The court also provided a summation of what does not constitute HIB:

> Thus, harmful or demeaning conduct motivated only by another reason, for example, a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation, does not come within the statutory definition of bullying.
>
> [Id. at 351.]

The category "any other distinguishing characteristic" has been interpreted to include a variety of traits. For example, appearance and body type may be "distinguishing

characteristics" under the HIB statute. See R.G.B. v. Village of Ridgewood Board of Education, EDU 14213-12, Initial Decision (May 15, 2013), adopted, Comm'r (June 24, 2013), http://njlaw.rutgers.edu/collections/oal/ (finding a HIB violation occurred when a student called another student a "horse" and a "fat-ass" because it was reasonable to perceive those comments as motivated by the "distinguishing characteristic" of appearance or body-type). Similarly, in C.C. ex rel. S.C. v. Board of Education of Jefferson, EDU 10872-14, Initial Decision (April 6, 2015), http://njlaw.rutgers.edu/collections/oal/, adopted, Comm'r (May 12, 2015), http://www.nj.gov/education/legal/, a student's comments that another student was "short" and "sucks at basketball" constituted HIB because it was reasonable to perceive those comments as motivated by the "distinguishing characteristic[s]" of height and sports proficiency.

Still, a "distinguishing characteristic" must be the motivation for the alleged bullying, even when the alleged bully is a teacher, coach, or staff member. In M.R. ex rel. M.R. v. Bd. of Educ. of the Ramapo Indian Hills Regional Sch. Distr., EDU 05308- 16, Initial Decision (November 7, 2016), modified in part, Comm'r (December 21, 2016), http://njlaw.rutgers.edu/collections/oal/, a parent alleged that his daughter and three other cheerleaders were bullied by their cheerleading coach. The alleged HIB stemmed from an incident in which the cheerleader sent a text message to her coach stating that she would be unable to attend the night's basketball game because she had other plans. In turn, the coach responded with a "strong bullying tone" informing her that she and any other cheerleader who missed the game would be off the team. The HIB investigation concluded that the coach did not engage in HIB against the cheerleader, and the board affirmed the findings. Importantly, no evidence supported that the coach's alleged actions' motivation was a distinguishing characteristic of the cheerleader.

Petitioner maintains that the question here is not whether the Board acted in an arbitrary, capricious, unreasonable manner. Instead, petitioner asserts the central issue is that the District did not follow the 2016 Annual Report of the New Jersey Anti-Bullying Task Force (ABTF). Specifically, petitioner contends that the 2016 ABTF reiterated

conclusions of the 2014 ABTF that addressed the broadness of the term "any other distinguishing characteristic" noting,

> By adding, 'any other distinguishing characteristic,' the Legislature's intent was clearly not to limit HIB to an incident that takes place because the HIB target has one of the specified characteristics. By viewing alleged HIB incidents through the lens of power differential, practitioners will be better able to identify those distinguishing characteristics that are less obvious and emerge only when considering the relative positions of the aggressor and the target, in terms of popularity, social standing, social awkwardness, or other less tangible characteristics."
>
> [Ibid.]

No statutory amendment incorporated the ABTF recommendations or inclusion of language addressing an "imbalance of power" or similar terms. Indeed, the last revision to ABRA occurred in 2012. See P.L.2012, c.1[4].The NJDOE published no formal guidance for schools or practitioners relating to the 2016 ABTF recommendation and last issued "Guidance to Schools on Implementing ABRA"[5] in 2011.

Significantly, the alleged failure to follow recommendations of the ABTF does not provide a separate cause of action or an issue appealable to the Commissioner. Indeed, petitioner cites no Policy provision that is contrary to the law or that the Policy does not include all items required under the ABRA, as enacted. Notably, the Policy includes a HIB definition explaining that "bullying is unwanted, aggressive behavior that may involve a real or perceived power imbalance." (emphasis added). The Policy also defines HIB mirroring the ABRA as an incident or incidents "reasonably perceived as being motivated either by any actual or perceived characteristic" to include "distinguishing characteristics" not covered by delineated traits. Petitioner suggests the Policy does not have distinct repercussions for those staff members committing HIB violations and the uneven relationship between staff members and students is insufficiently covered. However, the

[4] https://www.njleg.state.nj.us/2012/Bills/PL12/1
[5] https://www.nj.gov/education/students/safety/behavior/hib/guidance.pdf

Policy includes all items required under N.J.S.A. 18A:37-15b, and identifies consequences for HIB violations. The Policy also advises staff members that "consequences and remedial action" could entail discipline. Thus, I **CONCLUDE** that failing to follow the ABTF does not provide a basis for appeal in this forum, and no evidence supports that the Policy fails to include required provisions.

Petitioner suggests that the investigator and the Board did not review the alleged HIB incidents "through the lens [of the] power differential." Further, the investigator was unable to identify those distinguishing characteristics of J.B. Had O'Malley followed the ABTF guidelines requiring him to view the "relative positions of the aggressor and the target," J.B.'s distinguishing characteristics would be evident.

Yet, O'Malley's report did not conclude that J.B. was not "committed to academics" or that he did not have a distinguishing characteristic worthy of protection. Instead, there was insufficient evidence that J.B. was the victim of an alleged HIB because he was committed to academics or intellectual. Under ABRA, the misconduct must be "reasonably perceived as being motivated either by any actual or perceived characteristic" to qualify as a HIB violation. N.J.S.A. 18A:37-14. (emphasis added).

A careful review of the incidents does not reveal that Coach Truppi targeted J.B. for his academic commitment. Undeniably, Coach Truppi felt the players should make the team and the team's success their most important responsibility and was aggressive in his tactics to motivate the team. He discouraged any player missing practices, "focused on the negatives," and this "undermine[d] the trust and confidence the players have in Coach Truppi as well as the team environment and culture." In other words, his questionable treatment of the players was largely universal. Still, since the incidents complained of do not support that Coach Truppi targeted J.B. because of his commitment to academics, I **CONCLUDE** that a preponderance of the evidence does not exist that Coach Truppi committed a HIB violation against J.B. Moreover, having determined that Coach Truppi did not commit a HIB against J.B., the Board was not required to impose discipline.

Petitioner also argues that J.B.'s status as a student might be considered a second "distinguishing characteristic" under ABRA. Petitioner suggests that as an adult coach, Coach Truppi was "in a position of power using his authority control to harass, haze, and bully a subordinate student under his care."

Yet, ABRA only applies to HIB committed against students; its intention is not to address HIB committed against adults. If status as a student alone were sufficient to substantiate an HIB finding, the additional requirement that the misconduct be motivated by a "distinguishing characteristic" would be superfluous. Undeniably, ABRA requires something more.

For example, in Elrhard v. Bd. of Educ. of the Hunterdon Central Regional Sch. Dist., EDU 00188-14, Initial Decision (September 28, 2017), adopted, Comm'r (December 21, 2017), http://njlaw.rutgers.edu/collections/oal/, the alleged acts by the baseball Coaches included "unfair playing time, favoritism, profanity, and being too hard on the players." Moreover, the Coaches purportedly threatened to demote the player to the junior-varsity team and guilted the player into coming to practice during a family vacation. Yet, there was no link between the alleged conduct and the distinguishing characteristic of weakness or meekness to demonstrate that the actions were motivated by said characteristic, as required under ABRA. The Commissioner also agreed that the distinguishing characteristic under ABRA must be more specific than merely the imbalance of power that exists by nature of the position of an adult teacher or Coach and the minor child. Indeed, not all aggressive, harmful, or demeaning conduct constitutes a HIB. Evesham, 423 N.J. Super. at 351. Thus, I **CONCLUDE** that J.B.'s status as a student alone is not a distinguishing characteristic under ABRA. Therefore, I **CONCLUDE** that the Board and District did not act in an arbitrary, capricious, or unreasonable manner in finding that no HIB occurred against J.B. and that, as a matter of law, summary judgment is appropriate in their favor.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the District be **GRANTED** summary decision, and that the Petition of Appeal be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 8, 2021

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: March 8, 2021

Date Mailed to Parties: March 8, 2021

ljb

88-21

BEFORE THE COMMISSION OF EDUCATION OF NEW JERSEY DEPARTMENT OF EDUCATION

In the Matter of **RAGAN VAN CAMPEN,** **Respondent** **v.** **NEW JERSEY DEPARTMENT OF HUMAN SERVICES, COMMISSION FOR THE BLIND AND VISUALLY IMPAIRED,** **Agency** **Agency Docket No. 247-12/20**	**RE: SETTLEMENT AGREEMENT** **Dr. Andrée Y. McKissick** **Arbitrator**

APPEARANCES:

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CONFIRMATION OF VALID SETTLEMENT

The record of this matter and the proposed settlement agreement and general release have been reviewed. Upon such review, I find that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.*

842, 846. The criteria and guidelines which this Arbitrator considered in evaluating this tenure settlement is in concurrence with New Jersey courts which have shown great favor upon voluntary resolution of litigation through settlement (also see Judson v. Peoples Bank & Trust Co., 25 NJ 17 (1957); Honeywell v. Bobb, 130 NJ Super 130 (App. Div. 1974)). Thus, a settlement in good faith will save not only money and time but also proof problems. Therefore, it is in the public interest to compromise and settle tenure litigation pursuant to Tenure Employees Hearing Law (NJSA,18A: 6-10 et Seq.). Accordingly, the settlement is hereby approved, and the tenure matter dismissed, subject to compliance with the terms of the settlement.

AFFIRMATION

I, Dr. Andrée McKissick, do hereby affirm that I am the individual described in and who executed this instrument, which is my Opinion and Award.

DATE: April 14, 2021

Dr. Andrée McKissick

ARBITRATOR

C:/NJ Teacher Tenure Panel/Settlement (Van Campen) April 2021/Settlement (Van Campen) April 2021.docx

IN THE MATTER OF THE TENURE HEARING OF:

Ragan Van Campen, Instructor 12 Months,
Appellant

SETTLEMENT AGREEMENT

AND

Department of Human Services, (DHS)
Commission for the Blind and Visually Impaired,
Respondent

The parties in this appeal agree to voluntarily resolve all disputed matters and enter into the following Settlement Agreement, which fully disposes of all issues in controversy between them.

A. Appellant is a tenured instructor. The procedures to file tenure charges are pursuant to N.J.A.C. 10:11-1.8, and 6A:3-5.1 through 5.6.

B. Tenure charges dated October 8, 2020 and supporting documents were prepared and on October 16, 2020 served upon Appellant seeking reduction in salary for 30 days.

C. On November 9, 2020, the DHS Director of Employee Relations prepared a Certificate of Determination finding there was probable cause to credit the tenure charges filed against Appellant and further determined that the evidence in support of the charges is sufficient to warrant reduction in salary of 30 days.

D. On November 10, 2020 the Director of Employee Relations attempted to file the Certificate of Determination, the Filing of Tenure Charges, Affidavit in Support of Tenure Charges and the Certificate of Service, with the Commissioner of the Department of Education (DOE). Due to the closure of the building on this day, the charges were thereafter filed with the Commissioner on November 16, 2020.

E. On December 9, 2020 DOE acknowledged receipt of the certified tenure charges dated November 9, 2020.

F. On February 1, 2021 the DOE referred the charges to be heard by an arbitrator.

G. Appellant was charged under DHS Administrative Order 4:08: (B.1): Neglect of duty; (B.4): Failure or excessive delay in carrying out an order which would not result in danger to persons or property, (B.9) Incompetency or inefficiency; (C.9): Insubordination: intentional disobedience or refusal to accept reasonable order, assaulting or resisting authority, disrespect or use of insulting or

[illegible] and (6-1): Violation of a rule, regulation, policy, procedure, order or [illegible]

[illegible] Appeal with the DOE and request for a hearing, and Appellant and [illegible] following terms:

[illegible] listed in paragraph 4) above are sustained.

[illegible] the penalty of suspension of 30 days.

[illegible] that Appellant shall be required to only serve 15 days without pay of the [illegible] suspension. The remaining 15 days shall be satisfied as a record suspension.

[illegible] already served 6 days as of March 18, 2021 and will serve the remaining 9 [illegible] 25, 30, 31, April 6, 7, 8, 13, 2021.

[illegible] to further appeal the previous disciplinary suspension of three days [illegible] addressing performance issues.

[illegible] of the instant letter charges Appellant acknowledges she has continued to [illegible] deficiency. These deficiencies are enumerated in Appendix A and are incorporated [illegible] suspension of 30 days.

[illegible] prepared by Respondent as Appendix B, details expectations, [illegible] improvement goals, and timelines for Appellant to follow to achieve the [illegible] of performance. Appellant acknowledges she must meet the requirements [illegible] satisfactory performance.

[illegible] level employer, Appellant will be expected to work independently and [illegible] reporting requirements in a timely manner, subject to periodic monitoring by [illegible] work activities.

[illegible] agreement is a Last Chance Agreement. Appellant's compliance with all [illegible] and deadlines shall begin immediately and must be maintained. If any [illegible] Plan of Action is not met, or other performance deficiencies occur after [illegible] completion of the Plan of Action, removal will be sought by Respondent.

[illegible] Appellant, OIVI Human Resources will schedule Appellant for an [illegible] with the Employee Advisory Services (EAS). Appellant must attend this [illegible] all appointments as required by EAS. Failure to comply with the [illegible] of the EAS shall result in Respondent seeking Appellant's removal.

[illegible] an itinerant position, Appellant acknowledges she is required to travel to [illegible] locations.

acknowledges she will respond in a timely manner to scheduled meetings and [illegible] from supervisors, shall notify superiors in advance of cancellations and reschedule cancelled appointments promptly.

Agreement constitutes a final and complete resolution of the tenure charges in this [illegible] all issues in controversy between the parties.

[illegible] Respondent's personnel records to conform to the terms of the Settlement [illegible] records of the Respondent will be kept intact. Nothing herein shall [illegible] releasing information on this matter to anyone who has a release executed [illegible] with the DOE.

[illegible] claims against Respondent with regard to this matter including any award [illegible] or other monetary relief, except as may otherwise be provided herein.

[illegible] suits or actions, whether known, unknown, vested or contingent, civil, [illegible] in law or equity against the Respondent, its employees, agents, or assigns, [illegible] those which have been or could have been made or prosecuted on [illegible] of any party occurring at any time with respect to the events, information or [illegible] up to the date of this agreement, including, but not limited to, all [illegible] the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans [illegible] Family Leave Act, the Family and Medical Leave Act, the New Jersey [illegible] on the Equal Pay Act, the Conscientious Employee Protection Act, the [illegible] Employment Act, the LAD, the Civil Service Act, the Older Workers [illegible] Occupational Safety and Health Act, the Public Employees' [illegible] Health Act, the New Jersey Smoking Act, New Jersey wages and hours [illegible], unemployment compensation laws, disability benefits laws, the United [illegible] New Jersey Constitution, any workers' compensation or common law claims [illegible] implied. This waiver includes all claims involving any continuing [illegible] which occurred prior to the date of this Settlement Agreement and bars the [illegible] any past action or practice in any subsequent claims, except pending workers'

[illegible] of public and in the public interest because it imposes the desired [illegible] for a contested tenure hearing.

[illegible] in good faith. The parties have read the Agreement and freely and [illegible] of its terms.

12. If any provision of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

Date

Appellant

Date

Respondent

Date

On Behalf of Appellant

11/1/21

Date

On Behalf of Respondent

CERTIFICATION

I, [redacted], being the moving party in this matter, hereby certify that I have reviewed [redacted] and fully understand its meaning and terms. I acknowledge my understanding and acceptance of the terms of this Settlement Agreement. I acknowledge that my representative [redacted] understanding, verified my acceptance of the terms of this Settlement Agreement, and [redacted] regarding this settlement to my satisfaction. I am satisfied with my representation [redacted] this Settlement Agreement voluntarily.

I understand that this Settlement Agreement is approved by the **Commissioner of Education,** my claim will be [redacted].

I certify that statements made by me are true. I am aware that if any of the foregoing statements [redacted] willfully false, I am subject to punishment.

[redacted]

Appellant

APPENDIX A

Correction of Specifications for Additional infractions since the Issuance of 38 Days' Tenure Charges

Rogan Van Campen

March 19, 2021

[illegible] Progress Report (ESPR) for academic year 2020-2021 were missing for [illegible] zero instruction/consultation hours for these 34 students as of March

[illegible] the beginning of the school year. The ESPR entries serve as key [illegible] and used to track services provided to clients which were missing. [illegible] the ESPR by the September 2020 deadline.

[illegible] seen at least once by October 31, 2020, per CBVI academic calendar

[illegible] was missing for 24 students in Fully Accessible Client Tracking [illegible] March 9, 2021.

[illegible] School Reports (EOYSR) were missing for 25 students for academic year [illegible], 2020.

Appellant (Initial Name)

Respondent (Initial Name)

On Behalf of Appellant

(Initial Name)

4/1/21

On Behalf of Respondent

(Initial Name)

APPENDIX B

PLAN OF ACTION

Ragan Van Camper

March 12, 2021

Service Progress Reports must be opened and Progress Notes must be indicating all mandatory contractual hours for all students at every

immediately by: April 19, 2021

Service Progress Reports indicate zero time for the 2020-2021 school reports were opened but the number of hours indicated was for this time of year. Five Level 2 Students have zero time for the At this time all Level 1 students should have been seen at least 2-3 approximately 5 times. We now are more than halfway through the The pace of progress reporting is not keeping up with the pace of school year.

Functional Vision Assessments, needed Addendums and 2020- strategies for Students who are Non Visual Learners.

April 30, 2020

completed Functional Vision Assessments or Instructional Strategies Non-Visual Learners 2020-2021. According to the Education Calendar, February 26, 2021. Only one Functional Vision Assessment was 26, 2021.

2020-2021 school year all Education Calendar deadlines after April 13, Ms. Van Camper's last day of suspension is served, will be completed

completed coincide with the Education Calendar and include last working day of May 2021.

completed and cleaned up for the FACTS System Reset. System Reset is completed eligibility of students must be verified.

...case status must be brought to Status 10.

...must be completed coincide with the Education Calendar and include ...re ... for June 30, 2021:

...Initial SCARF Referrals
...ssment Objectives for 2021-2022 must be created
...ssment Objectives for 2020-2021 must be completed and dated.

...must be completed coincides with the Education Calendar and is due by ...

...Year School Reports must be completed and dated for all students at ...

...ompleted End of School Year Reports for the previous 2019-2020 school ... because these reports were never completed and dated in FACTS ... reporting forms for subsequent school years. Therefore, they must be ...

...must be completed and was a holdover from the 2019-2020 school year ... by August 31, 2021.

...Year School Reports (EOYs) for 2019-2020 must be completed and ... at all levels of service. There were 25 EOYs from 2019-2020 that ... and dated.

...with ... on completing all reports, RV will not be participating in Virtual ...

...educational Academic Calendar school year deadlines must be met, all ... be entered into FACTS within a 2-week time period of visits. This 2- ... is a CBVI agency standard for all field employees. Any delay in ... must be approved by the supervisor.

Appellant (Initial Name)

Respondent (Initial Name)

On Behalf of Appellant
(Initial Name)

4/1/21

On Behalf of Respondent
(Initial Name)

89-21

89-21

New Jersey Commissioner of Education

Final Decision

Nermin Messiha,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

Synopsis

Pro-se petitioner appealed the determination of the respondent – the State Board of Examiners (SBE) – that she had not met the requirements for issuance of a Teacher of Biological Services Certificate of Eligibility (CE). The SBE denied petitioner's application because she did not complete the Praxis II General Sciences: Content Knowledge test, as required by *N.J.A.C.* 6A:9B-8.3(a)(4). Additionally, as her application for the CE was not completed until after September 1, 2015, petitioner was also required to pass the basic skills assessment in accordance with *N.J.A.C.* 6A:9B-8.3(a)(5), which she failed to do. The SBE filed a motion for summary decision, which was opposed by petitioner.

The ALJ found, *inter alia*, that: there are no issues of material fact in this case, and the matter is ripe for summary decision; petitioner did not complete the required Praxis II General Sciences test prior to her application for the CE; and petitioner's failure to understand that this test was required does not release her from the obligation of passing the test to achieve certification. The ALJ concluded that petitioner has not met the requirements for the CE she seeks. Accordingly, summary decision was granted in favor of the SBE, and the petition was dismissed.

The Commissioner concurred with the findings and determination of the ALJ herein; additionally, the Commissioner noted, *inter alia*, that petitioner failed to complete the required basic skills assessment pursuant to *N.J.A.C.* 6A:9B-8.3(a)(5). Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

89-21

OAL Dkt. No. EDU 08616-20
Agency Dkt. No. 160-7/20

New Jersey Commissioner of Education

Final Decision

Nermin Messiha,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) that the New Jersey State Board of Examiners did not act in an arbitrary, capricious, or unreasonable manner when it denied petitioner's application for a Teacher of Biological Services Certificate of Eligibility (CE). The Commissioner further concurs with the ALJ that petitioner did not meet the requirements for a CE because she failed to complete the Praxis II General Sciences: Content Knowledge test, as required by *N.J.A.C.* 6A:9B-8.3(a)(4). Additionally, as her application was not completed until after September 1, 2015, petitioner was also required to pass the basic skills assessment in accordance with *N.J.A.C.* 6A:9B-8.3(a)(5), which she did not do.[2]

[1] To the extent the Initial Decision indicates that respondent's motion for summary decision was filed as to "Count Two of the complaint," the Commissioner notes that the motion for summary decision was filed as to the entire petition.

[2] Subsequent to petitioner's application, she took the basic skills test on May 28, 2016, and passed the reading portion. Petitioner has not passed the writing and math portions of the Praxis I.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[3]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 16, 2021
Date of Mailing: April 16, 2021

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 08616-20
AGENCY DKT. NO. 160/7 20

NERMIN MESSIAH.,
Petitioner,
v.
NJ DEPARTMENT OF EDUCATION
STATE BOARD OF EXAMINERS,
Respondent.

Nermin Messiah, pro se

David Kalisky, Deputy Attorney General, for Respondent, (Gurbir Grewald, Attorney General of New Jersey)

Record Closed: March 3, 2021 Decided: March 8, 2021

BEFORE: KIMBERLY A. MOSS, ALJ:

This mater having been opened to the Court by respondent, David Kalisky, Deputy Attorney General on a motion for summary decision which was received by the Office of Administrative Law (OAL) on February 24, 2021. Petitioner filed opposition to the motion on March 3, 2021.

By way of background, respondent alleges that petitioner did not comply with the requirements for obtaining a teaching certificate. Petitioner alleges that she complied with the requirements that were in effect at the time of her application.

The matter was transferred to the Office of Administrative Law for adjudication of the remaining counts, where it was filed as a contested matter on September 10, 2020.

FACTUAL DISCUSSION

Petitioner completed a web-based application with the Department of Teachers Certification Information System (TCIS) and paid the online application fee on August 17, 2015, for a Certificate of Eligibility in Biological Science. Her application was registered with TCIS and given a tracking number of 680838. Applicants who registered with TCIS in August 2015 would have had access to the most up-to-date and publicly available edition of "Appendix D" of the Department's "Technical Manual," which was last updated in June of 2015. Petitioner states that she was not sent an email attachment that included Appendix D of the Technical Manual. At that time Appendix D of the Technical Manual was at the web address www.state.nj.us/education/educators/license/1112.pdf.

Other requirements for obtaining a certificate of eligibility include submitting an official college transcript, a notarized oath of allegiance with the requested information filled out and taking the Praxis II in the subject assessment and specialty area test. If the application was completed after September 1, 2015, the applicant must pass the Praxis core academic skills for educators : Reading, Writing and Math, or score in the top one third on the SAT, ACT or GRE for the year that the test was taken.

Respondent states they received petitioners' transcripts on September 8, 2015. Petitioner states that she provided her transcripts to the department on two prior occasions. Petitioner admits that she did not submit a notarized authorization of allegiance until September 3, 2015. She denies that it did not have the name of the endorsement.

Respondent states that prior to September1, 2015, petitioner would have to pass two Praxis II tests- Biology content knowledge and General Science content knowledge. Petitioner passed the Praxis II Biology test. Petitioner states that she was not informed that she had to take and pass the Praxis II general science test. Petitioner did not take the Praxis II General Science test. Petitioner passed the Praxis II subject assessment test prior to September 1, 2015.

LEGAL ANALYSIS AND CONCLUSION

Respondent seeks to summarily decision on Count Two of the complaint. The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. These provisions mirror the language of Rule 4:46-2 and the New Jersey Supreme Court's decision in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

There is no genuine issue of material fact in this matter.

N.J.A.C. 6A: 9B-8.3(a) 4 provides:

> (a) Except as indicated in N.J.A.C. 6A:9B-8.8, 10, and 11, the candidate shall meet the following criteria to be eligible for a CE in instructional areas: 4. including, but not limited to, passing the appropriate State test(s) of subject matter knowledge and completing the required subject-area course requirements;

This regulation was last amended on May 15, 2006, nine years prior to petitioner's application.

Petitioner did complete the general science test before September 1, 2015. Petitioner believed that she would receive appendix D of the Technical Manual by email, but the manual was on the website. Petitioner not knowing that she had to take the general science test does not change that fact that it was required for her to pass that test to achieve the certification. Petitioner has not, as of now, taken the Praxis II General Science test.

N.J.A.C. 6A:9B-5.3(b) provides:

> The Board of Examiners shall issue the appropriate certificate upon the candidate's completion of all certification requirements in effect at the time the Office receives the application. Requirements include, but are not limited to, coursework, degree, tests, fees, GPA, and all certificate rules pursuant to N.J.A.C. 6A:9B-8 through 13. An application shall be deemed filed with the Office when it and all required supporting documentation has been received.

In the Summer of 2015, the required supporting documentation for a CE application consisted of several items, including, but not limited to the following:(1) the candidate's online web application; (2) the candidate's online application fee; (3) the candidate's completed and notarized Oath of Allegiance form; and (4) the candidate's official college transcripts. Petitioner admits that she did not provide the notarized oath of allegiance prior to September 1, 2015.

I **CONCLUDE** petitioner did not complete the requirements for a Certificate of Eligibility in Biological Science.

ORDER

Based on the foregoing, it is **ORDERED** that Respondent's motion for summary decision be and is hereby **GRANTED**. Petitioner did not comply with the requirements for obtaining a teaching certificate therefore her motion must be **DENIED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 8, 2021

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: March 8, 2021

Date Mailed to Parties: March 8, 2021

ljb

DOCUMENTS RELIED ON

- Respondent's motion for summary decision and exhibits
- Petitioner's opposition to motion for summary decision and exhibits

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

April 16, 2021

Ryan Amberger, Esq.
Montenegro, Thompson, Montenegro & Genz, P.C.
531 Burnt Tavern Road
Brick, New Jersey 08724

Teresa L. Moore, Esq.
Riker Danzig Scherer Hyland & Perretti, LLC
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One Speedwell Avenue
Morristown, New Jersey 07962

Re: *Board of Education of the Township of Brick, Ocean County v. New Jersey Natural Gas, Agency Docket No. 17-2/21*

Dear Counsel:

I have reviewed the Petition for Declaratory Ruling in the above-captioned matter, together with the respondent's answer to the petition.

Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq*. Accordingly, petitioner's request for declaratory ruling is declined and this matter shall be transmitted to the Office of Administrative Law.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

c: County Superintendent
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OAL Dkt. No. EDU 07868-20
Agency Dkt. No. 165-8/20

New Jersey Commissioner of Education

Final Decision

Board of Education of the Village of Ridgefield Park, Bergen County,

Petitioner,

v.

Board of Education of the Borough of Little Ferry, Bergen County, and Frank R. Scarafile, Superintendent,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto, have been reviewed and considered.

This matter involves a sending-receiving relationship whereby students from Little Ferry attend Ridgefield Park High School. Historically, the tuition rate that the Ridgefield Park Board of Education charged the Little Ferry Board of Education was lower than the certified tuition rate based on Ridgefield Park's actual cost per pupil. However, in 2019, Ridgefield Park proposed a contract in which it reserved the right to charge the full certified tuition rate. When Little Ferry refused to sign the contract, Ridgefield Park appealed to the Commissioner. The Administrative Law Judge (ALJ) granted Ridgefield Park's motion for summary decision, finding that the plain language of the applicable statute gives the receiving district exclusive authority to insist on any amount up to the certified tuition rate. The ALJ noted

that Ridgefield Park's claim is further supported by the regulation that allows for tuition adjustments, through which the receiving district may charge the sending district for any shortfall between the estimated tuition rate set upon entering into the contract and the certified tuition rate that is calculated later. The ALJ rejected Little Ferry's argument that because the regulation does not require tuition adjustments, it contemplates negotiation of a lower rate, and concluded that the regulation does not deprive Ridgefield Park of its clear statutory right to demand the full certified tuition amount. Accordingly, the ALJ ordered that Ridgefield Park may demand the full certified tuition rate and directed Little Ferry to execute the proposed contract.[1] Finally, the ALJ denied Ridgefield Park's request for attorneys' fees, as the Commissioner has no jurisdiction to enter such an award.

In its exceptions, Little Ferry argues that the ALJ improperly determined that the matter was ripe for summary decision, because there are disputed issues of material fact regarding the accuracy and propriety of the methods and calculations Ridgefield Park used to determine the tuition rate. Little Ferry also contends that the statutory and regulatory language affords discretion to the parties to negotiate rates and does not indicate that the payment amount is to be unilaterally decided by the receiving district. Little Ferry states that it seeks the opportunity to engage with Ridgefield Park to negotiate a rate agreed upon by both parties.

In reply, Ridgefield Park argues that the sole issue before the Commissioner is a matter of statutory interpretation – whether Ridgefield Park has the discretion to charge a tuition rate up to the actual cost per pupil. Reiterating arguments set forth in its briefs below, as well as the conclusions reached by the ALJ in the Initial Decision, Ridgefield Park contends that while

[1] The ALJ noted that Ridgefield Park's right to demand the full certified tuition rate is statutory and exists regardless of the language of the contract.

negotiations between the districts are permitted, they are not required, and the ultimate authority to set a rate when the parties cannot reach an agreement lies with the receiving district.

Upon review, the Commissioner concurs with the ALJ that this matter is ripe for summary decision. The relief sought in the petition of appeal pertains to Ridgefield Park's ability to demand the full certified tuition rate and to require Little Ferry to enter into a contract providing for payment of that rate. The calculation of the rate itself is not at issue in the petition of appeal. Should Little Ferry wish to contest the calculation of the certified tuition rate, it is free to file its own petition of appeal, but that issue is outside the scope of the matter now before the Commissioner. The only issue before the Commissioner is whether Ridgefield Park may demand for the full certified tuition rate, which is a legal question appropriate for resolution by summary decision.

The Commissioner also concurs with the ALJ that Ridgefield Park may charge the full certified tuition rate. *N.J.S.A.* 18A:28-19 provides that the receiving district "shall determine" the tuition rate. As the ALJ correctly concluded, the plain language of the statute gives the receiving district – Ridgefield Park – the discretion to set the tuition at any amount, with the only limitation being that it cannot exceed the certified tuition rate. While nothing in the statues or regulations precludes negotiations between the parties, and the receiving district is free to accept a tuition rate lower than the full certified tuition rate, the statutory language clearly provides for a specific outcome in the event that the receiving district does not wish to negotiate, or negotiations are unsuccessful. In those circumstances, the receiving district is permitted to set the tuition rate, as long as it is not more than the certified tuition rate.

Accordingly, the Initial Decision is affirmed, and Ridgefield Park's motion for summary decision is granted. Ridgefield Park may determine the tuition rate between the parties, as long as it does not exceed the actual per pupil cost as determined by the applicable

statutes and regulations. Little Ferry is ordered to execute the contract proposed by Ridgefield Park for the 2019-2020 and 2020-2021 school years. Ridgefield Park's request for attorneys' fees is denied.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 22, 2021
Date of Mailing: April 27, 2021

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 07868-20

AGENCY DKT. NO. 165-8/20

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEFIELD PARK, BERGEN COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY, AND FRANK R. SCARAFILE, SUPERINTENDENT,

Respondents.

Kerri A. Wright, Esq., for petitioner (Porzio, Bromberg and Newman, attorneys)

John G. Geppert, Jr. Esq., for respondent (Scarinci Hollenbeck, attorneys)

Record Closed: February 12, 2021 Decided: March 8, 2021

BEFORE **ELLEN S. BASS**, Acting Director & Chief ALJ:

STATEMENT OF THE CASE

Petitioner, the Ridgefield Park Board of Education ("Ridgefield Park"), seeks an order compelling respondent, Little Ferry Board of Education ("Little Ferry"), to execute a sending-receiving contract which reserves to Ridgefield Park the right to demand

tuition in the full amount of the certified per pupil cost, as defined by statute and regulation. N.J.S.A. 18A:38-19; N.J.A.C. 6A:23A-1.1, et. seq. Little Ferry responds that that the tuition rate is negotiable; that the new contractual language is inconsistent with the parties' past practice; and that it is financially untenable for its school district.

PROCEDURAL HISTORY

A petition of appeal was filed by Ridgefield Park with the Commissioner of Education ("the Commissioner") on August 7, 2020. An answer was filed by Little Ferry and the matter was transmitted to the Office of Administrative Law ("OAL") as a contested case on August 21, 2020. Ridgefield Park filed a Motion for Summary Decision on December 9, 2020, and Opposition to the Motion was filed by Little Ferry on January 29, 2021. Ridgefield Park replied to the Opposition on February 12, 2021, and the record closed.[1]

ISSUE PRESENTED

Can a receiving district, in its sole discretion, set the tuition amount charged to a sending district, and can that tuition be in an amount up to and including the certified per pupil cost as calculated in accordance with applicable law and regulations? If so, can Ridgefield Park compel Little Ferry to execute a sending-receiving agreement that so provides?

FINDINGS OF FACT

The submissions of the parties reveal that the salient facts are not in dispute. I **FIND**:

[1] Via letters dated February 18, 2021, and February 26, 2021, Little Ferry advised that it had retained an accountant who had reviewed documents obtained via an Open Public Records ("OPRA") request. That accountant, via certification, raised questions regarding the validity of the certified tuition rate. Counsel for Ridgefield Park has objected to these late submissions and challenges their relevance. As will be more fully addressed below, I agree that these submissions are not pertinent to the issue presented by the pleadings.

Pursuant to a longstanding sending-receiving relationship, Little Ferry students attend Ridgefield Park High School on a tuition basis. The tuition amount is calculated in accordance with a regulatory formula. Actual audited expenditures and average daily enrollment numbers are not available until the school year has concluded, so the tuition to be paid is calculated and adjusted over a three-year period. In year one of the cycle, Little Ferry provides Ridgefield Park with the estimated number of Little Ferry students who will attend Ridgefield Park High School the following year, and Ridgefield Park provides an estimated tuition amount. Little Ferry includes this amount in its budget in year two and pays Ridgefield Park based on this estimated amount during that year. During year three, the Department of Education reviews Ridgefield Park's audited financials and issues "certified tuition rates," which represent the actual cost per student in year two. If the amount certified by the Department differs from the amount Ridgefield provided as an estimate in year one, any deficits or credits are trued-up by the districts in year three. This cycle is intended to ensure that Little Ferry pays tuition based on the actual number of students received and based on Ridgefield Park's actual audited expenditures. This three-year cycle repeats on a rolling basis.

The two Boards are parties to a formal written sending-receiving agreement which historically has provided for a tuition rate less than the certified rate yielded by the regulatory formula. For example, the certified rate exceeded the parties' contractual rate by $309,626 in 2014; $332,593 in 2015; $589,723 in 2016; $194,786 in 2017 and $277,373 in 2018. It is uncontroverted that Ridgefield Park did not attempt to recoup the difference in the past. But in the spring of 2019, Ridgefield Park presented Little Ferry with a contract that now provided for tuition adjustments, and that reserved Ridgefield Park's right to demand the full certified tuition amount. Little Ferry refused to execute the agreement, and this dispute ensued.

On October 11, 2019, the parties met with the Interim Executive Bergen County Superintendent of Schools to mediate their dispute. Adjustments to the tuition paid for both the 2016-2017 and the 2019-2020 school years were discussed, but the parties were unable to reach an accord. On February 13, 2020, the County Superintendent advised Little Ferry that it owed Ridgefield Park the sum of $251,542 for the 2016-2017 school year. He moreover advised that Little Ferry "must sign the 2019-2020 tuition

contract and reimburse Ridgefield Park for any corresponding tuition adjustments." Ongoing efforts were made to reach an accord, to include discussion of a payment plan for back tuition. As a result of these efforts, the adjustment for the 2016-2017 school year has been paid. And Little Ferry has agreed to pay the certified tuition rate for the 2020-2021 school year but continues to refuse to sign the proposed sending-receiving agreements for the 2019-2020 and 2020-2021 school years.

Both Boards state that they are in precarious financial situations, with Ridgefield Park asserting that a signed contract is its only assurance that the moneys expected from Little Ferry will be paid. Little Ferry does not contest the facts set forth in the petition, but rather, vigorously urges that it simply cannot afford the tuition adjustment sought by Ridgefield Park. Little Ferry moreover points out that in the past, the two Boards have cooperatively agreed to tuition charges, and have negotiated caps on tuition adjustments. And it urges that financial mismanagement by Ridgefield Park has resulted in the astronomical tuition increases which are presently at issue, and which Little Ferry can ill afford. Little Ferry asserts in its Opposition to the Motion, for the first time, that the tuition rate has been improperly calculated and that there has been a lack of transparency by Ridgefield Park relative to how that tuition rate was calculated.

But the accuracy of the certified tuition amount is an issue raised nowhere in the pleadings. And neither the financial situation of each of these Boards, nor the history of their past efforts to agree on a tuition amount are pertinent to the narrow issue presented; that is, whether the law permits Ridgefield Park to demand the full certified tuition amount. Suffice it say, however, and I **FIND**, that Ridgefield will struggle to meet its fiscal demands without the amount of tuition it seeks. And I further **FIND** that Little Ferry has fiscal constraints of its own that have prompted it to protest payment of the full tuition amount.

CONCLUSIONS OF LAW

N.J.A.C. 1:1-12.5(b) provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving

party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'Fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 252. I **CONCLUDE** that this matter is ripe for summary decision. The petition of appeal raises a purely legal question, one which asks that I determine whether the statutory and regulatory scheme affords Ridgefield Park the discretion to demand that Little Ferry pay the full certified tuition amount for the students it sends to Ridgefield Park High School. The affordability of that tuition is not at issue; nor it is pertinent that Ridgefield Park may sorely need the full tuition amount. The facts raised by Little Ferry in regard to the calculation of the certified tuition amount, while controverted, are a proverbial "red herring." [2] They are not material to the limited issue presented by the

[2] A claim that the certified tuition amount was improperly calculated could be brought by Little Ferry in a separate action. See also: N.J.A.C. 6A:23A-17.1(f)(5).

pleadings. I **CONCLUDE** that the law supports Ridgefield Park's demand for the full certified tuition, and that it is entitled to the relief it seeks.

N.J.A.C. 6A:23A-1.2 defines a sending-receiving relationship as "an agreement between two district boards of education, one of which does not have the facilities to educate in-district an entire grade(s) or provide an entire program(s), and as an alternative sends such students to a district board of education having such accommodations and pays tuition, pursuant to N.J.S.A. 18A:38-8 et seq." The calculation of tuition payments is governed by N.J.S.A. 18A:38-19, which provides as follows:

> Whenever the pupils of any school district are attending public school in another district, within or without the State, pursuant to this article [N.J.S.18A:38-8 through N.J.S.18A:38-24], the board of education of the receiving district **shall determine** a tuition rate to be paid by the board of education of the sending district to an amount not in excess of the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the State board... (emphasis supplied).

Relying on the words "shall determine," Ridgefield Park urges that it may set any tuition amount, so long as that amount does not exceed the "actual cost per pupil." The "actual cost per pupil" is defined at N.J.A.C. 6A:23A-17.1(b) as "the local cost per student in average daily enrollment, based upon audited expenditures for that year for the purpose for which the tuition rate is being determined and consistent with the grade/program categories in N.J.S.A. 18A:7F-50 and 18A:7F-55..."

When interpreting a statute or regulation, our courts assume that the framers intended to ascribe to words their ordinary meaning. Jablonowska v. Suther, 195 N.J. 91, 105 (2008). The intent of a statute or regulation should be gleaned from a view of the whole and of every part of the statute, with the real intention prevailing over the literal sense of its terms. Schierstead v. City of Brigantine, 29 N.J. 220, 230 (1959). I **CONCLUDE** that the plain language of N.J.S.A. 18A:38-19 supports Ridgefield Park's view that it may insist on the full amount of tuition yielded by the regulatory scheme. The statute clearly and unequivocally indicates that the receiving district "shall" set the

tuition rate. It does not state that that the sending district has any power to dictate the amount of tuition to be paid.

Ridgefield Park's view is supported by the applicable regulations, which set forth an express procedure for the payment and calculation of tuition. N.J.A.C. 6A:23A-17.1(f) provides:

> The receiving district board of education and the sending district board of education shall establish by written contractual agreement a tentative tuition charge for budgetary purposes. Such tentative charge shall equal an amount not in excess of the receiving district board of education's "estimated cost per student" for the ensuing school year for the purpose or purposes for which tuition is being charged, multiplied by the "estimated average daily enrollment of students" expected to be received during the ensuing school year. Such written contract shall be on a form prepared by the Commissioner.

The districts must sign an agreement for the "ensuing school year," and the sending district must pay ten percent of the tentative tuition no later than the first of each month from September through June of the contract year." The agreement must specify that all adjustments resulting from a difference in cost of number of students will be made only during the second school year following the contract year. N.J.A.C. 6A:23-17.1(f)(3). The regulations anticipate a need to reconcile the estimated and certified amounts and provide that "[a]ll contracts must include a payment schedule for all adjustments that may be made." Ibid.

Once the Department of Education determines the actual cost per student, the receiving district may charge for any shortfall.[3] N.J.A.C. 6A:23-17.1(f)(7) provides as follows:

> If the Commissioner later determines that the tentative charge established by written contractual agreement, except for a contractual agreement for a student enrolled in a special education class, was less than the actual cost per student during the school year multiplied by the actual average daily enrollment received, the

[3] The regulations also allow the sending district to recoup an overpayment. N.J.A.C. 6A:23A-7.1(f)(6).

> receiving district board of education may charge the sending district board of education all or part of the amount owed by the sending district board of education, to be paid during the second school year following the school year for which the tentative charge was paid. Such adjustment for a contractual agreement for a student enrolled in a special education class shall be made no later than the end of the second school year following the contract year. The executive county superintendent of schools of the county in which the sending district board of education is located may approve the payment of the additional charge over another period, if the sending district board of education can demonstrate that payment during the second school year following the school year for which the tentative charge was paid would cause a hardship.(emphasis supplied)

Ridgefield Park asserts, persuasively so, that the regulation does not require that it demand the full actual cost per student; but it nonetheless grants it full discretion to do so. An administrative regulation is subject to the same canons of construction as a statute. In re N.J.A.C. 14A:20-1.1, 216 N.J. Super. 297, 306 (App. Div. 1987). A regulation should be "construed in accordance with the plain meaning of its language . . . and in a manner that makes sense when read in the context of the entire regulation." Medford Convalescent and Nursing Ctr. v. DMAHS, 218 N.J. Super. 1, 5 (App. Div. 1985). Here, the regulatory scheme envisions an adjustment of the estimated amount. N.J.A.C. 6A:23A-17.1(f)(6) and (7). And by stating that the receiving district "may charge all or part" of the difference between the estimated cost, the regulation plainly permits Ridgefield Park to choose to demand the full amount.

Little Ferry argues that the use of the word "may" in the regulations reflects that the parties may negotiate any tuition rate they like, and that both districts are equally empowered players in the negotiation process. Little Ferry urges that had the rule makers intended to give Ridgefield Park the authority it claims they would have used the word "shall." And since under N.J.S.A. 18A:38-19 the tentative charge is to be an amount "not in excess of" the certified rate, Little Ferry asserts that the law provides for an arm's length negotiated rate that would allow the parties to determine a lesser amount than the certified rate. These arguments are unpersuasive. The regulation is intended to give breath and meaning to N.J.S.A. 18A:38-19; in other words, to allow the regulated community to understand the mechanics of implementing the statute's requirements. And the statute could not be clearer. It provides that the receiving district

"shall" determine the tuition rate, thus vesting in Ridgefield Park the exclusive authority to forgive the difference between the estimated tuition rate and the certified rate, or not, in its sole discretion. The parties obviously negotiate the tentative rate. But these negotiations do not deprive Ridgefield Park of its clear right, ultimately, to demand the full certified tuition amount.

The prior agreements between the parties did not expressly confirm Ridgefield Park's right to the full tuition amount, but this fact offers Little Ferry no solace. It is well established that the statutory and regulatory scheme governs the sending-receiving relationship relative to tuition payments, and not the parties' contractual language. See: Mountainside Bd. of Educ. v. Berkeley Heights Bd. of Educ., Dkt. No. EDU 09700-06, Initial Decision (July 20, 2007), adopted, Comm'r (January 17, 2008), <http://njlaw.rutgers.edu/collections/oal/>. Indeed, the Commissioner of Education has broad powers to oversee sending-receiving agreements. Merchantville Bd. of Educ. v. Pennsauken and Haddon Bds. of Educ., 204 N.J. Super. 508 (App. Div. 1985). While the regulatory scheme demands execution of a formal agreement (N.J.A.C. 6A:23A-17.1(f)), any contractual language or past practice that is at odds with the regulations is unenforceable.

Finally, Little Ferry's reliance on N.J.S.A. 18A:38-8.1 is misplaced. This statute allows for sending district representation on the receiving district's board of education and permits its representative to participate in discussions on several delineated topics. But N.J.S.A. 18A:38-8.1 makes it clear that there would be insufficient representation to shift the balance of power in favor of the sending district. Little Ferry thus contends that, "sending districts are deprived of virtually any opportunity to voice any meaningful agreement or objection to decisions made by the receiving board that ultimately result in significant increases to certified tuition rates." But Little Ferry can meaningfully assert that the tuition rate is improperly calculated via the filing of its own petition before the Commissioner of Education.

In summary, I **CONCLUDE** that Ridgefield Park may seek the full certified tuition amount from Little Ferry. Since N.J.A.C. 6A:23A-17.1(f) requires the execution of a written contract, Little Ferry must execute a sending-receiving contract with Ridgefield

Park. Having determined that Ridgefield Park has the legal right to demand the full certified tuition amount once the tuition is reconciled in accordance with the regulatory formula, I **CONCLUDE** that the agreement may so provide. But importantly, Ridgefield Park has the right to full tuition regardless of the contractual language. Accordingly, deleting that language would in no way abrogate its rights.

Ridgefield Park demands that Little Ferry reimburse the attorney's fees it has expended in asserting its claims. It is well established that the Commissioner of Education is without jurisdiction to award attorneys' fees. See: Balsley v. North Hunterdon Reg. H.S. Bd. of Educ., 117 N.J. 434, 447 (1990) where the Court held that "[t]he specialized remedy of counsel fees is not one within the statutory authority of the Commissioner." Accordingly, I **CONCLUDE** that the request for attorney's fees must be denied.

ORDER

Based on the foregoing, it is **ORDERED** that Summary Decision is **GRANTED** in favor of Ridgefield Park. It is further **ORDERED** as follows:

1. Ridgefield Park may determine the tuition amount between the parties, so long as that amount is not more than the actual cost per pupil as determined by the statutory and regulatory scheme governing tuition payments in sending-receiving relationships.

2. Little Ferry is directed to execute the contract proposed by Ridgefield Park for 2019-2020 and 2020-2021 school years.

3. The demand for attorneys' fees is **DENIED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 8, 2021

DATE

ELLEN S. BASS, Acting Director & Chief ALJ

Date Received at Agency: March 8, 2021

Date Mailed to Parties: March 8, 2021

sej

93-21

93-21

New Jersey Commissioner of Education

Final Decision

Mercer County Special Services Educational and Therapeutic Association,

Petitioners,

v.

Board of Education of the Mercer County Special Services School District, Mercer County, and Board of Education of the City of Trenton, Mercer County,

Respondent.

Synopsis

The petitioner – the Mercer County Special Services Education and Therapeutic Association (Association) – represents the interests of its member paraprofessionals who are employed by the respondent Board of Education of the Mercer County Special Services School District (MCSSSD) as individual aides for special education students sent to MCSSSD by the respondent Board of Education of the City of Trenton (Trenton). The petitioner alleged that layoffs of Association members by MCSSSD and Trenton during and as a result of the COVID-19 pandemic violated the New Jersey School Law, *N.J.S.A.* 18A:1-1 et. seq., and its accompanying regulations, *N.J.A.C.* 6A:1-1 et. seq. The Association filed its appeal with the Commissioner, arguing that the layoffs violated respondents' obligations to provide a free, appropriate public education (FAPE) to all students. The respondents filed motions to dismiss for lack of standing and jurisdiction.

The ALJ found, *inter alia,* that: the Association does not have standing to bring a claim seeking to enforce the rights of special education students under the Individuals with Disabilities Education Act (IDEA); further, neither the school laws nor the contract between MCSSSD and Trenton provide a basis for standing in this case; the Commissioner does not have jurisdiction here; the Association's members have no statutory or regulatory claim to their jobs, and though they may have a claim under their employment contracts with MCSSSD, the Commissioner has no jurisdiction over contractual disputes. Accordingly, the ALJ granted the respondents' motions to dismiss.

Upon review, the Commissioner concurred with the ALJ, for the reasons thoroughly expressed in the Initial Decision, that the Association lacks standing in this case and the Commissioner does not have jurisdiction over special education matters, which are under the sole purview of the Office of Special Education. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

93-21

OAL Dkt. No. EDU 10956-20
Agency Dkt. No. 212-10/20

New Jersey Commissioner of Education

Final Decision

Mercer County Special Services Educational and Therapeutic Association,

Petitioner,

v.

Board of Education of the Mercer County Special Services School District, Mercer County, and Board of Education of the City of Trenton, Mercer County,

Respondents.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and respondents' replies thereto have been reviewed and considered.

The Mercer County Special Services Educational and Therapeutic Association (Association) represents the interests of its member paraprofessionals, who are employed by the Mercer County Special Services School District (MCSSSD) as individual aides for special education students sent to MCSSSD by the Trenton Board of Education (Trenton), at Trenton's expense. In October 2020, Trenton notified MCSSSD that it would no longer pay for the cost of individual aides who were working with students remotely due to the COVID-19 pandemic. Approximately twenty-seven individual aides were laid off between October 11, 2020 and November 9, 2020, when they were reinstated. The Association appealed to the Commissioner, arguing that the layoffs violated respondents' obligations to provide a free, appropriate public education (FAPE) to all students. The Administrative Law Judge (ALJ) granted respondents' motions to dismiss, finding that the

Association does not have standing to bring a claim seeking to enforce the rights of special education students under the Individuals with Disabilities Education Act (IDEA), nor did the school laws or the contract between MCSSSD and Trenton provide a basis for standing. For similar reasons, the ALJ concluded that the Commissioner does not have jurisdiction in this matter. The ALJ further found that the Association's members have no statutory or regulatory claim to their jobs, and while they may have a claim under their employment contracts with MCSSSD, the Commissioner has no jurisdiction over contractual disputes.[1]

In its exceptions, the Association argues that by failing to follow students' Individualized Education Programs (IEPs), respondents violated the school laws, independent of whether they also violated the IDEA. According to the Association, the fact that the individual aides were laid off and lost pay makes this matter a controversy that is properly before the Commissioner. The Association contends that this matter does not require the Commissioner to make a substantive determination regarding whether individual students were provided with a FAPE or whether their educational needs were being met, but rather only requires a comparison of the student IEPs to the services that were actually provided, with the issue being whether the IEPs were followed.

In their replies, Trenton and MCSSSD reiterate arguments regarding standing and jurisdiction previously made in their motions to dismiss, and urge the Commissioner to affirm the Initial Decision.

Upon review, the Commissioner concurs with the ALJ, for the reasons thoroughly detailed in the Initial Decision, that the Association does not have standing and that the Commissioner does not have jurisdiction over this matter.[2] As the Association itself acknowledges in its exceptions, this matter requires a comparison of student IEPs to the services that were actually

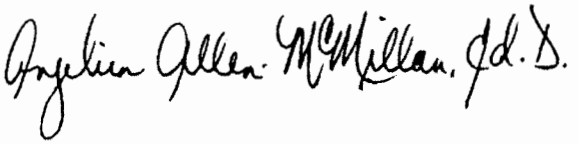
[1] The ALJ did not reach the issue of whether the Association's claims were moot in light of new agreements entered into by MCSSSD and Trenton.

[2] The Commissioner does not reach respondents' arguments that the matter is moot.

provided, and the issue is whether the IEPs have been followed. Resolving matters involving the provision of special education services is one of the functions of the dispute resolution process of the Department of Education's Office of Special Education (OSE). *N.J.A.C.* 6A:14-2.7; *N.J.A.C.* 6A:14-9.2. Moreover, while the Association characterizes its claim as one made pursuant to *N.J.S.A.* 18A:6-30 of the school laws, which provides remedies for employees who are "illegally dismissed," it is clear that this, too, is actually a special education issue, because the only provisions cited by the Association for the alleged illegality of the layoff are special education regulations. In the absence of any claim arising under the school laws, the Commissioner has no jurisdiction to adjudicate a claim that respondents failed to follow student IEPs, because such review falls exclusively within the purview of the OSE. *See Long Beach Island Educ. Ass'n v. Bd. of Educ. of the Long Beach Island Consolidated Sch. Dist.*, Commissioner Decision No. 330-09 (decided October 13, 2009); *Trenton Educ. Ass'n v. Bd. of Educ. of the City of Trenton, Mercer Cty.*, Commissioner Decision No. 283-20 (decided December 14, 2020).

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 23, 2021
Date of Mailing: April 27, 2021

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTIONS TO DISMISS
OAL DOCKET NO. EDU 10956-20
AGENCY REF. NO. 212-10/20

MERCER COUNTY SPECIAL SERVICES EDUCATIONAL AND THERAPEUTIC ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY, AND BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondents.

Edward A. Cridge, Esq., for petitioner (Mellk O'Neil, attorneys)

Walter R. Bliss, Jr., Esq., for respondent, Board of Education of the Mercer County Special Services School District, Mercer County (Law Offices of Walter R. Bliss, Jr., attorneys)

Elesia L. James, Assistant General Counsel, for respondent, Board of Education of the City of Trenton, Mercer County (James Rolle, Jr., General Counsel)

Record Closed: February 18, 2021 Decided: March 9, 2021

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF CASE

Petitioner Mercer County Special Services Education and Therapeutic Association (Association) alleges that the layoffs of Association members during and as a result of the COVID-19 emergency by respondents, Board of Education of the Mercer County Special Services School District, Mercer County (MCSSSD), and Board of Education of the City of Trenton, Mercer County (Trenton), violated the New Jersey School Law, N.J.S.A. 18A:1-1 et. seq., and its accompanying regulations, N.J.A.C. 6A:1-1 et. seq.

PROCEDURAL HISTORY

On October 1, 2020, the Association filed a petition with the Commissioner of the New Jersey Department of Education pursuant to N.J.S.A 18A:6-9. On November 20, 2020, respondents filed motions to dismiss in lieu of answers. These motions were not decided by the Commissioner and were transmitted with the petition on November 24, 2020, to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

By letter dated January 19, 2021, a briefing schedule was issued and on February 8, 2021, the Association responded to the motions to dismiss. On February 18, 2021, MCSSD and Trenton submitted reply briefs and the motions are now ripe for review.

FACTUAL DISCUSSION AND FINDINGS

Respondents' motions were filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a motion to dismiss in lieu of an answer. The New Jersey Supreme Court explained that the analysis required when considering a motion to dismiss is "whether a cause

of action is suggested by the facts." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988) (citations omitted). Further:

> Because the matter arises on defendants' motion to dismiss, [the court must] accept as true the facts alleged in the complaint. . . . Plaintiffs are entitled to every reasonable inference in their favor. A reviewing court must 'search the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . .'
>
> [Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 625-26 (1995) (citations omitted); see also, Maeker v. Ross, 219 N.J. 565, 569 (2014).]

A motion to dismiss should only be granted in the rarest of instances. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989).[1] In reviewing the complaint, the question is not whether the petitioner can prove the allegations, but whether the facts alleged are sufficient to state a cause of action. Id. at 746. Accordingly, for the purposes of the motion, all facts alleged by the petition will be deemed admitted, and I **FIND** as follows:

1. The City of Trenton School District is a public school district with administrative offices at 108 North Clinton Avenue, Trenton, New Jersey.

2. MCSSSD is a receiving school district as provided at N.J.A.C. 6A:14-7.1, which provides special education (SE) and related services to students from local school districts, including Trenton.

3. The Association is a labor organization serving as the majority representative for employees of MCSSSD, including individual aides (or paraprofessionals).

4. Consistent with state and federal law, a local educational district must develop an individual education program (IEP) for each student in the district classified as eligible for SE and related services. For each SE student sent by Trenton to

[1] See also, F. G. v. MacDonell, 150 N.J. 550, 556 (1997) ("If a generous reading of the allegations merely suggests a cause of action, the complaint will withstand the motion.").

MCSSSD, Trenton is responsible for developing his or her IEP and paying the cost of that student's education (i.e., tuition to MCSSSD).

5. The IEPs of some of the SE students sent by Trenton to MCSSSD provide for individual aides to support such students on a one-to-one basis. This service is considered an "extraordinary service" and is billed by MCSSSD to Trenton separately and paid to MCSSSD by Trenton directly.

6. During the 2019-2020 and the 2020-2021 school years, due to the COVID-19 pandemic, MCSSSD provided educational services remotely to SE students, including students from Trenton.

7. Prior to October 9, 2020, Trenton notified MCSSSD that it would no longer pay for the cost of individual aides who were working with SE students remotely. MCSSSD notified the Association that it would lay off approximately twenty-seven individual aides, all of whom are represented by the Association.

8. The layoffs of individual aides became effective October 11, 2020, continuing while all instruction was provided on a remote basis. The individual aides were reinstated effective November 9, 2020.

9. Prior to November 9, 2020, MCSSSD and Trenton reached agreement on the retention of and payment for individual aides as specified in the IEPs of SE students, whether school is conducted remotely or in-person.

10. MCSSSD and Trenton reached agreement on payment of invoices for individual aides for the period of all-remote instruction from mid-March 2020, through October 11, 2020.

11. The Association claims that the above-described action by Trenton violates Trenton's obligation to provide all SE students with a free appropriate public education (FAPE).
12. The Association claims that the above-described action by MCSSSD violates the obligation of MCSSSD to provide all SE students with a FAPE.

13. In this matter, the Association asks the Commissioner:

    (a) for a declaration that Trenton and MCSSSD are required to follow the IEPs of SE students from Trenton;

    (b) to direct Trenton to pay the cost of individual aides who are assigned by MCSSSD to work remotely with SE students from Trenton;

    (c) to enjoin MCSSSD from laying off individual aides who are assigned by MCSSSD to SE students from Trenton in compliance with the IEPs of such students; and

    (d) to direct MCSSSD to reinstate with back pay, benefits and emoluments, all individual aides who were laid off as a result of Trenton's refusal to pay the cost of individual aides who were working with SE students remotely, and to direct Trenton to reimburse MCSSSD for the resulting costs.

LEGAL ANALYSIS AND CONCLUSION

Respondents contend that the petition must be dismissed for lack of standing, as the Association lacks standing to bring claims under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq. (IDEA), on behalf of any SE students, and the Association lacks standing to challenge or enforce the contract between MCSSSD and Trenton. Respondents further argue that the petition must be dismissed for lack of jurisdiction, as the Commissioner lacks jurisdiction to hear a claim based on the IDEA and/or to enforce the contract between MCSSSD and Trenton. Finally, respondents claim that the controversies raised by the petition are now moot.[2]

The Association responds that the motions for dismissal for lack of standing and jurisdiction must be denied as the Association does not bring this action under the IDEA but under the New Jersey School Law, N.J.S.A. 18A:1-1 et seq. (School Law), and the regulations promulgated thereto. The failure of respondents to provide individual aides to SE students as required under the IEPs of such students was a violation of the School Law, as a result of which Association members suffered compensable injury. Further, Association argues that the prospective relief requested by the Association is still available and the underlying issue is of substantial importance, capable of repetition yet evading review and therefore, not moot.

STANDING

Standing is a "threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal." In re Six-Month Extension of N.J.A.C. 5:91-1, 372 N.J. Super. 61, 85 (App. Div. 2004), certif. denied, 182 N.J. 630 (2005); Stubus v. Williams, 339 N.J. Super. 38, 47 (App. Div. 2001). A lack of standing precludes a court from entertaining any of the substantive issues presented for determination. Watkins v.

[2] In addition, respondents contend that any claims alleged by the Association to arise under the New Jersey School Law (cited below) prior to July 3, 2020, are time-barred. Ltr. Br. of Respondent Board of Education of the City of Trenton (November 20, 2020), at 3. Petitioner did not respond to this defense, presumably because the acts complained of occurred after July 3, 2020.

Resorts Int'l Hotel and Casino, 124 N.J. 398, 418 (1991) ("A dismissal for lack of standing . . . amounts to a refusal by the court to resolve the matter.")

To have standing to bring an administrative action, a party must have suffered a distinct injury or harm that was caused by the adverse party and that can be remedied by the administrative forum. Herron v. Bd. of Educ. of the Tsp. of Montclair, OAL Docket No. EDU 14067-13, Initial Decision, *5 (April 16, 2014), Comm. Ed. Dec. (June 2, 2014), https://njlaw.rutgers.edu/collections/oal/html/initial/edu14067-13_1.html. While New Jersey courts often take a liberal approach on this issue, standing "is not automatic and a litigant usually has no standing to assert the rights of a third party." In re N.J.A.C. 5:91-1, 372 N.J. Super. at 85 (citations omitted); see also, Kathleen Donohue v. State-Operated Sch. Dist. of Patterson, OAL Docket Nos. EDU 08806-16 and 09476-16, Initial Decision, *17 (April 6, 2017), Comm. Ed. Dec. (May 8, 2017) (adopting decision that former teacher had no standing to assert the rights of schoolchildren to FAPE despite claims that the "administration squander[ed] resources and [failed] to adequately supervise the performance of those responsible to instruct the children"), https://njlaw.rutgers.edu/collections/oal/final/edu08806-16_1_1.pdf.

Respondents argue that petitioner attempts to raise claims on behalf of SE students under the IDEA and such claims can only be brought by the students or their parents (or legal guardians). Even a generous reading of the petition cannot avoid the conclusion that the Association is alleging violations of the IDEA, specifically that by failing to adhere to the requirements of individual aides in IEPs, respondents did not provide FAPE to the respective SE students. Among the purposes of IDEA is "to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. 1400 (d)(1)(B). New Jersey regulations make clear, however, that "a petition on behalf of a minor shall be filed by the parent or legal guardian of the minor" not by the teachers or other service providers. N.J.A.C. 6A:3-1.3 (a)(2). I **CONCLUDE** that the Association has no standing to bring a claim for an order enforcing the rights of SE students under the IDEA.

Notwithstanding the foregoing, in its response brief, the Association clarifies that it does not bring this action under the IDEA, but under the School Law. Ltr. Br. of Petitioner in

Response to Motions to Dismiss (February 3, 2021), at 4-5. Petitioner argues that the failure of respondents to follow the IEPs of SE students from Trenton was not permissible and resulted in the layoffs of Association members, triggering petitioner's right to bring suit under the following statute:

> Any person holding office, position or employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom, shall be entitled to compensation for the period covered by the illegal dismissal or suspension, if such dismissal or suspension shall be finally determined to have been without good cause, upon making written application therefor with the board or body by whom he was employed, within 30 days after such determination.
>
> [N.J.S.A. 18A:6-30 (emphasis added).]

The Association argues that its members were laid off as a direct result of respondents' failure to follow the requirements of certain IEPs and "neither respondent argues. . . that the paraprofessional layoffs were permissible[.]" Ltr. Br. of Pet'r, at 4. These improper layoffs were a violation of the School Law and led to cognizable injury to Association members, giving the Association standing to bring the claims here. For support, the Association cites a case involving the decision of a school board to lay off child study team (CST) members and replace them with a private entity, which was a clear violation of the statute and regulations calling for CST members to be employees of the district. Ltr. Br. of Pet'r, at 5, citing Bloomfield Ed. Assn. o/b/o Child Study Team v. Bd. of Ed. of Twp. of Bloomfield, OAL Docket No. EDU 18705-13, Comm. Ed. Dec. 410-15, https://njlaw.rutgers.edu/collections/oal/html/initial/edu18705-13_1.html.

The Bloomfield case does not support the Association's position on standing. The petitioners in Bloomfield were tenured employees of the school district, laid off by the district in an effort to save money by outsourcing their jobs. Id. at *4, *9. Besides the protections afforded them by tenure, applicable law[3] prohibited the school district from replacing petitioners with an unrelated outside entity. Id. at *10-11. The "improper layoffs" in Bloomfield were found to violate two provisions of the School Law, specifically, N.J.S.A. 18A:28-5, and

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[3] N.J.S.A. 18A:46-5.1; N.J.A.C. 6A:14-3.1(b).

28-9. Further, the labor organization in Bloomfield brought claims on behalf of its members that the members could have brought on their own. See, Crescent Park Tenants Assoc. v. Realty Equities Corp., 58 N.J. 98, 109 (1971) (association of tenants had standing where there was no question as to "the stake and adverseness" of any individual tenant). In this matter, to find the layoffs improper would require an evaluation of whether the IDEA permitted Trenton to make changes to the respective IEPs; in other words, the layoffs would only be improper if the students' right to FAPE was impaired as a result. As explained above, the Association has no standing to assert those rights. Even assuming that the actions of respondents vis-à-vis the SE students were not permissible under the IDEA, petitioner points to no provision in the School Law which protects its members from layoffs when a sending district changes the services provided under IEPs. To find otherwise would impair the ability of any CST to modify an IEP mid-way through a school year. I **CONCLUDE** that the School Law does not provide petitioner withstanding to challenge the actions of respondents in modifying services to SE students as required by the students' respective IEPs.

Respondents also argue that petitioner has no standing to brings claims based on the contracts entered by and between MCSSSD and Trenton because the Association is not a party to these contracts. "The obligation of contracts is, in general, limited to the parties making them." Aronsohn v. Mandara, 98 N.J. 92, 101, 484 A.2d 675 (1984) (citation omitted); see also, Borrello v. Elizabeth Bd. of Educ., No. A-3151-14T4, 2016 N.J. Super. Unpub. LEXIS 1915, at *13 (App. Div. Aug. 16, 2016) (court dismissed claims brought under collective bargaining agreement against individuals who were not parties to the contract). Here, the Association represents independent aides who are hired as needed by MCSSSD. Their right to employment would be found in the contracts they may have signed with MCSSD, not in the contracts Trenton signed with MCSSSD.[4] I **CONCLUDE** that the Association has no standing to bring a claim under the School Law to enforce the contract entered by and between respondents MCSSSD and Trenton.

[4] Respondent MCSSSD states that "to the extent the Association is alleging a contracting claim against MCSSSD challenging the notice of layoff," such is outside the Commissioner's jurisdiction. Ltr. Br. of Resp't Board, at 3. Petitioner did not respond to this argument.

JURISDICTION

Respondents contend that whether the petition is grounded in the IDEA or the School Law, the Commissioner of Education has no jurisdiction to hear this matter. Petitioner, however, contends that the Commissioner has jurisdiction over its claims under the following provision of the School Law:

> Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioners.
>
> [N.J.S.A. 18A:6-9.]

As stated above, petitioner contends that respondents' failure to comply with the IEPs of certain Trenton SE students was a violation of the IDEA and therefore, led to the illegal dismissal without good cause of Association members, which is compensable in an action brought under the School Law, N.J.S.A. 18A:6-30. Therefore, petitioner argues, the Commissioner has proper jurisdiction to hear this action. Ltr. Br. of Pet'r, at 4-5.

Despite petitioner's assertion that it is undisputed that the layoffs of Association members by MCSSSD were impermissible, neither respondent conceded that position.[5] Further, to reach the conclusion that layoffs were impermissible would require an inquiry into whether a school district is obligated to provide one-on-one assistance to SE students outside the classroom during a pandemic, when the aides may or may not be able to work in close physical proximity to those SE students. This is a question that can only be resolved by application of the IDEA and then only on a case-by-case basis. Federal and state law, as stated above, permits only students and/or parents to challenge the denial of FAPE and/or to enforce IEPs. Further, as both respondents note, actions under the IDEA must be filed with the Director of the Office of Special Programs, not with the Commissioner. N.J.A.C. 6A:3-1.3(e)(2); N.J.A.C. 6A:14-9.2.

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[5] See, Ltr. Br. of Pet'r, at 4; cf. Ltr. Br. of Respondent MCSSSD in Reply to Petitioner's Response to Motion to Dismiss (February 18, 2021), at 3, and Ltr. Br. of Respondent Trenton in Reply to Petitioner's Response to Motion to Dismiss (February 18, 2021), at 3.

The Commissioner's subject matter jurisdiction is limited by statute to "controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9; Balsley v. N. Hunterdon Reg'l Sch. Dist. Bd. of Educ., 117 N.J. 434, 438 (1990). It is well settled that the Commissioner does not have jurisdiction over contractual disputes, even if those disputes "pertain to school personnel," Picogna v. Bd. of Educ., Twp. of Cherry Hill, 249 N.J. Super. 332, 335 (App. Div. 1991), or involve school boards. Archway Programs, Inc. v. Pemberton Tp. Bd. of Educ., 352 N.J. Super. 420, 424-25 (App. Div. 2002) (contract claims against school boards do not arise under the school laws and are "typically and appropriately adjudicated in the courts").

Contractual disputes are generally considered to be outside the Commissioner's jurisdiction because no special expertise in school law is necessary for the interpretation of contractual language. See, Picogna, 249 N.J. Super. at 335 (no jurisdiction over contract claim of non-tenured school employee because no interpretation of school laws was required); S. Orange-Maplewood Ed. Ass'n v. Bd. of Ed. of Sch. Dist. of S. Orange & Maplewood, 146 N.J. Super. 457, 462 (App. Div. 1977) (though Board "exercised its authority under the school laws" to reach agreement with teachers' union, the dispute over "the interpretation of that agreement" should be brought in Superior Court).

In this matter, the members of the Association have no statutory or regulatory claim to their jobs under the School Law. The Association may have claims against MCSSSD as a result of the employment contracts signed with the individual members, and the relief sought by the Association – preventing MCSSSD from conducting further layoffs, and restitution of back pay, benefits and emoluments lost as a result of the alleged improper layoffs – would be based on the terms of those employment contracts. As stated above, however, such contract claims fall outside the jurisdiction of the Commissioner. I **CONCLUDE** that petitioner has failed to demonstrate that this venue has the proper jurisdiction to hear this case.

While concluding that petitioner has no standing to bring this action and the Commissioner no jurisdiction to hear it, no findings are made with respect to respondents' argument that the claims herein are moot as a result of agreements reached by

respondents after this petition was filed. Similarly, no findings are made with respect to the ability of petitioner to raise its claims in another forum.

ORDER

It is hereby **ORDERED** that the motions to dismiss of **BOARD OF EDUCATION OF THE MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,** and of the **BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,** are **GRANTED** and the claims brought by the petition of **MERCER COUNTY EDUCATIONAL AND THERAPEUTIC ASSOCIATION** are hereby **DISMISSED.**

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration. This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this initial decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 9, 2021
DATE

Tricia M Caliguire

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nd

94-21

94-21E

OAL Dkt. No. EDU 02939-21
Agency Dkt. No. 37-3/21

New Jersey Commissioner of Education

Order on Emergent Relief

J.L., on behalf of minor child, J.L.,

Petitioner,

v.

Board of Education of the Upper Freehold Regional School District, Monmouth County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 27, 2021
Date of Mailing: April 27, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 02939-21
AGENCY DKT. NO. 37-3/21

J.L. ON BEHALF OF
MINOR CHILD, J.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
UPPER FREEHOLD REGIONAL
SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent.

J.L., petitioner, pro se

Patrick J. Madden, Esq., for respondent (Madden & Madden, P.C., attorneys)

BEFORE **DAVID M. FRITCH, ALJ**:

STATEMENT OF THE CASE

The petitioner, on behalf of his son, J.L., filed a pro se petition of appeal with the State of New Jersey Department of Education, seeking relief on an emergent basis against respondent, the Board of Education of Upper Freehold Regional School, seeking immediate reinstatement of his son into three national honor societies following

the respondent's removal of J.L. from these honor societies upon finding J.L. committed plagiarism on a homework assignment he submitted in October 2020.

PROCEDURAL HISTORY

On March 4, 2021, the New Jersey Department of Education received the petition for emergent relief. The matter was transmitted to the Office of Administrative Law, where it was filed on March 30, 2021. N.J.S.A. 52:14F-5(e), (f), and (g) and N.J.A.C. 1:6A-1 through 18.5. Oral argument on the petition for emergent relief was held on April 5, 2021, and the record on the emergent petition closed on that date.

FACTUAL DISCUSSION

A summary of the pertinent evidence presented is as follows, and I **FIND** the following **FACTS** are undisputed:

1. J.L. is a senior enrolled at Allentown High School (AHS). At the time of the action at issue, J.L. was a member of the National Honor Society (NHS), National History Honor Society (NHHS), and the National Science Honor Society (NSHS). J.L. is scheduled to graduate from AHS on June 23, 2021.

2. On October 20, 2020, J.L. submitted a written homework assignment involving a literature journal writing of a literary character. (See Resp. Br. at Ex. A.) The work that J.L. submitted was partially copied, word-for-word, from "SparkNotes"[1] without any citations or quotations. (Id.)

    a. AHS determined that J.L.'s assignment, a character analysis of the "Crystal Merchant" character from the book The Alchemist[2] was "61%

[1] SparkNotes is a publisher of study guides that provides summaries and critical analyses of classic works of literature as well as guides for history, math, biology, and other subjects. See About Us, SparkNotes, available at www.sparknotes.com/about/, last visited April 5, 2021. (See also Guterl Cert. at ¶ 6.)

[2] The Alchemist is a novel by Paulo Coelho which "tells the magical story of Santiago, an Andalusian shepherd boy who yearns to travel in search of a worldly treasure as extravagant as any ever found." The Alchemist Paperback, Amazon.com, available at https://www.amazon.com/Alchemist-Paulo-Coelho/dp/0061122416, last visited April 5, 2021.

plagiarized, but 0% cited, from the website www.sparknotes.com, which provides summaries and analysis of literature." (Id. See also Guterl Cert. at ¶ 6.) AHS' computer-generated analysis of J.L.'s submission found that it "contained only four (4) lines which were not copied directly from SparkNotes." (Id. at ¶ 7.)

3. As a result of J.L.'s submission, his teacher wrote him up for an honor code infraction for plagiarism, noting that "[a]n original journal was assigned but [J.L.] submitted a word-for-word version directly from SparkNotes." (Resp. Br. at Ex. A.)

a. This was a "level two" offense under AHS' honor code which, as defined in AHS' student handbook, includes "[t]urning in a paper with text directly copied from a website." (Resp. Br. at Ex. B. at 64.)

b. AHS' honor code further defines forgery-misrepresentation as "plagiarism, copyright infringement or falsifying written information so as to misrepresent the views, facts as expressed by teachers, staff or parents. Turning in work, written or verbal (giving a speech), that is plagiarized or copied directly from another source as one's own work." (Id. at 15-16.) Under the AHS honor code, this is a category four, -four-point infraction. (Id. at 12.)

c. Among the enumerated consequences for a Level Two offense is 4 demerits issued on the first offense, and that "Honor Societies [are] notified." (Id. at 65.)

4. As a result of his honor code violation, J.L. was notified that he was required to attend an NHS Faculty Council meeting scheduled for November 2, 2020. (Resp. Br. at Ex. C.) J.L. was permitted to have a parent attend the meeting to explain the situation which gave rise to the honor code violation. (Id.)

a. The rules of AHS' NHS note that members "may be disciplined or dismissed for failure to maintain standards of scholarship, leadership, character or service that were used as the basis for their selection." (Id. at

Ex. U at 68.) Membership in AHS' NHS is limited to students "having no recorded incidents of cheating or intentional dishonesty." (Id. at 66.) The rules of AHS' NHHS require members to "maintain behavior that is exemplary in keeping with the Code of Conduct in place at [AHS]" and that candidates "can have no more than 8 demerits and no four or five point infractions." (Id. at Ex. V.)

c. The rules of AHS' NSHS also require members to "maintain behavior that is exemplary in keeping with the Code of Conduct in place at [AHS]" and that candidates "can have no more than 8 demerits and no four or five point infractions." (Id. at Ex. W.)

5. Following the November 3, 2020, meeting of the NHS Faculty Council, J.L. was notified that he was being dismissed from the NHS, NHHS, and NSHS. (Resp. Br. at Ex. D.)

a. The bylaws of AHS' NHS (id. at Ex. U), NHHS (id. at Ex. V), and NSHS (id. at Ex. W) all provide for disciplinary action, including removal from the Honor Societies, for the infraction of plagiarism.

b. Approximately one year before this incident, J.L. signed the 2019-20 NHS contract which provided that "cheating" was a "flagrant violation" of the NHS standards and would result in "immediate dismissal" from the NHS. (Resp. Br. at Ex. X.) This contract further defined "cheating" to include "plagiarism." (Id.)

6. J.L.'s parents appealed the decision of the NHS Faculty Council to Principal Embley of AHS. (Resp. Br. at Ex. E.) In an email dated November 10, 2020, Principal Embley notified J.L. that she was denying his appeal. (Id. at Ex. F.)

7. In an email dated November 10, 2020, J.L. sent an email to Superintendent Guterl of the Upper Freehold Regional School District, requesting a meeting to discuss his dismissal from the honor societies at AHS. (Id. at Ex. I.) Superintendent Guterl responded on November 24, 2020, informing J.L. that, after reviewing the

information regarding J.L.'s honor society dismissals, there was no justification to overturn the District's decision. (Id. at Ex. L.)

8. J.L. requested a hearing before the Upper Freehold Regional School District Board of Education (the Board) on November 25, 2020. (Id. at Ex. M.) At the Board's meeting on January 6, 2021, the petitioner and his parents attended and both the petitioners' parents addressed the Board to present their arguments why J.L. should be restored to his honor society memberships. (Id. at Ex. M.) The Board affirmed the decision to dismiss J.L. from his honor society memberships, finding that:

> [I]t is both clear and undisputed that [J.L.] committed an act of plagiarism that violated the Code of Conduct and the Honor Code. While [J.L.'s father's] presentation ascribed the incident to a communication failure with the teacher and attempted to minimize the conduct by referring to it as merely using ideas from the Internet and arguing that [J.L.] went above and beyond on the assignment by doing some outside work, he never disputed the underlying plagiarism and [J.L.] admitted to it.
>
> [Id.]

9. The petitioner, in his filing of the present petition, does not contest the underlying nature of the charges AHS brought against J.L. Instead, the petitioner characterizes the incident as involving "not a test but a MERE two paragraph daily homework assignment" and that J.L. was using this outside source "as a guide to help him complete" that assignment. (Pet. Statement of Facts to Accompany Pro Se Petition of Appeal.) The petitioner concedes the validity of the underlying disciplinary charge, noting "I understand the zero on the homework and the school detentions which he served but the removal from the three National Honor Societies is just not fair. He took his demerits, zero on the assignment and school detention without any complaints. But this punishment is lifelong, inconsistent, discriminatory, and FAR TOO EXCESSIVE." (Id. (emphasis in original).)

The petitioner also claims that his son is "being grossly and unfairly treated by his principal in comparison to how she treated others who did things much more severe

and worse." (Id.) Petitioner avers that, when J.L. was in the tenth grade, three AHS students "conspired together in advance to plagiarize each other's work and cheat on a mid-term test therefore helping one another achieve better grades" but these students are "now in numerous National Honor Societies" despite their offense. (Id.) At hearing, the respondent disputed the facts of this prior incident as alleged by the petitioner, and further distinguished the incidents in question, noting that, while the "Faculty Council initially denied NHS admission" to these three students, they were eventually accepted "upon learning their teacher had rescinded the student's disciplinary charges." (Guterl Cert. at ¶ 14.) The respondent further added that there have been "other [AHS] students denied admission into the Honor Societies, or who have been removed from same, based upon offenses similar to J.L.'s." (Id. at ¶ 17.)

LEGAL DISCUSSION

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief:

> A motion for 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;
> 2. The legal right underlying petitioner's claim is settled;
> 3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and
> 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.

The petitioner has the burden of establishing all of the above requirements in order to warrant relief in his favor and must prove each of these Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J.

Super. 508, 520 (App. Div. 2008); D.I. and S.I. on behalf of T.I. v. Monroe Township Board of Education, 2017 N.J.Agen LEXIS 814, 7 (October 25, 2017).

Beginning with the first requirement, it is well-settled that emergent relief should not be granted except "when necessary to prevent irreparable harm." Crowe, 90 N.J. at 132-33. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "substantial injury to a material degree coupled with the inadequacy of money damages." Judice's Sunshine Pontiac v. General Motors Corp., 418 F.Supp. 1212, 1218 (D.N.J. 1976) (citation omitted).

The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group v. Amoco Chemicals Corp., 614 F.2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief requires "a 'clear showing of immediate irreparable injury,' or a 'presently existing actual threat; (an injunction) may not be used to simply eliminate the possibility of a future remote future injury or a future invasion of rights, be those rights protected by statute or by common law.'" Id. (citations omitted). In this case, the petitioner claims that, if the expulsion from the honor societies is not reversed, J.L.'s "total academic future is in peril over this," he "is looking to go to an Ivy League School or another prestigious university next year" and this "outcome may affect that as well as future scholarships, internships, jobs, etc." (Pet. Statement of Facts to Accompany Pro Se Petition of Appeal.) The petitioner posited at the hearing that his son has been holding back on submitting scholarship applications because he feels that his chances may be adversely impacted by his current lack of honor society membership.

In their response, the respondent aptly noted that J.L. had already submitted his college applications before he was expelled from the honor societies, the District has not required J.L. to remove his membership in these societies from his college applications, and the District has not notified any of the schools that J.L. has applied to of his removal from these societies. (Resp. Br. at 17 (noting that college admissions decisions for the 2021-22 school year have already been made or will be made, at the

latest, by April 6, 2021). See also Guterl Cert. at ¶ 3.) The petitioner, at hearing, noted that his son's college applications were completed in August 2020, well before this incident, and he has already been accepted to a college (which he did not wish to identify at the hearing) that his son plans to attend in the fall. Despite this, however, he remains concerned that the school "might" inform his son's college and doesn't wish to "take a chance" of that. While the petitioner speculates that the respondent's action here may have an adverse impact on future scholarship applications, job opportunities, etc., in the absence of tangible evidence that any pending college or scholarship applications will or have been adversely impacted by J.L.'s expulsion from these honor societies, the petitioner's assertion of future harm to J.L.'s academic future at this point is purely speculative. Therefore, I **CONCLUDE** that the petitioner has failed to meet their burden of establishing a clear showing that he will suffer immediate irreparable injury unless the requested relief is granted.

Secondly, the petitioner must also demonstrate that the legal right underlying their claim is settled. Crowe, 90 N.J. at 133. The establishment of standards and policies for admission to school-associated honor societies is a matter within the discretion of the local school board. See, e.g., L.B. v. Bd. of Educ. of the Rumson-Fair Haven Regional School District, EDU 8599-00, Final Decision, (January 16, 2001), http://lawlibrary.rutgers.edu/oal/search.html; I.C.W., obo J.W. v. Bd. of Educ. of the Borough of Mountain Lakes, OAL Dkt. No. EDU 05838-11, Final Decision, (October 14, 2011), http://lawlibrary.rutgers.edu/oal/search.html. The petitioner is challenging the Board's action as "totally unfair, inconsistent, and therefore discriminatory." (Pet. Statement of Facts to Accompany Pro Se Petition of Appeal.) School board policies and actions within their authority are entitled to a presumption of lawfulness and good faith, and where they are challenged, the challenger bears the burden of proving that the actions are unlawful, arbitrary, capricious, or unreasonable. Schuster v. Bd. of Educ. Montgomery Twp., 96 N.J.A.R. 2d (EDU) 670, 676 (citing Schnick v. Westwood Bd. of Educ., 60 N.J. Super. 448 (App. Div. 1960) and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962)). See also Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966); Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960).

While it is well established that the Commissioner of Education has jurisdictional authority to determine disputes over admissions to school-associated Honor Societies, that review remains limited and "the Commissioner will not intervene in a determination regarding Honor Society eligibility unless the local board's action has been shown to be arbitrary, capricious, or unreasonable." Hook, Guardians ad Litem for Hook v. Bd. of Educ. of the Borough of South Plainfield, 1992 WL 252861 at *2 (N.J. Adm. 1992). The arbitrary, capricious and unreasonable standard of review imposes a heavy burden on challengers of these actions. This standard has been defined by New Jersey courts as follows:

> In the law, "arbitrary" and "capricious" means having no rational basis. Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is no room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached . . . Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling.
>
> [Piccoli v. Ed. of Educ. of Ramapo Indian Hills Regional School District, EDU 1839-98, Initial Decision, (January 22, 1999) http://lawlibrary.rutgers.edu/oal/search.html (citing Bayshore Sewage Co. v. Dent. of Envir. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974)).]

The petitioner's legal right to challenge the Board's decision is well-established; therefore, I **CONCLUDE** that the petitioner has met his burden to show a well-settled legal right underpins his claim. To prevail in the present action, however, the petitioner must also make a preliminary showing of a reasonable probability of success on the merits. Crowe, 90 N.J. at 133. The applicable "arbitrary and capricious" legal standard applied to the respondent's actions in this matter makes the petitioner's probability of success on the merits dubious. The petitioner does not contest the underlying conduct which led to his son's expulsion from the honor societies and, it is clear on the record presented, that expulsion from the honor societies in question was a clearly delineated potential consequence for a student engaging in the conduct which J.L. engaged in.

(See Resp. Br. at Ex. U; Id. at Ex. V; Id. at Ex. W.) The petitioner's argument is based on an otherwise unsupported allegation that students at AHS who previously engaged in "far worse" conduct were still permitted to join honor societies. At this point on the record presented, however, this argument is unavailing as the respondent has distinguished this matter by noting that the underlying disciplinary charges alleged against those students had been rescinded (Guterl Cert. at ¶ 14), while the validity of the disciplinary charges that led to J.L.'s expulsion from these honor societies remain unchallenged.

Unlike the alleged conduct of the other students cited to in the petitioner's filing, J.L.'s violations of the AHS honor code were neither dismissed nor are the material facts of these violations in dispute in the present matter. (See Pet. Statement of Facts to Accompany Pro Se Petition of Appeal ("I understand the zero on the homework and the school detentions which he served but the removal from the three National Honor Societies is just not fair. He took his demerits, zero on the assignment and school detention without any complaints. But this punishment is lifelong, inconsistent, discriminatory, and FAR TOO EXCESSIVE.")) Petitioner, rather, is challenging the consequences of his conduct as it relates to his expulsion from the three honor societies. As a student who submitted an academic assignment with uncredited content copied from a website and presented that copied material as his own work, the respondent's subsequent action to remove J.L. from the three honor societies is consistent with the stated rules and regulations for each of these organizations. It is undisputed that J.L. submitted a homework assignment which presented copied text from a website as his own work. This undisputed conduct falls under the AHS' honor code as a "level two" offense, which includes conduct of "[t]urning in a paper with text directly copied from a website." (Resp. Br. at Ex. B. at 64.) This conduct also falls squarely within the AHS honor code definition of forgery-misrepresentation, which is defined as "plagiarism, copyright infringement or falsifying written information so as to misrepresent the views, facts as expressed by teachers, staff or parents. Turning in work, written or verbal (giving a speech), that is plagiarized or copied directly from another source as one's own work." (Id. at 15-16.) Under AHS' honor code, this is a category four, four-point infraction. (Id. at 12.)

Membership in AHS' NHS is limited to students "having no recorded incidents of cheating or intentional dishonesty." (Resp. Br. at Ex. U at 66 (emphasis added).) The rules of AHS' NHHS require members to "maintain behavior that is exemplary in keeping with the Code of Conduct in place at [AHS]" and that candidates "can have no more than 8 demerits and no four or five point infractions." (Id. at Ex. V (emphasis added).) The rules of AHS' NSHS also require members to "maintain behavior that is exemplary in keeping with the Code of Conduct in place at [AHS]" and that candidates "can have no more than 8 demerits and no four or five point infractions." (Id. at Ex. W (emphasis added).) As it is factually undisputed that J.L. committed an act of plagiarism which is a four-point infraction under the AHS honor code, the respondent's subsequent actions in this matter are consistent with the stated rules for these Honor Societies. On the record developed at this stage of the proceedings, I **CONCLUDE**, therefore, that the petitioner has not shown a likelihood of prevailing on the merits of the underlying claim—particularly in light of the applicable "arbitrary and capricious" standard which applies to this matter.

Having concluded that the petitioner has failed to meet two of the requisite standards for emergent relief, I need not go into the fourth standard. However, in order to give a full review of the petition, I will discuss the equities. The petitioner contends that, J.L. is "the ONLY party herein who suffers" and AHS will suffer "absolutely no harm if [J.L.] is reinstated." (Pet. Request for Emergent Relief.) The respondent supports its position in noting they have "an overriding interest in ensuring the District's rules and regulations are implemented and that actions taken within the Board's sound discretion are not disturbed." (Resp. Br. at 19-20.) In balancing the equities of the parties' respective positions, the respondent clearly has a strong interest in enforcing a code of conduct in its schools and ensuring the academic integrity of its students and institutions. The petitioner is asking the respondent to essentially disregard a key tenet of academic integrity that underpins three of its honor societies by ignoring the academic misconduct by one of its members by allowing them to maintain their status and membership in these societies after committing a factually undisputed act of academic plagiarism. If the expulsion decision is permitted to stand, however, the

petitioner will still graduate from AHS in the coming months, his college applications which were submitted before this incident, remain as they were without notation of his dismissal from the honor societies, and he will be permitted to continue onto the next phase of his education without any definitive impediment from the respondent's actions beyond the speculative impact that this may or may not have on his future endeavors at this stage in his academic career. Further, it is noteworthy that any possible future adverse impact the respondent's actions may have on the petitioner in the future are easily traceable to the petitioner's own conduct in taking the written work of another and passing it off in a submission to his teacher as his own work. In balancing of the respective equities, I **CONCLUDE** that the petitioner has failed to meet his burden to demonstrate that he will suffer greater harm than the respondent if the requested relief is not granted.

Based upon the foregoing, as all four of the Crowe v. De Gioia standards as codified in N.J.A.C. 6A:3-1.6 must be met in order for emergent relief to be granted, I **CONCLUDE** that the petitioner has failed to meet the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting an order for emergent relief in this matter. This order on application for emergency relief shall remain in effect until the issuance of a decision on the merits of the matter.

ORDER

Accordingly, I **ORDER** that the petitioner's application for emergent relief be and hereby is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who 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 the **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.

April 6, 2021
DATE

DAVID M. FRITCH, ALJ

/dw

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

None

For respondent:

Ex. A	AHS Demerit Form, October 20, 2020
Ex. B	AHS Student Handbook
Ex. C	Invitation to NHS Faculty Council Meeting, October 26, 2020
Ex. D	AHS NHS Decision, November 3, 2020
Ex. E	Email communications, November 3, 2020 – November 7, 2020
Ex. F	Email communications, November 10, 2020
Ex. G	Decision by Upper Freehold Regional School District, January 22, 2021
Ex. H	Email communications, November 10, 2020
Ex. I	Email communications, November 11, 2020
Ex. J	Email communications, November 11, 2020 – March 9, 2021
Ex. K	Email communications, March 9, 2021
Ex. L	Email communications, November 24, 2020

Ex. M	Email communications, March 9, 2021
Ex. N	Email communications, December 21, 2020
Ex. O	Email communications, December 21, 2020
Ex. P	Email communications, March 9, 2021
Ex. Q	Email communications, January 4, 2021
Ex. R	Email communications, March 9, 2021
Ex. S	Email communications, November 16, 2020 – March 9, 2021
Ex. T	Email communications, March 9, 2021
Ex. U	AHS NHS Bylaws
Ex. V	AHS NHHS Bylaws
Ex. W	AHS NSHS Bylaws
Ex. X	NHS 2019—20 Contract
Ex. Y	AHS NHS Honor Code
Ex. Z	Email communications, January 29, 2021 – January 31, 2021

96-21

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges

WILLINGBORO BOARD OF EDUCATION, BURLINGTON COUNTY, NJ Petitioner, -and- **RAYMOND G. MORISON, JR.,** Respondent.	AGENCY DOCKET NO.: 251-12/20 **DECISION AND AWARD**

BEFORE: RUTH MOSCOVITCH, Arbitrator

Appearances:

For the Petitioner:
Caitlin Pletcher
Steinhardt Cappelli Tipton & Taylor
430 Mountain Avenue, Suite 103
New Providence, NJ 0797a4

For the Respondent:
Dean R. Wittman
Zeller & Wieliczko
120 Haddontowne Court
Cherry Hill, NU 08034

This matter comes before me on tenure charges brought under N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, et seq., by Petitioner Willingboro Board of Education, Burlington County (the "Board") against Respondent Raymond G. Morison, Jr. The tenure charges at issue here were certified to the Bureau of Controversies and Disputes by the Board on or about December 15, 2020. I was appointed the arbitrator to adjudicate this matter on December 28, 2020.

The parties filed counter motions for summary adjudication of this matter, which I denied on February 22, 2021 in a 17-page decision. I then conducted a hearing via video conferencing on March 11, 2021. Both sides were represented by counsel and were afforded the opportunity to call witnesses, present evidence, and cross-examine witnesses offered by the opposing party. All witnesses were sworn. A court reporter attended the hearing and produced a transcript of the proceedings.

The Board presented the testimony of four individuals: two Board employees -- Dr. Neely Hackett, Superintendent of Schools and, Kimberly Ash, Willingboro High School Principal – and two former students, CH and KP. The Board identified a total of 27 exhibits, including pleadings and Board policies. Eight exhibits (P. 19-27) were identified by the witnesses during the hearing and were entered into evidence.[1] Respondent testified in his own behalf and offered 28 exhibits: his resume at the time he was hired by the Board and 27 evaluations. The parties submitted post-hearing briefs simultaneously on April 15, 2021. No objection has been made to the fairness of this proceeding.

TENURE CHARGES

BACKGROUND INFORMATION COMMON TO ALL CHARGES.

Respondent was hired by the Board on or about September 28, 2004 as a physical education teacher. Respondent subsequently earned tenure in his position, in or about September 29, 2007. During his tenure. Respondent also served as a softball and soccer coach.

[1] Respondent's counsel objected to the admission of a ninth exhibit, P. 25. I allowed testimony but reserved my ruling to allow the parties to argue the matter in their post-hearing briefs. My ruling appears in the Discussion section below. The remaining exhibits had already been present with the Charges and Motion for Summary Judgment.

During his employment with the Board, Respondent was, at all times, subject to the terms and conditions of his employment contract. These contracts obligated Respondent to faithfully perform the duties of his position in accordance with any and all Board policies and any and all applicable laws, rules and regulations.

Relevant Board Policies

Willingboro Township Board of Education Policy No. 3150 *Discipline,* states, in pertinent part:

> The Board of Education directs all teaching staff members to observe statutes of the State of New Jersey, rules of the State Board of Education, policies of this Board, and duly promulgated administrative rules and regulations governing staff conduct. Violations of those statutes, rules, policies and regulations will be subject to discipline.
>
> The Superintendent shall deal with disciplinary matters on a case-by-case basis. Discipline measures will include verbal and written warnings as appropriate and will provide, wherever possible, for progressive penalties for repeated violations. Penalties may include suspension, withholding one or more increments, and dismissal.

Willingboro Township Board of Education Policy No. 3211, *Code of Ethics,* states, in pertinent part:

> The Board of Education endorses the code of ethics for professional educators published by the National Education Association.
>
> Preamble
>
> The educator, believing in the worth and dignity of each human being, recognizes the supreme importance of the pursuit of truth, devotion to excellence, and the nature of democratic principles. Essential to these goals is the protection of freedom to learn and to teach and the guarantee of equal educational opportunity for all. The educator accepts the responsibility to adhere to the highest ethical standards.
>
> The educator recognizes the magnitude of the responsibility inherent in the teaching process. The desire for the respect and confidence of one's colleagues, of pupils, of parent(s) or legal guardian(s), and of the members of the community provides the incentive to attain and maintain the highest possible degree of ethical conduct. The Code of Ethics of the Education Profession indicates the aspiration of all educators and provides standards

by which to judge conduct.

The remedies specified by the NEA and/or its affiliates for the violation of any provision of this Code shall be exclusive and no such provision shall be enforceable in any form other than one specifically designated by the NEA or its affiliates.

Principle I — Commitment to the Pupil

The educator strives to 'help each pupil realize his/her potential as a worthy and effective member of society. The educator therefore works to stimulate the spirit of inquiry, the acquisition of knowledge and understanding, and the thoughtful formulation of worthy goals...

7. Shall not use professional relationships with pupils for private advantage.

Willingboro Township Board of Education Policy No. 3281, *Inappropriate Staff Conduct,* states, in pertinent part:

In support of this Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils.

Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.

Inappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. Therefore, school staff members are advised to be concerned with such conduct which may include, but is not limited to, communications and/or publications using e-mails, textmessaging, social networking sites, or any other medium that is directed and/or available to pupils or for public display.

A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education, an arbitration process, and/or appropriate courts to be inappropriate or

conduct unbecoming a school staff member.

Willingboro Township Board of Education Policy No. 3282, *Use of Social Networking Sites*, states:

> The Board of Education has a strong commitment to quality education and the well-being of all pupils, as well as the preservation of the school district's reputation. The Board believes staff members must establish and maintain public trust and confidence and be committed to protecting all pupils attending the school district. In support of the Board's strong commitment to the public's trust and confidence, the Board holds all staff members to the highest level of professional responsibility.
>
> The Commissioner of Education has determined inappropriate conduct outside a staff member's professional responsibilities may determine them as unfit to discharge the duties and functions of their position. Staff members should be advised communications, publications, photographs, and other information appearing on social networking sites deemed inappropriate by the Board could be cause for dismissal of a non-tenured staff member or to certify tenure charges against a tenured staff member to the Commissioner of Education.
>
> Staff members are advised to be concerned and aware such conduct deemed inappropriate may include, but is not limited to, communications and/or publications using e- mails, text-messaging, social networking sites, or any other form of electronic communication that is directed and/or available to pupils or for public display or publication.
>
> While the Board respects the right of staff members to use social networking sites, staff members should recognize they are held to a higher standard than the general public with regard to standards of conduct and ethics. It is important that a staff member's use of these sites does not damage the reputation of the school district, employees, pupils, or their families. Staff members who utilize, post or publish images, photographs, or comments on social networking sites, blogs, or other forms of electronic communication outside their professional responsibilities shall ensure their use, postings, or publications are done with an appropriate level of professionalism and are appropriate conduct for a school staff member. Staff members should exercise care in setting appropriate boundaries between their personal and public online behavior, understanding that what is private in the digital world often has the possibility of becoming public even without their knowledge or consent.
>
> The school district strongly encourages all staff members to carefully review the privacy settings on social networking sites they use and exercise

care and good judgment when posting content and information on such sites. Staff members should adhere to the following guidelines, which are consistent with the district's workplace standards on harassment, pupil relationships, conduct, professional communication, and confidentiality.

When using personal social networking sites, school staff members:

1. Should not make statements that would violate any of the district's policies, including its policies concerning discrimination or harassment;

2. Must uphold the district's value of respect for the individual and avoid making defamatory statements about the school district, employees, pupils, or their families;

3. May not disclose any confidential information about the school district or confidential information obtained during the course of his/her employment, about any individual(s) or organization, including pupils and/or their families;

4. Shall not use social networking sites to post any materials of a sexually graphic nature;

5. Shall not use social networking sites to post any materials which promote violence;

6. Shall not use social networking sites which would be detrimental to the mission and function of the district;

7. Are prohibited from using their school district title as well as adding references to the district in any correspondence including, but not limited to, e-mails, postings, blogs, and social networking sites unless the communication is of an official nature and is serving the mission of the district. This prohibition also includes signature lines and personal e-mail accounts;

8. Shall not post updates to their status on any social networking sites during normal working hours including posting of statements or comments on the social networking sites of others during school time unless it involves a school project. Employees must seek approval from the Superintendent of Schools for such use; and
9. Shall not post or publish any information the Commissioner of Education would deem to be inappropriate conduct by a school staff member.

The Policy of this district is to maintain a level of professionalism both during and after the school day. Any publication through any means of electronic communication which is potentially adverse to the operation, morale, or efficiency of the district, will be deemed a violation of this Policy. If the Board or Superintendent believes that a staff member's activity on any social networking site violates the district's policies, the Board or Superintendent may request that the employee cease such activity. Depending on the severity of the incident, the staff member may be subject to disciplinary action.

This Policy has been developed and adopted by this Board to provide guidance and direction to staff members on how to avoid actual and/or the appearance of inappropriate conduct toward pupils and/or the community while using social networking sites.

SPECIFICATION OF CHARGES

CHARGE I

CONDUCT UNBECOMING A TEACHING STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S INAPPROPRIATE CONDUCT TOWARD FORMER STUDENTS

The foregoing background information, and the facts alleged therein, are incorporated by reference as if fully set forth herein. Raymond G. Morison, Jr. has engaged in unbecoming conduct including misconduct, insubordination, inappropriate conduct with former students, and other just cause by his acts and omissions relative to his former students. These acts and omissions, as specifically set forth below, constitute just cause for immediate dismissal due to conduct unbecoming.

Count 1

On April 30, 2016, Respondent inappropriately messaged a former student, KP on Facebook and stated, "I want to fuck u." KP immediately notified the Board, which notified the police and prosecutor's office. As a result of this inappropriate message, Respondent was subjected to a month-long unpaid suspension.

Count 2

On August 22, 2020, Respondent sent a "friend request" to former student CH, which she accepted. Thereafter, Respondent began a conversation with CH over Facebook messenger, which ended with Respondent stating, "I should've gotten u earlier." Respondent's language and tone caused CH to feel

uncomfortable, and as if she were being preyed upon. As a result, she contacted Principal Kimberly Ash.

CHARGE II
CONDUCT UNBECOMING A TEACHING STAFF MEMBER, INSUBORDINATION AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S VIOLATION OF THE BOARD'S INAPPROPRIATE STAFF CONDUCT POLICY

The foregoing background information, and the facts alleged therein, are incorporated by reference as if fully set forth herein. Raymond G. Morison, Jr. has engaged in unbecoming conduct including misconduct, insubordination, and other just cause by violating Willingboro Township Board Policy No. 3281, *Inappropriate Staff Conduct*. His acts and omissions, as specifically set forth below, constitute just cause for immediate dismissal.

Willingboro Township Board of Education Policy No. 3281, *Inappropriate Staff Conduct*, states, in pertinent part:

> Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.
>
> Inappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. Therefore, school staff members are advised to be concerned with such conduct which may include, but is not limited to, communications and/or publications using e-mails, textmessaging, social networking sites, or any other medium that is directed and/or available to pupils or for public display.
>
> A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education, an arbitration process, and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member.

Count 1

On April 30, 2016, Respondent sent several messages to former student, KP, on Facebook. The string of messages ended with Respondent stating, "I want to fuck u. I saw u were sleeping." This language and behavior is in direct violation of Board Policy 3281.

Count 2

On August 22, 2020, Respondent sent several messages to former student CH on Facebook, including stating that he was laying on the beach at his parents' house, asking what CH's plans were, and stating, "I should've gotten u earlier." This language and behavior is in direct violation of Board Policy 3281.

CHARGE III
CONDUCT UNBECOMING A TEACHING STAFF MEMBER,INSUBORDINATION AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S VIOLATION OF THE BOARD'S SOCIAL MEDIA POLICY

The foregoing background information, and the facts alleged therein, are incorporated by reference as if fully set forth herein. Raymond G. Morison, Jr. has engaged in unbecoming conduct including misconduct, insubordination, and other just cause by violating Willingboro Township Board Policy No. 3282, *Use of Social Networking Sites*. His acts and omissions, as specifically set forth below, constitute just cause for immediate dismissal.

Willingboro Township Board of Education Policy No. 3282, *Use of Social Networking Sites,* states, in pertinent part,

> While the Board respects the right of staff members to use social networking sites, staff members should recognize they are held to a higher standard than the general public with regard to standards of conduct and ethics. It is important that a staff member's use of these sites does not damage the reputation of the school district, employees, pupils, or their families. Staff members who utilize, post or publish images, photographs, or comments on social networking sites, blogs, or other forms of electronic communication outside their professional responsibilities shall ensure their use, postings, or publications are done with an appropriate level of professionalism and are appropriate conduct for a school staff member. Staff members should exercise care in setting appropriate boundaries between their personal and public online behavior, understanding that what is private in the digital world often has the possibility of becoming public even without their knowledge or consent.

Count 1

On April 30, 2016, Respondent sent several messages to former student, KP, on Facebook. The string of messages ended with Respondent stating, "I want to fuck u. I saw u were sleeping." This language and behavior is in direct violation of Board Policy 3282.

Count 2

On August 22, 2020, Respondent sent several messages to former student CH on Facebook, including stating that he was laying on the beach at his parents' house, asking what CH's plans were, and stating, "I should've gotten u earlier." This language and behavior is in direct violation of Board Policy 3282.

CHARGE IV
CONDUCT UNBECOMING A TEACHING STAFF MEMBER, INSUBORDINATION AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S VIOLATION OF THE BOARD'S CODE OF ETHICS

The foregoing background information, and the facts alleged therein, are incorporated by reference as if fully set forth herein. Raymond G. Morison, Jr. has engaged in unbecoming conduct including misconduct, insubordination, and other just cause by violating Willingboro Township Board Policy No. 3211, *Code of Ethics*. His acts and omissions, as specifically set forth below, constitute just cause for immediate dismissal.

Principle 1(7) of the Code of Ethics states that teachers, "Shall not use professional relationships with pupils for private advantage." While KP and CH are former students, the relationship between them and Respondent is still subject to the Code of Ethics. Respondent used his position as their former educator to form a personal relationship, which he clearly hoped to make into a more intimate relationship.

CHARGE V
CONDUCT UNBECOMING A STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S INAPPROPRIATE CONDUCT TOWARD FORMER STUDENTS

The foregoing background information, common to all charges, and the facts alleged therein, are incorporated by reference as if fully set forth herein.

Each of the foregoing charges and counts individually warrant dismissal. Viewed in their totality within the context of the Respondent's behavior, it is evident that he engaged in a pattern of unbecoming conduct or other just cause, warranting immediate dismissal. The allegations, jointly and severally, demonstrate his unfitness to continue to serve in a position of immediate trust, warranting his immediate dismissal

ISSUE PRESENTED

Whether the Board has demonstrated by a preponderance of the credible evidence that the Respondent has engaged in conduct unbecoming a tenured employee. If so, what shall be the penalty?

FACTUAL BACKGROUND

The Board. The Board operates public schools for the town of Willingboro in Burlington County, New Jersey. The schools serve students for grades kindergarten through high school. The Board also operates an alternative school for students who have to be removed from the general school population due to behavioral issues.

Respondent. Respondent is a native of New Jersey and received his education, including his health and exercise science and teacher certifications from Rowan University in 2000. That year, he also attended Trenton State, where he received certification as a drivers' education instructor. (Tr. 209)

Following his certifications, Respondent began teaching in New Jersey public schools. In 2004 he was hired and began teaching physical education and drivers' education at Willingboro High. (Tr. 210) In 2017 he was transferred to Willingboro's Alternative High School, where he has taught middle and high school students. (Tr. 210, 212) During his years at Willingboro, he has coached high school softball, baseball, and varsity wrestling; he testified that he has never coached soccer. (Tr. 215)

Respondent testified about his personal life. He is married and has three children. In 1998 or 1999 his wife developed a debilitating brain tumor; she is now partially paralyzed and lives in a care facility. (Tr. 217) Respondent separated from his wife in 2010, keeping his children with him and raising them with the help of his

parents, who live with him. (Tr. 217, 218) In 2015 he became engaged to a woman; however, she had a heart attack in his home and died in front of his boys, his father and himself. (Tr. 220) Respondent testified that he had a difficult time and started drinking. (Tr. 220-1) In 2016, he renewed a friendship with a woman he had known, TM. Like him, she had a lot of issues, but they trusted one another and started talking to each other. They also began a sexual relationship. (Tr. 222-3)

April 2016 incident. Respondent had an online exchange with a female former student, KP, beginning on the night of April 30, 2016 and ending the next day. The exchange is included in the Charges and is undisputed:

On April 30, 2016, at midnight, Respondent contacted a former student, KP, on Facebook. The midnight exchange was as follows:

- Mr. Morison: *Hey*
- Mr. Morison: *What u doing*
- *KP:* I was sleeping. Lol

Over twelve hours later, at 1:04 P.M., Respondent sent the following, also via Facebook:

- *Mr. Morison: I want to fuck u*
- *Mr. Morison: I saw u were sleeping*

KP's testimony regarding the April 2016 incident. KP was a student at Willingboro High from 2010-2014, when she graduated. (Tr. 191) She had Respondent for drivers' education and gym in her sophomore year. (Tr. 192) He was also her coach for girls' softball, which she played in her freshman, sophomore, and senior years. (Tr. 192-3)

Since her graduation, KP has not seen Respondent in person, but she did have online communications with him in 2016. (Tr. 194) Respondent sent her a

Friend request on Facebook, which she accepted. (Id.) KP does not recall exactly when in 2016 he made the Friend request, or when she accepted it, but she recalls that Respondent initiated his first online conversation with her a few days before April 30. (TR. 201) She recalls that around midnight on April 30, 2016, they had a conversation, back and forth, beginning around midnight:

> It began he asked me like what school I was at and like how everything was going. And then we started talking, like just catching up, he told me about the current girl's softball team and how they were doing. And then we also spoke about his children for a brief moment to see how they were doing as well.

(Tr. 197)

KP testified that she went to sleep after that. The next morning, she saw a message from Respondent sent at 12:12 a.m. the night before: "Hey, what u doing." (P. 19, Tr. 197) She thought, "he must be a night owl if consistently he contacts me around midnights." (Id.) She responded, "I was sleeping, LOL." The next message that came in from Respondent was "I want to F-U-C-K u" and "I saw u were sleeping." (Id.)

KP testified:

> I was definitely taken aback because it was unprovoked and un, like, wanted because, like I don't understand how it went from us talking about like how school was going and the girl's softball team to escalating to what was said.

(Tr. 197-8) KP did not respond to these messages and has not heard from Respondent or had any communication with him since that time. (Tr. 199, 205) After talking the matter over with a friend, she met with Principal Ash to report

the messages. She was very uncomfortable doing so, but decided it was important to report the interchange:

> because it's better to speak up and then rather than to stay silent and the case that he could possibly be sending these messages to like other women or like even the other girls currently students, that was like my main fear.
>
> ***
>
> again, like I said, in the case like this is unwanted conversation, like regardless if it's if I was a student or not, it's just not acceptable, especially when it's so unwanted. Like unprovoked in any manner, like this is still a form of sexual harassment that no one should have to be obliged by or like accept if they did not want to.

(Tr. 200) At the Principal's request, she filled out an incident report on May 20, 2016. (P. 20)

Principal Ash confirmed that when KP came to see her and report the April 2016 incident, she was " very uncomfortable showing it to me because of the strong language in it;" and was concerned that her father not find out. (Tr. 159)

Respondent's testimony regarding the April 2016 incident.

Respondent testified that this exchange took place during the period following the death of his fiancée, when he was drinking heavily. He was online with TM at the same time as KP and testified that he had intended the sexual text for TM, rather than KP. (Tr. 252) He only noticed his mistake a day or two afterward. (Id.) He was embarrassed when he noticed, but he did not reach out to KP to apologize:

> I kind of was like, you know, mad at myself and embarrassed and I thought should I just send another message back to her to try to clarify it and then I didn't, I just figured it would go away. And then three weeks or a month later, I guess is when it came to me what had happened, but at that point there was no way, I'm not going to reach out, like because of what was

> going on, I can't reach out to apologize at that point, like, and I never had the opportunity even to meet with her to explain what had gone -- gone on, like that wasn't intended for her. Because we -- we -- like I had never -- like she said, we had talked for the couple days and we talked about regular like everyday living stuff and then like you could tell that message wasn't meant for that person, it's out of the blue completely to the wrong person.

(Tr. 254-5)

Resolution of the April 2016 incident. About a month later, the Board placed Respondent on administrative leave with pay. (Tr. 229) He was out of work for about a year, during which time, at the urging of his family, he got help for his drinking problems. (Tr. 226) He does not know if his explanation was told to the Board, but he told his attorney and Union rep what had happened. (Tr. 262) He consented to the settlement agreement of a 30-day suspension that is referenced in the Charges. He thought that "dealt with" the situation. (P. 22, Tr. 251) Respondent testified that "no one ever clarified what exactly I was being suspended for." (Id.)

August 22, 2020 incident. Respondent had an online exchange with another female former student, CH, on August 22, 2020. The exchange is referenced in the Charges and is undisputed:

Sunday, 5:20 p.m.

Respondent: How u been

CH: Hey mr. [Respondent]! I've been good! How are you?

Respondent: I'm good. Down the shore laying here! Lol

My parents have a house down here so I spend my summers down here

Sunday, 6:00 pm.

Respondent; U have any plans

CH: Just relaxing I go back to grad school tomorrow.

Respondent: Where's that at

CH: Jefferson University

Respondent: I should've gotten u earlier

Relaxing is always good!!!

I've been relaxing on the beach all summer! Lol

(P. 24)

CH's testimony regarding August 22, 2020 incident. CH attended Willingboro High from 2009-2013. She had Respondent for gym and possibly drivers' ed during her junior and senior years. She believes she also had him as a substitute soccer coach: she was a player and also a team manager in her senior year. She has not seen Respondent since she graduated in 2013.

Her next contact with Respondent was on Facebook. She received a Friend request from Respondent, who she could see was also Facebook friends with other former students she knew. She accepted the friend request.

A day later, in the afternoon, Respondent sent her the message shown above. She thought it felt a little casual:

> I mean, it's not the first time that I've spoke to or caught up with a faculty member outside of school that either I like ran into or maybe came across on Facebook or a platform. And usually they'll ask like, you know, what are you doing now, are you working, you know, are you in school, things like that, but it just seemed kind of informal, I guess.

(Tr. 110) CH went on to explain that when Respondent asked her about her plans, she felt the conversation took an inappropriate turn (P. 26):

> The conversation just got a little bit more casual. I felt like, you know, initially, because I knew Mr. [Respondent] in high school, I guess I saw him more as an authoritative figure and at first he was, you know, messaging me, I thought it was just to catch up and ask like, you know, again what I've been up to, like, you know, was I in school, so forth. And it just got a little personal I felt at that point, because it was about like what I was doing, what my plans were and he was obviously in a relaxed setting.

(Tr. 111-12) She described her reaction to the casualness of the conversation:

> Just speaking of peers my age and, you know, just knowing how casually we speak to each other and, you know, what different messages mean, it just made me feel as if I wasn't seen as a past student or, you know, someone that looked at him as an authority figure.
>
> ***
>
> At first I, you know, I tried to give him the benefit of the doubt, so I tried not to just go off and think that it was anything unusual, so I answered it. I thought when he asked if I had any plans, it was just like our first conversation casual, so I responded back and said I'm just relaxing, I go back to grad school tomorrow.

(Tr. 112) She became uncomfortable with Respondent's next message, "I should've gotten to you earlier:"

> Meaning I should've gotten you at an earlier -- oh, that message made me a little uncomfortable, honestly, I think that was the turning point for me, it felt like I should've gotten to you at a early date -- an earlier date so we could hang out, so it didn't seem as much as, you know, about just like catching up or just asking like where I was at in life, it just felt like more of a leeway into like a physical appearance.

(Tr. 113) At the time, she was not sure what Respondent meant. (Tr. 136) She acknowledged that Respondent did not ever tell her that he wanted to "hang out" with her,

> But I felt like he insinuated that when he asked if I had any plans and he should have gotten to me earlier.

(Tr. 135)

After this exchange, CH stopped messaging Respondent; she "unfriended" him:

> I think it was just my way of saying that it was inappropriate, I realized that it wasn't the type of relationship that I felt it would be or expected it to be from the friend request.

(Tr. 138) He did not message her again or otherwise attempt to contact her. (Id.)

Two days later, on August 24, 2020, CH was on twitter and saw a tweet from one of her peers that she went to high school with. (Tr. 115) The tweet said, "My old gym teacher slid in my DMs at 1:53 a.m." (P. 25) She replied, "He slid in mine too. Like an f'ing weirdo." (Tr. 122, P. 25) Another former student followed with "Mr. V [blank] slid in mine" and ended with three emojis. (Tr. , p. 25) After someone posted a message with lots of emojis, another individual, a male who CH recognized as a former student, posted: "Yoo u da second female I seen say something about Morrison dm'n them lastnight. [emoji] smh he bugged out." Another person replied, "Lol who," and the male student responded, "Mr. Morrison from the high." (Id.) CH blocked the names of the individuals making the tweets by drawing over them, and then took a screen shot of the conversation. She no longer can go back to the original posting. Although at the time she knew the names of three people who participated in this conversation on twitter with her, she did not identify them, stating: "I wish not to honestly disclose those names because I do not have their permission to bring their names into court." (Tr. 126)

After seeing the tweets, CH reached out to some friends to ask their advice about whether she should report her interaction with Respondent. After

considering their advice and reevaluating the events, she decided that she did need to come forward:

> I think that after I saw that other women were saying that they were contacted as well, it made me a little bit more uncomfortable in the sense that I felt like it was happening to multiple people that I graduated with and I felt like it was my responsibility to bring it forward and speak on it if I'm -- if I knew who to go to. And I had, you know, collected additional evidence of people talking about the event. So after that instance I decided, after I took some days, to gain the courage to report it to Miss Ash.

(Tr. 128) CH sent an email to Principal Kimberly Ash on August 29, 2020:

> I'm reaching out to you about a concern that I have about a currently employed staff member of the district. [Respondent] was a Gym teacher and girls soccer coach in my years at the highschool. I have not seen or spoken to Mr. [Respondent] since I graduated in 2013. Last Saturday, I noticed a friend request from him late at night, which I accepted. I accepted the request assuming he was just being friendly and catching up with students he previously knew. I did notice we had some mutual friends. A few hours later I received a message from him asking "How u been". I thought at the moment that it felt a little casual, but I responded "hey Mr. [Respondent]! I've been good! How are you?". The conversation took an inappropriate turn when he stated that he was laying on the beach at his parents house and asked what my plans were. It continued with phrases like "U have any plans" and "I should've gotten u earlier" I stopped responding. Unsure what this meant, I learned from my peers posts on social media that he had sent them a friend request and messaged them as well (at least two other alumni). In light of the recent discoveries of Mr. HH and Mr.HH I have felt that the things being said on social media should be taken seriously and active staff should be held accountable in order to make Willingboro Schools safe places for students. Though the women who have stated that they've been contacted, as well as myself are in our adult years now, I find it predatory for a teacher to reach out to past students that they do not have a professional, or informal relationship with after they graduate and suggest "hanging out". I'm not sure if this has been bought to your attention before, but it is my hope that young black women in Willingboro can feel safe and not prayed [sic] upon by teachers, coaches, and mentors who help shape our futures.
>
> Thank you.

(P. 26, Tr. 127) In this hearing, CH was asked to explain why she used the word "predatory" to refer to Respondent's messages:

> It just made me feel as though -- the fact that I was messaged made me feel as though, after all those years, you know, it's been eight years since I graduated, maybe going on nine now, and it just made me feel as though a memory of me being my younger self versus now for me not to have seen or spoken to a faculty member within the last eight or nine years would just make me feel like why would you feel the need to reach out to me in that way, in such an informal way?

CH ended her testimony explaining how she felt about the messages she received from Respondent:

> I think that growing up in -- or getting a good amount of my education in Willingboro school system and, you know, seeing a lot of different faculty members come and go, we gain close relationships with some of the faculty members that are there for extended periods of time and, you know, they work in various departments, whether it's coaching and teaching, you know, they may substitute for a class, so we get to know these faces and it's very familiar. And to be from such a small town, these are faces that stick with you, names for the rest of your life, so I just think the importance of it, you know, as a young woman coming out of the Willingboro school system is that we should feel safe within our schools and we should feel like our educators truly care about the well-being of us as the alumni and also as students that are currently here. It means a lot to me because, you know, it makes me feel uncomfortable to know that there may be faculty members within the school that may not have seen us as children at the time and do not see us as, you know, alumni and someone who looks up to them now. So to me it was important to bring it forward to the younger women who are currently in the school now and will be graduating, and not only with [Respondent], but with other faculty members or educators, may go through the same thing as me in life and be confused on what kind of decision to make and what steps to take.

(Tr. 130-1)

Principal Ash confirmed that CH reached out to her via email on August 29, 2020 (P. 26, Tr. 147) and shared with her the August 29 Facebook messages

she had received from Respondent. (P. 24, Tr. 147-8) Principal Ash reported the matter to Superintendent Hackett. (Tr. 152)

Respondent's testimony regarding the August 2020 incident.

Respondent testified that he has been active on social media through Facebook, Instagram, and Snapchat. (Tr. 272) Over the years, he has been in touch with maybe 20 to 30 former students, including some of student athletes he coached and other students he runs into at the CVS or when he is driving for Uber or Lyft. (Tr. 269-70) He is probably friends with more male than female students. (Tr. 270) When he is on social media and sees the names pop up of former students who are friends with some of his other former students, he'll "friend request them:" "It's like I haven't talked to that person in years, let me see what they're doing." (Tr. 276)

Respondent acknowledged that he sent a Friend request to CH in 2020. When asked why he sent a Friend request to CH, he explained that although he never coached her, he had her as a student, and:

> I talk – I talk to like I said, numerous former students on social media. I reached out to see how she was doing. And that's basically -- that's basically it, see where she was at, what she was doing.

(Tr. 236, 235) He went on to explain:

> in the beginning we were just talking about what's going -- like what's going on and how she's been. It was basically just a general question back and forth of where we're both at that point. 'Cause I hadn't talked to her in years like, like some of the other students, like former students. Like I said, sometimes they'll reach out on social media. Most of the time I end up picking a lot of former students up through Uber and Lyft and it's like they recognize me usually, you know. Well, in this I was just reaching out to see what she was doing, what she had been up to. That's what, usually

> I'll send a friend request or if they send a friend request and then usually ask how you been or how are you, what are you doing.

(Tr. 236-7) When he said, "I should've gotten u earlier," he meant he should have gotten her earlier because she was going back to school. (Tr. at 238)

As to whether Respondent ever contacted other students and/or spoke inappropriately to them, he provided an answer in his certification that "I know I had not done so." (P. 11, par. 6) However, in his testimony, Respondent agreed that answer was not accurate. (Tr. 272)

Respondent's interview with Dr. Hackett. On October 9, 2020, Dr. Hackett conducted an online interview with Respondent as part of her investigation of his online communication with CH that was reported to her by Principal Ash. Respondent's then current principal, Ms. Alicia Biddle, also participated in the interview. Dr. Hackett testified that during this interview, Respondent told her he wanted

> the young lady to come down and spend time with him. I don't know whether he said beach house or shore, I can't remember. I thought he said beach house, but he wanted the young lady to come down and spend time with him.

(Tr. 27)

Respondent corroborated Dr. Hackett's memory regarding this exchange:

> I said if it got to I possibly would have invited her down to meet at the beach down at the shore. I never -- but in a lot of the testimony like that was saying the shore house, which the shore house was never involved because my family, my mom would never even allow it, because due to what's going with, you know, my wife, my fiancée, like my mom's very strict about bringing anyone around the kids. They've gone through too much loss and too much. So that was definitely not said as far as the shore house. And I never had -- I never actually -- I never actually put out the invite....

(Tr. 245) Respondent said much the same thing in his certification dated February 16, 2021:

> 5. I did say that I may have asked her to come to the shore, but since summer was over and she was leaving for graduate school, I did not extend any invitation.

(P. 11)

Dr. Hackett also discussed Respondent's social media accounts:

> I believe he mentioned something along the lines of he should just -- he should just delete his social media accounts, something like I should just delete my accounts. And I think I might have said something along the lines of perhaps that could have been a course of action after the first incident because you turned around and repeated it again.

(Tr. 29)

Respondent's agreed that he told Dr. Hackett he would delete his accounts. However, he testified that in fact he has not deleted all of his social media accounts – he still has a Snapchat account with the user name of "Coach Morison." (Tr. 272-4) He also explained why he was getting off social media:

> I said, between all the election stuff and the movement, there was so much arguing going on, I was like I was going to delete -- I was tired of seeing the posts on Facebook anyway, everybody arguing. And then at that point, like after what had been brought up and now that I was in another meeting, I'm like this isn't worth it because people are making their own opinions and they're reading the message in one way when you're sending it a different way. And I was like is, it's not worth it anymore, I'm like not even going to be here.

(Tr. 241) He went on to elaborate:

> at this point you really can't talk to anyone is what this is coming down to because anything you say can be twisted at this point.
>
> ***

> Like you literally, you kind of really can't say anything, obviously, like, without being, you know, without messages being misconstrued. So like it's better off at this point like, you know, to get off the social media, that's why I got off it. Because it's not -- it's not worth it.

(Tr. 280, 281)

POSITIONS OF THE PARTIES

The Board argues that it has met its burden to prove the tenure charges by a preponderance of the credible evidence. In particular, (1) the Board has proven that Respondent used his professional position as a teacher and the trust he established with his students to his advantage to contact former students inappropriately on social media on multiple occasions; this was established not only through the uncontested messages, but also through CH's testimony and the production of messages on Twitter demonstrating that at least two other female alumni referenced "gym teacher," confirming that Respondent had reached out to them; (2) the weight of the evidence establishes that Respondent does not understand or appreciate the magnitude of the issue presented by his messaging with former students; in his interview with Superintendent Hackett, as well as his testimony in this proceeding, Respondent has demonstrated that he does not understand or care about how the students or Board administrators reacted to his behavior; he has not learned from his prior discipline in 2016; (3) Respondent's inability to discern between inappropriate and appropriate communications confirms that he is unfit to be a staff member for the Board; (4) Respondent's own testimony shows that he intended to invite CH to have a personal rendezvous with him, despite the fact that his only connection to her was his role as her former teacher nine years earlier; CH

reasonably perceived that intent and was uncomfortable; such a misuse of his position as a teacher to reach out to former students for his personal advantage is contrary to Board policies and is conduct unbecoming a staff member; (5) Respondent has shown no remorse at all for his behavior; he has demonstrated that he thought it was perfectly acceptable to allow KP to think he had intended to send her a vulgar message in 2016, making no effort to clarify or rectify the situation; likewise he shows no sign that he understand his 2020 communication with CH could or would be perceived as unwanted, indeed, predatory; thus the Board cannot be assured that he will not engage in inappropriate social media interactions with students or former students in the future; (6) additionally, Respondent has not entirely discontinued his use of social media, dialing back his use only because he found people using the media were misconstruing posts; he continues to be active on at least one site as "Coach Morison," a title and status he enjoyed only as a Board employee; he has not learned why his use of social media to reach out to former students, particularly female former students, to invite them to meet up with him, is inappropriate; (7) Respondent has continued to seek access to former students through his work driving for Uber and Lyft; he cannot be trusted to refrain from using his position as a former teacher to interact with students, even if he does stay off social media; (8) similar to the employee in *I/M/O David Clune*, where a teacher was discharged because of inappropriate Facebook and text messages to two female former students, Respondent used his position as a former teacher to seek out former students, violating their trust and the public's trust in the teachers and other Board employees responsible for the care and custody of school children; the Board

has proven it has a reasonable basis for concern for the safety of its students if Respondent is allowed to enter a classroom again; (9) by his own admission, Respondent sought to interact with many former students in addition to CH and KP; the interactions that form the basis of these charges are aggravated by the fact that he served a suspension in 2016 for similar conduct, yet apparently learned nothing from that experience; the Board cannot be assured that Respondent understands the line between appropriate and inappropriate interactons with current or former students.

For all of these reasons, loss of tenure and discharge is the appropriate penalty in this case.

Respondent, on the other hand, argues that the Board has not met its burden to prove the tenure charges, in that (1) none of the evidence -- neither the exhibits nor the testimony -- establishes that Respondent made any inappropriate advances toward CH; it would be unreasonable to interpret that as his purpose based upon the content of the communications; Respondent's intent upon contacting CH was not to extend any invitation to spend time with her or otherwise, but simply to inquire as to what was going on in her life; this is no different than the interactions he has had with 20 to 30 other former students without incident; (2) further, it is unreasonable to punish Respondent based upon his perceived thoughts rather than his actual words; similarly it is unreasonable to speculate about where a conversation may have gone if it were to continue, when it did not; (3) the Board has failed to prove that Respondent reached out to other former students with similar messages or for a similar purpose; the screen shot of tweets must be excluded as hearsay,

particularly since CH refused to identify the individuals posting those tweets, even though she knew who they were; that has unfairly prejudiced Respondent, depriving him of the opportunity to challenge the authenticity of the tweets or cross-examine the alleged tweeters; (4) for the same reason, the portion of CH's email to Principal Ash saying that she had learned from her peers that Respondent had sent others a friend request and messages, must be stricken, since there is no competent, credible, admissible evidence supporting this; this is a fiction created by the Board; (5) because, as Respondent and Dr. Hackett both testified, Respondent did delete his social media accounts, the likelihood that a similar incident will occur in the future if Respondent is reinstated is minimized; (6) the actual words in Respondent's message to CH fall well short of the messages in *I/M/O David Clune*, relied upon by the Board: (i) Respondent was not exchanging messages with young students, but with an adult in her mid-twenties; (ii) the language itself was neither salacious nor racy; (iii) the text did not concern the appearance of the student, invite smoking marijuana, tell her he was attracted to her, or urge her to keep the communications secret; and (iv) CH never asked Respondent to stop contacting her; in short, given the stark differences between the two cases, *Clune* cannot serve as precedent in this case; (7) Respondent's conduct was not outrageous; hence termination is too harsh a penalty, particularly in light of Respondent's lengthy history as an effective teacher.

In sum, the Board has failed to prove that Respondent was guilty of any misconduct. But, if his communications can be considered as misconduct, termination is simply too harsh a penalty.

DISCUSSION

Both parties were ably represented by counsel in this proceeding and had full opportunity to present evidence and make arguments in support of their respective positions. In the preparation of this Opinion and Award, I have given careful consideration to the testimonial and documentary evidence, the legal authorities cited, and the positions and arguments set forth by the parties. For the reasons set forth below, I find the Board has proven Count 2 of Charges I II, III, and IV and Charge V. Respondent did engage in conduct unbecoming a tenured teacher. I further find that while Respondent's conduct was improper, removal from his position and loss of tenure is not the appropriate penalty.

Before addressing the Charges, I turn to certain preliminary issues.

Exhibit P. 25, Screenshot of Twitter posts from August 24, 2020, is admissible for limited purposes only.

During the hearing, the Board introduced a screen shot of tweets from August 24, 2020. (P. 25) The screen shot had been taken by CH, who blocked out the names of the people sending the tweets in order to protect the identity of the individuals involved. Respondent objected to the exhibit on two grounds.

First, Respondent cites N.J.S.A. 18A:6-17.1(b) which requires the Board to furnish all documents to the charged employee at the time the case is referred to arbitration; the Board is precluded from presenting additional evidence at the hearing, except for purposes of impeachment of witnesses. It is undisputed that the Board did not provide this piece of evidence upon referral of the case to arbitration. The Board only obtained the document later and did provide it

attached to the Superintendent's Certification dated February 17, 2021, submitted in opposition to the Respondent's Motion for Summary Judgment.

The Board argues that the document should be admitted because it does not add new charges, but simply corroborates the statements of CH that are the basis of these charges. As early as August 29, 2020, about a week after Respondent exchanged messages with CH on Facebook, she sent an email to Principal Ash reporting that exchange. In that email, which was furnished to Respondent in support of the charges, she referred to learning "from my peers on social media" about Respondent messaging at least two other alumni. (P. 26) Thus the existence of social media posts was not withheld from Respondent.

The Board cites the case of *Petrella v. Hackensack* BOE, 2021 WL 84056 for the proposition that exhibits submitted after the original charges may be admitted if (a) they do not materially expand on the original charges, and (b) the Respondent has a "full and fair opportunity to dispute all charges." In that case, the arbitrator permitted an additional 17 exhibits to be entered into evidence. Here we have the single exhibit.

I agree with the Board that Exhibit P. 25 did not expand the scope of the original charges. Further, Respondent was given ample notice of the additional document a full month before the hearing, and therefore had a full and fair opportunity to review the document and prepare his defense against the charges.

Second, Respondent argues that the document is classic hearsay and should be excluded. Because CH refused to identify the people sending the tweets and did not produce the original of the document, he had no opportunity

to cross examine the speakers or confront his accusers. He is obviously correct that he was deprived of the opportunity to cross-examine the authors of the tweets, and thus could not refute the allegation that he had messaged at least two other alumni around the same time he messaged CH.

There are a couple of points to be made about this exhibit. First, the messages themselves do not clearly assert that Respondent "dm'n" or messaged three students. According to CH, a female alum first said "my old gym teacher skid in my DMS at 1:53 a.m." CH then responded, "he slid in mine too." Then a third alum, a male, said "Yoo u da second female I seen say something about Morrison dm'n them last night." Another former student wrote about a different teacher, "Mr. V," sending her a message. The evidence thus is unclear: did the alums on twitter know about Respondent sending messages to two students the same night or three? CH was questioned about this message, but the matter remains murky to me, particularly since CH refused to identify the senders of the messages, although she knew who they were. (Tr. 123-4)

Second, P. 25 does contain uncorroborated hearsay. It cannot be used to prove the truth of the matter asserted. Thus it may not be used, and has no weight, on the issue of whether Respondent did, in fact, send messages to multiple students around the same time that he sent his message to CH. Nor do I have any evidence of the content of these messages, if they were sent. So, I exclude P. 25 from consideration on the questions of whether Respondent was reaching out to multiple female alums and, if so, for the purpose of pursuing personal interactions.

On the other hand, the exhibit does corroborate CH's statement that she had reason to believe Respondent was messaging other female alums. In his testimony, Respondent readily admitted sending social messages to many alums, male and female – some 20 to 30. Interestingly, Respondent never denied seeking personal interactions with other alums, and he did admit having the purpose of asking CH to meet up with him, only dropping that idea when she told him she was going back to graduate school the next day.

Finally, Respondent claimed in his Certification (P. 11) that he knew he had not contacted other former students, "In fact, Petitioner has not provided any additional evidence or witnesses of any such communications." Exhibit P. 25 impeaches that certified statement.

In short, even though the exhibit cannot be used to prove that Respondent was preying upon multiple female alums, the exhibit is nevertheless admissible and probative to corroborate CH's statements and testimony. Further, it is admissible as corroboration of Respondent's testimony about multiple social media exchanges with other alums and impeaches his statement that he had not contacted others.

Disputed Issues of Material Fact Identified in Motions for Summary Judgement.

In my decision denying the parties' respective motions for summary judgment, I noted "there are at least three issues of material fact in dispute here: (1) whether Respondent admitted to Dr. Hackett that he intended to invite CH to his parents' beach house, and, relatedly, whether it was reasonable for CH to

interpret his messaging as an overture for that purpose; (2) whether Respondent reached out to other former students with similar messages and/or for a similar purpose; (3) whether Respondent told Dr. Hackett that he intended to delete all of his social media accounts." Having now heard all of the evidence and arguments, I address these three issues in turn.

1. **Respondent intended to invite CH to meet up with him at the shore, and it was reasonable for CH to interpret his messaging as an overture for that purpose.**

As discussed above, Respondent admits that he did intend to invite CH to meet up with him "at the shore" although not to his parents' beach house. At the time I wrote my decision denying the motions for summary judgment, I had assumed the issue concerned a potential invitation to his parents' house, but Respondent clarified that he would not have done that, since his mother was very strict and would not have allowed him to bring people around his children.

I find there is no significance between an intent to invite CH to his parents' home or inviting her to meet him at shore. If anything, an invitation to meet alone with him somewhere on the shore, is more inappropriate than inviting her to come to his family home where other members of his family, including his parents and children, would be present. It was reasonable for CH to interpret his messages as an overture for a rendezvous or meet-up, one-on-one. Since he had no prior personal relationship with this former student, having had no contact with her for almost 9 years, this was an overture that was highly inappropriate and violated the Board's policies requiring all school staff to "maintain a professional relationship with pupils and to protect the health, safety and welfare

of school pupils." (Policy #3281) It also violated the Board's Code of Ethics, requiring that educators "Shall not use professional relationships with pupils for private advantage." The fact that CH terminated the conversation so that Respondent never actually made an invitation and she did not accept one, does not render the communication harmless.

I am not called upon to decide whether Respondent's other Friend requests to former students were inappropriate. Respondent testified that he has some 20-30 friendships on Facebook with former students, many of which he initiated when he saw their names pop up as mutual friends of others with whom he maintained online friendships. The Board's policy does not absolutely prohibit online friendships between employees and pupils – whether current or former. However, initiating a friendship and using it as an overture for a personal meet-up with a former student crosses the line from friendly, professional, and supportive interest in the post-graduation lives and well-being of students, to potentially predatory behavior. Respondent's only basis for contacting CH was that he was her former teacher; using that relationship to pursue a personal relationship was entirely improper.

2. Respondent did reach out to other former students. The Board, however, has failed to prove that he sent similar messages with a similar purpose as with CH.

As discussed above, Respondent testified that he reached out to other former students and exchanged messages with them on Facebook and other social media platforms. His testimony corroborates the testimony of CH and

Exhibit P. 25 as to interactions with former students. That allegation is thus proven.

However, the Board has failed to meet its burden to prove that the content of Respondent's communications with other students was inappropriate. There simply is no credible evidence on this point: CH does not know the content of the other messages, and she refused to furnish the names of witnesses who might know. We do know that he sent messages late at night, but there is no evidence that he was either hoping or intending to invite other students to make personal contact with him.

3. Respondent told Dr. Hackett that he intended to delete all of his social media accounts.

At the time the parties filed their motions for summary judgment, this was an open issue: the Board's charges contained an allegation that Respondent told Dr. Hackett he intended to deactivate all of his social media accounts. Respondent at that point had neither admitted nor denied this allegation. During the hearing, however, as cited above, he agreed that he told Dr. Hackett he had deleted his social media accounts. He further testified that he had not in fact deleted all of his accounts – he still has a Snapchat account. (Tr. 273)

Further, Respondent gave as to his reasons for discontinuing social media his disgust with the elections, and people misconstruing his opinions. (Tr. 280-1) He did not delete them to avoid making inappropriate communications.

General Conclusions. I find that the Board has proven by substantial credible evidence that Respondent initiated contact with a 24-year-old former

female student that was unprovoked and unwanted. His messages, though not lewd or vulgar in themselves, were intended to set up a personal interaction with a student he had no contact with for almost 9 years. This student reasonably concluded that he was seeking some kind of personal interaction.

I agree with the Board that Respondent simply has no understanding of why his conduct was unwanted, unprofessional and inappropriate. The casual tone of his online messaging shows a lack of appreciation for his obligation to maintain a dignified, respectful and professional presence in the community, whether on line or in person, toward past as well as current students, and toward the public at large.

Even accepting his explanation that his vulgar sexual message to KP in 2016 was sent in error, he has not learned from his experience. His testimony and conduct clearly show that he sees nothing wrong with reaching out to former students with whom he has had no contact since high school to begin friendships on social media or elsewhere. He shows no understanding or empathy with how such overtures could be perceived and that they could be disturbing to these students. It is troubling that Respondent was insensitive -- even oblivious -- to how his conduct as a white man of middle years would be perceived by the young black women he approached, whom he knew only because he was their teacher. CH expressed this concern to Principal Ash: "it is my hope that young black women in Willingboro can feel safe and not prayed [sic] upon by teachers, coaches, and mentors who help shape our futures."

While I find Respondent's social media interactions with CH were unprofessional and unbecoming conduct, I cannot agree with the Board that all of Respondent's interactions with former students in the community have been improper. For example, in its post-hearing brief, the Board argues that Respondent's testimony about encountering former students in the community as an Uber/Lyft driver and having friendly exchanges with them "makes it clear that he will seek access to the students of Willingboro Township by other means." (Brief, p. 16) That goes too far and is unfair. The Board has suspended Respondent from his employment as a teacher, and he has taken up driving for car services as a means of earning a living. There is no evidence that he engages in this activity in order to "seek access" to students. It is both natural and appropriate that he should be courteous and friendly whenever he does encounter students in the community. There is no evidence that he is initiating these interactions for personal purposes, as he did with CH.

This case arises out of the misuse of social media. The District's policy on social media largely focuses on warning staff to beware of posting communications that can be made available "for public display or publication," with the "possibility of becoming public even without their knowledge or consent." (P. 18, Board policy on Use of Social Networking Sites) But the facts of this case equally involve the question of ethical behavior by Board staff toward people in the community – current and former students and the public at large. I do not know the nature of training that the Board gives staff on these policies. I suggest that Board needs to educate staff on the appropriate range of interactions

staff may have with members of the public and former students. More thorough training should help staff understand that they must be professional, respectful and cautious in all their interactions, including on social media.

I regard the current charges as very serious, particularly in light of Respondent's failure to appreciate the consequences of his actions or understand how his actions could be perceived and be hurtful to others, even after receiving discipline in 2016. Nevertheless, I conclude that discharge is too severe a penalty based on the facts before me. The 2020 messages were not lewd or vulgar, but merely insensitive and overly casual. They were addressed to an adult. And, to her credit, CH reacted with maturity: she discontinued the correspondence. Even if Respondent intended to set up a tryst of some sort, which would have been highly inappropriate, the fact is that CH quickly cut off the interchange, so it never came to that; she was not unduly harmed by Respondent's conduct. CH only thought to report the incident when she had reason to believe Respondent was sending messages to numerous young women in what seemed to her a predatory manner. Whether in fact Respondent sent such messages and what their content was remains unproven.

I will not deprive a teacher of his livelihood forever, because he sought casual friendships with a former student, when he did not use lewd or vulgar language and did not pursue the relationship when the student dropped it. Yet, a severe penalty must be imposed so that he learns to act within the ethical and professional boundaries of his role as a teacher and mentor to foster and protect the health, safety and welfare of school pupils, not only while he is their teacher,

but after they graduate. If he still cannot appreciate the unethical and inappropriate nature of his approaches to former students and continues this behavior in the future, further consequences, including additional tenure charges, may be warranted.

With regard to the particular tenure charges, I make the following findings:

CHARGE I: CONDUCT UNBECOMING A TEACHING STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S INAPPROPRIATE CONDUCT TOWARD FORMER STUDENTS

I find that Respondent engaged in unbecoming conduct when, as alleged in Count 1, he texted KP on April 30, 2016, but he has already served a month-long unpaid suspension for that conduct; it cannot be the basis of discipline again.

I find that Respondent engaged in unbecoming conduct when, as alleged in Count 2, he engaged in an inappropriate online conversation with CH on August 22, 2020.

CHARGE II: CONDUCT UNBECOMING A TEACHING STAFF MEMBER, INSUBORDINATION AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S VIOLATION OF THE BOARD'S INAPPROPRIATE STAFF CONDUCT POLICY

I find that Respondent engaged in unbecoming conduct and violated the Board's Inappropriate Staff Conduct Policy, when, as alleged in Count 1, he texted KP on April 30, 2016, but he has already served a month-long unpaid suspension for that conduct; it cannot be the basis of discipline again.

I find that Respondent engaged in unbecoming conduct and violated the Board's Inappropriate Staff Conduct Policy when, as alleged in Count 2, he engaged in an inappropriate online conversation with CH on August 22, 2020.

CHARGE III: CONDUCT UNBECOMING A TEACHING STAFF MEMBER,INSUBORDINATION AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S VIOLATION OF THE BOARD'S SOCIAL MEDIA POLICY

I find that Respondent engaged in unbecoming conduct and violated the Board's Social Media Policy, when, as alleged in Count 1, he texted KP on April 30, 2016, but he has already served a month-long unpaid suspension for that conduct; it cannot be the basis of discipline again.

I find that Respondent engaged in unbecoming conduct and violated the Board's Social Media Policy when, as alleged in Count 2, he engaged in an inappropriate online conversation with CH on August 22, 2020.

CHARGE IV: CONDUCT UNBECOMING A TEACHING STAFF MEMBER, INSUBORDINATION AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S VIOLATION OF THE BOARD'S CODE OF ETHICS

I find that Respondent engaged in unbecoming conduct and violated the Board's Code of Ethics, when, as alleged in Count 1, he texted KP on April 30, 2016, but he has already served a month-long unpaid suspension for that conduct; it cannot be the basis of discipline again.

I find that Respondent engaged in unbecoming conduct and violated the Board's Code of Ethics when, as alleged in Count 2, he engaged in an inappropriate online conversation with CH on August 22, 2020.

CHARGE V: CONDUCT UNBECOMING A STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S INAPPROPRIATE CONDUCT TOWARD FORMER STUDENTS

I find that the Respondent engaged in a pattern of unbecoming conduct or other just cause, warranting disciplinary consequences. I find that the conduct was serious but does not warrant his immediate dismissal.

AWARD

The Board has established Count 2 of Charges I, II, III, and IV and Charge V. The proven allegations are serious and constitute grounds for discipline. Respondent is ordered suspended without pay for the entire 2020-2021 school year. He may return to his position as a tenured teacher beginning in the fall of 2021, subject to the following conditions:

1. Prior to his return to his teaching position, Respondent shall report to the Board all existing social media relationships with current or former students.
2. Respondent is prohibited from initiating any new online relationships with current or former students of the Board – whether as Facebook Friend or otherwise on any social media platform -- for two full academic years, from 2021-2022 through the end of 2022-2023. If current or former students initiate new relationships with Respondent, he shall report the same to the Board.
3. During the two-year period the Board may request that Respondent provide access to his social media accounts for the purpose of monitoring Respondent's compliance with the prohibition outlined above.
4. During the two-year period, Respondent is prohibited from using any terms, such as "Coach," on any social media platforms that identify him as an employee of the Board.
5. In the event that Respondent violates any of the terms set forth herein, he may be subject to further tenure charges which may result in termination.

Ruth Moscovitch

Ruth Moscovitch, Arbitrator

Date: April 29, 2021

ACKNOWLEDGMENT

STATE OF NEW HAMPSHIRE)
) ss.:
COUNTY OF CARROLL)

On April 30, 2021 RUTH MOSCOVITCH, whom I know, came before me and acknowledged that she executed the foregoing as and for her Opinion and Award in the above-captioned matter.

Notary Public

My Commission expires

KELLY A. COX
Notary Public - New Hamp
My Commission Expires March 27, 2024

9721

97-21

New Jersey Commissioner of Education

Decision

L.G., on behalf of minor child, J.A.,

Petitioner,

v.

Board of Education of the Borough of Metuchen, Middlesex County,

Respondent.

Synopsis

Petitioner disputed the respondent Board's finding that her son, J.A., committed an act of harassment, intimidation or bullying (HIB) against a fellow student at Metuchen High School pursuant to the Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13.2 et seq. After an investigation by the school's anti-bullying specialist, the Board determined that J.A. had committed an act of HIB when he called an African American student the "N-word." Petitioner claimed that the Board's determination of HIB was arbitrary, capricious and unreasonable as it was based upon an investigation that was improperly limited in scope, and upon the confession of J.A., which petitioner suggests was coerced. The Board contended that the HIB investigation was properly conducted and that the Board was not arbitrary, capricious or unreasonable in making the determination that J.A.'s conduct constituted HIB.

The ALJ found, *inter alia*, that: an action by a board of education is entitled to a presumption of correctness unless it is proven to be arbitrary, capricious or unreasonable; under New Jersey's Anti-Bullying Bill of Rights Act, "harassment, intimidation, or bullying" is broadly defined as any gesture, any written, verbal, or physical act, or any electronic communication that is reasonably perceived as motivated by any actual or perceived distinguishing characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical, or sensory disability, that takes place on school property and substantially disrupts the orderly operation of the school; in the instant case, the record reflects that J.A. admitted using a racial epithet and that the Board's HIB investigation showed that the epithet was directed at an African American student; J.A.'s comments and actions were reasonably perceived as being motivated by a distinguishing characteristic; and the petitioner has failed to prove that the Board acted in an arbitrary, capricious or unreasonable manner in determining that J.A.'s behavior constituted HIB. Accordingly, the ALJ ordered that the petition be dismissed.

Upon review, the Commissioner concurred with the Administrative Law Judge that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination, pursuant to the Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 *et seq.* Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

97-21

OAL Dkt. No. EDU 05388-19
Agency Dkt. No. 41-2/19

New Jersey Commissioner of Education

Final Decision

L.G., on behalf of minor child, J.A.,

Petitioner,

v.

Board of Education of the Borough of Metuchen, Middlesex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

In this matter, the Metuchen Board of Education determined that J.A. committed an act of harassment, intimidation and bullying (HIB) when he called an African American student the "N-word." Upon review, the Commissioner agrees with the Administrative Law Judge that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination, pursuant to the Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 *et seq.*

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 29, 2021
Date of Mailing: May 4, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 05388-19
AGENCY DKT. NO. 41-2-19

L.G. ON BEHALF OF J.A.,
Petitioners,
v.
BOARD OF EDUCATION OF
THE BOROUGH OF METUCHEN,
MIDDLESEX COUNTY,
Respondent.

L.G., petitioner, pro se

Jessika Kleen, Esq., for respondents (Machado Law Group, attorneys)

Record Closed: May 1, 2020 Decided: March 15, 2021

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Petitioner, L.G. on behalf of J.A., filed a Petition of Appeal to the Commissioner of Education, in which they dispute respondent's finding that J.A. committed an act of harassment, intimidation or bullying (HIB) pursuant to N.J.S.A. 18A:37-13.2 et seq.

PROCEDURAL HISTORY

The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on April 22, 2019. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Hearings were held on December 10, 2019. The record was left open for parties to submit closing briefs, and the record closed on May 1, 2020.

FACTUAL DISCUSSION

Susan Paredes testified on behalf of the Board of Education. She is employed as the assistant principal of Metuchen high school. She discussed her education and professional background. At the time of her testimony she was in her eleventh year as assistant principal. She oversees student affairs. She is the school's anti-bullying specialist she is also the affirmative-action officer and testing coordinator. She is responsible for investigating HIB and identifying patterns of behavior. She has been trained in how to conduct investigations. She had three to five training sessions per year for the first five years that the HIB law was in place and one to two training sessions per year since then. She is familiar with the current matter.

Paredes investigated student J.A. J.A.'s mother, L.G. had called stating that another student, R.S., had airdropped a photograph of J.A. to kids in the cafeteria. J.A. was flexing for the camera. He was very embarrassed by the picture being circulated and he stayed home. J.A.'s mother wanted an HIB investigation of R.S. Paredes explained that airdrop is a wireless transmission to nearby devices without using email or text. Paredes investigated the matter. She started with a phone call with L.G. She then interviewed J.A. She interviewed members of a PS4 chat group who had received the image initially. She interviewed kids at the lunch table and kids in a cooking class. She created a report. (R-1.)

Each interviewed student was called individually. Paredes tried to be general with her questions to hear what witnesses saw or had to say and she would get more specific if she needed to. She described her process - she takes as many notes as possible and

completed as many interviews as possible on the first day. She reviewed her notes (R-3) and notes not all interviews were done on the same day. She asked R.S. why the picture was sent. He admitted that he sent the picture. He told her that he did it because he was angry at J.A. because J.A. called him a "fat 'N-word'." Paredes determined the matter of sending the picture was not an act of HIB and the case against R.S. was closed. Based upon what she found out Paredes then opened an HIB investigation of J.A. (R-2) for his use of the "N-word," noting that R.S. is an African-American student. She made a finding that J.A. did in fact use the word. J.A. admitted to using the word in the eighth grade. At the time of the investigation he was in ninth grade. While in eighth grade he attended a different school in the District.

Paredes explained that the first case, the one against R.S., did not meet the definition of HIB. It was a code of conduct violation but did not go to a characteristic as contemplated by the HIB law and policy. She noted that she interviewed J.A. three times. The first time was as the victim in the first incident. The second time was after she spoke to R.S. She interviewed five kids who heard J.A. use the word at different times. Once she concluded the interviews, she called J.A. back in to explain the findings and results.

Other students and R.S. said that J.A. had used the word in fact in ninth grade. Paredes did not feel that the students seemed rehearsed in their responses to interview. At that time J.A. changed his story from never using the word to saying it occurred in eighth grade. Paredes then contacted J.A.'s mother, petitioner L.G. She wrote up a report and sent the report to the Board of Education. L.G. appealed the matter to the Board of Education. The Board of Education upheld its decision. L.G. then appealed the Board of Education decision. Paredes did not ask leading questions of the students she interviewed. She has been trained in how to avoid doing so. She interviewed students who J.A. or R.S. indicated to her may have seen the incident.

On cross-examination Paredes was asked why more kids from the cooking class were not interviewed if that is where the "N-word" was allegedly used. Her response was that it did not just occur in cooking class. She was asked why student C.S. was interviewed as C.S. was neither in the cooking class nor at the lunch table. She

responded that C.S. is a cousin of R.S. and the name had been given to her. C.S. came to see her for the interview and told her that he had heard the epithet used.

Paredes had been suspicious of C.S. but C.S. was not the sole determinant. He had not indicated when he had heard it but indicated that he heard it himself. Student A.A. was the first interview of the first case, occurring before R.S. was interviewed so there were no questions about the "N-word" only about the airdropped picture. A.A. was called back for a second interview. A.A. did hear the word used in eighth grade and ninth grade but did not say where or when. A.A. is not in the cooking class. K.S. acknowledged hearing the word but not say where or when. D.C. said that word was thrown around a lot as a joke.

L.G., the petitioner, testified on her own behalf. She states that she only knows what J.A. told her - that he only admitted to saying the word after being badgered for fifteen minutes. She states that J.A. claims he was told by Paredes that others had told him he said it so that he should just admit it. J.A. tells L.G. that he said that he said the word just to get out of her office. L.G. believes her son. She believes there's too many holes in the District's story. J.A. has no history of problems with any other students. In eighth grade he was often bullied he was trying to find a group in the ninth grade - just looking for a group that he could sit with.

J.A. told petitioner that another student, A.W., spoke to Paredes and told her about group chats where R.S. had used the "N-word."

Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In Re Estate of Perrone, 5 N.J. 514 (1950). The Court pronounced:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.
>
> [Ibid. at 522]

See also Spagnuolo v. Bonnet, 16 N.J. 546, (1954), State v. Taylor, 38 N.J. Super. 6 (App. Div.1955).

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, a trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura- Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

In the present matter, both witnesses have testified credibly. Paredes's description of the events leading up to the investigation of the present mater, and her handling of the investigation are essentially unchallenged from a factual basis and were detailed clear and direct. Her testimony is adopted in its entirety and **FOUND** as **FACT**.

L.G. also testified credibly. She truthfully testified to what J.A. told her and there is no reason to doubt that he told her exactly what she reported. Notably J.A. admitted to L.G. that he had confessed to Paredes as to using the epithet. There is no reason to disbelieve that he further told his mother that he really had not used the epithet and only admitted so under duress. Unfortunately, there is also no way to assess the truth of J.A.'s statement to his mother based solely upon her re-telling of a hearsay statement. While I **FIND**, and it is not in dispute, that he did confess to Paredes, and that he did tell L.G. that he did so only under duress, there is insufficient evidence to make a finding that his confession was untrue. It is not unusual that a student in trouble may tell one account to a school authority and a different account to a parent, nor is it unusual or inappropriate that a parent will believe the account of their child. Nothing is inherently unbelievable, but the evidence constrains the findings.

I further **FIND** that Paredes reasonably relied on J.A.'s confession, but that it was not the sole determinant in reaching her conclusions. She was also informed by the interviews she conducted with other students and the totality of her investigation consistent with her training and applicable policies in doing so.

CONCLUSIONS OF LAW

New Jersey enacted the Anti-Bullying Bill of Rights Act to "strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying" occurring both on and off of school grounds. N.J.S.A. 18A:37-13.1(f). Definitions relative to adoption of harassment and bullying prevention policies are found in N.J.S.A. 18A:37-14, which states in part:

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> > (a) a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
> >
> > (b) has the effect of insulting or demeaning any student or group of students; or
> >
> > (c) creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

It has not been placed in dispute whether the use of the "N-Word" by one student against another constitutes HIB, within the meaning of the Act, as HIB is defined at N.J.S.A. 18A:37-14. In this case, the record reflects that J.A. admitted using the epithet and that Paredes was convinced by her interviews with several other students that J.A.

had directed it at R.S. I **CONCLUDE** that those comments and actions are reasonably perceived to be motivated by the distinguishing characteristic of R.S being an African-American student. In K.L. v. Evesham Twp. Bd. of Ed. 423 N.J. Super. 337 the Appellate Division stated that the definition of bullying does not include harmful or demeaning conduct motivated by other reason, for example a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation. The fact that R.S. felt angered by this action so as to transmit the photo by airdrop demonstrates that the conduct had an effect of insulting or demeaning R.S. Therefore, I **CONCLUDE** that J.A.'s comments constitute a violation of HIB.

Respondent urges this tribunal to conclude that the Board was not arbitrary, capricious or unreasonable in its determination that the HIB investigation was conducted properly and that J.A.'s conduct did constitute HIB. Therefore, the Petition of Appeal should be dismissed. Petitioner asserts that the Board limited the scope of its investigation and essentially coerced a confession out of J.A. and the Board's decision was arbitrary, capricious, and unreasonable.

The Commissioner of Education will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008) (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)), adopted, Comm'r (April 7, 2008), <http://njlaw.rutgers.edu/collections/oal/>. Further, the Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). New Jersey courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, in order to prevail, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances

before it. T.B.M., EDU 2780-07, Initial Decision (February 6, 2008), <http://njlaw.rutgers.edu/collections/oal/>; see W.C.L. and A.L. ex rel L.L. v. Tenafly Bd. of Educ., OAL Dkt. No. EDU 3223-12 (2013) (The petitioner challenged the school board's decision that a student committed an act of HIB. The administrative law judge, (ALJ) found that the Board's actions were consistent with the letter and spirit of the law and were not taken in bad faith or in disregard of the circumstances. The ALJ concluded that the petitioner failed to establish that the Board's actions were arbitrary, capricious, or unreasonable. The Commissioner affirmed the ALJ's decision to dismiss the petition of appeal.); J.M.C. ex rel A.C. v. E. Brunswick Bd. of Educ., OAL Dkt. No. EDU 4144-12 (2013) (The petitioner challenged the Board's determination that the actions of the petitioner's son constituted HIB. The Board found that the student called another student "gay" and said he "danced like a girl." The demeaning remarks constituted HIB.). In both cases, the petitioners failed to satisfy their burden to show that the Board's actions were arbitrary, capricious, or unreasonable.

I have carefully reviewed the record. Petitioner has presented no credible evidence that the Board acted in an arbitrary manner. As I have previously concluded that J.A.'s comments and actions are reasonably perceived to be motivated by the distinguishing characteristic of R.S. being African-American, I **CONCLUDE** that petitioner has not met the burden of proof that the Board acted in an arbitrary manner in concluding that J.A.'s conduct constituted harassment, intimidation or bullying under the New Jersey Anti-Bullying Bill of Rights Act. Paredes could have interviewed more students. Perhaps some of them would have confirmed seeing the incident. Others may not have seen the incident in question. The record reflects that Paredes interviewed a substantial number of students and at the conclusion felt comfortable determining that the alleged conduct had in fact occurred. Merely suggesting that more witnesses could have been interviewed and that such interviews could have possibly revealed evidence leading to a different conclusion is not sufficient to deem the action arbitrary, especially when petitioner has only alleged the possibility that other interviews could have gone differently and not presented any evidence or testimony showing that it would have.

ORDER

Based on the foregoing, I **ORDER** that the petition be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 15, 2021
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: March 15, 2021 (emailed)

Date Mailed to Parties:

EAP/mel

APPENDIX

WITNESSES

For Petitioner:

L.G.

For Respondent:

Susan Paredes

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Report by Susan Paredes
R-2 HIB Investigation
R-3 Investigation Notes
R-4 October 22, 2018 Letter to Parent regarding HIB
R-5 November 13, 2018 Parent HIB appeal to Board
R-6 November 27, 2018 Parent HIB Appeal to Board
R-7 December 17, 2018 Board Determination
R-8 February 8, 2019 Petition of Appeal
R-9 April 11, 2019 Answer to Petition of Appeal

98-21

98-21

State Board of Examiners Dkt No. 1718-158
OAL Dkt. No. EDE 4106-18
Agency Dkt. No. 1-1/21A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Certificates of Elizabeth Sheehy, State Board of Examiners, New Jersey Department of Education.

Order of Suspension by the State Board of Examiners, November 4, 2020

For the Respondent-Appellant, James J. Uliano, Esq.

For the Petitioner-Respondent State Board of Examiners, Laurie Fichera, Deputy Attorney General (Gurbir S. Grewal, Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Elizabeth Sheehy's appeal of the Order of the State Board of Examiners (Board), dated November 4, 2020, suspending her Teacher of Blind or Partially Sighted (TBVI) and Teacher of Handicapped certificates for a period of one year. Following the issuance of an Order to Show Cause by the Board and a hearing at the Office of Administrative Law (OAL), the Administrative Law Judge (ALJ) found that while appellant's actions demonstrated some inefficiency, she did not intentionally submit false or fraudulent billings, and accordingly dismissed the charges against her. Thereafter, the Board adopted the factual findings in the Initial Decision, while also reaching the legal conclusion that appellant had engaged in unbecoming conduct. Consequently, the Board imposed a penalty of a one-year suspension of appellant's certificates.

On appeal, appellant argues that the fault in this matter lies with the Freehold Township school district, which failed to abide by its own policy requiring a contract for services

provided by independent consultants such as appellant. Appellant contends that the Board erroneously concluded that she did not bill by mistake, because the ALJ found appellant credible in her explanations regarding her billing practices and concluded that there was no evidence that she acted with a knowing purpose or intent to defraud the school district. Additionally, appellant argues that it was inappropriate for the Board to base her suspension on her alleged failure to comply with students' IEPs, as no such allegation was made against her in the Order to Show Cause. Appellant takes issue with the Board's conclusion that she had multiple chances to correct her billing issues but failed to do so, claiming that there is nothing in the record to support that statement. Finally, appellant argues that a one-year penalty is inconsistent with penalties imposed by the Board in other matters.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute her judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a).

After a comprehensive review of the record, the Commissioner finds that the Board's decision was arbitrary and capricious because it incorrectly rejected or modified the ALJ's credibility findings. Pursuant to *N.J.S.A.* 52:14B-10(c), an agency "may not reject or modify any findings of fact as to issues of credibility of lay witnesses unless it is first determined from a review of the record that those findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." Moreover, in rejecting or modifying any findings of fact, the agency must "state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record." *Ibid.*

While the Board states in its decision that it defers to the ALJ's credibility determinations, it also makes findings that directly contradict those credibility determinations. The Board's decision turns, in large part, on its finding that appellant did not bill by mistake, but "knowingly overbilled." That finding is directly contrary to the ALJ's findings, repeated throughout the Initial Decision, that appellant's billing practices were lax and she committed errors, but she did not knowingly defraud the district. In fact, the Board's decision explicitly states that appellant's "billing failures cannot be explained away as unknowing errors, as stated by ALJ Masin." This statement is not a difference in legal conclusions, as the Board asserts, but rather a rejection or modification of a finding of fact based on the credibility of a witness. While the Board may disagree with the ALJ that multiple instances of billing errors by appellant were made unknowingly, it is not permitted to reject or modify the ALJ's credibility finding without stating with particularity its reasons for doing so.

The Commissioner is therefore constrained to remand this matter to the Board to make explicit findings as to whether the ALJ's assessment of the testimony regarding appellant's billing practices was arbitrary, capricious, or unreasonable, or was not supported by sufficient, competent and credible evidence in the record.

Accordingly, this matter is remanded to the State Board of Examiners for further proceedings consistent with this decision.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 4, 2021
Date of Mailing: May 4, 2021

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
ELIZABETH SHEEHY	:	ORDER OF SUSPENSION
_____	:	DOCKET NO: 1718-158

At its meeting of December 8, 2017, the State Board of Examiners (Board) reviewed information it received from the Monmouth County Prosecutor's Office regarding Elizabeth Sheehy (Sheehy). Sheehy, a contracted consultant Visual Aid teacher, was accused of False Representation in Payment Claims on a Government Contract after she allegedly submitted claims for payment to several school districts for services she never provided to students. On September 25, 2017, Sheehy received an Order of Postponement and was accepted into a Pretrial Intervention program (PTI) for 12 months. She was also ordered to perform 100 hours of community service.

Sheehy currently holds a Teacher of Blind or Partially Sighted (TBVI) and Teacher of Handicapped Certificates. After reviewing the above information, at its January 19, 2018 meeting, the Board voted to issue an Order to Show Cause to Sheehy as to why her certificates should not be revoked.

After finding a correct address, the Board sent Sheehy the Order to Show Cause by regular and certified mail on February 8, 2018. The Order provided that Sheehy must file an Answer within 30 days. Sheehy responded on March 7, 2018. In her Answer, Sheehy acknowledges that due to a shortage of TBVI teachers she was contracted to provide services in various school districts. Answer at ¶ 1c. She denied the allegations regarding the criminal Accusation. *Id.* at ¶ 3. Sheehy indicates that she provides both direct and indirect services to students. *Id.* at ¶ 3d. Sheehy indicates that she would bill for both services and that she was not trained in record keeping or bills. *Id.* She states that when she was contacted by the prosecutor's office regarding billing for Freehold Township School District, she returned $1,540 for 20 hours of services she had billed. *Id.* at ¶ 3h. Sheehy acknowledged that she received pretrial intervention and community services based upon the criminal Accusation. *Id* at ¶ 4.

Since there were material facts in dispute, the Board transmitted the matter to the Office of Administrative Law (OAL) on March 15, 2018 for hearing as a contested case. Administrative Law Judge (ALJ) Jeff S. Masin, retired on recall, decided the matter after reviewing the hearing testimony when the matter was previously heard by Judge James-Beavers. ALJ Masin determined that a re-hearing of the matter was not required because ALJ Masin listened to the recorded testimony and determined that the re-presentation of testimony was not necessary for him to decide the matter. Accordingly, the record closed on May 1, 2020. *In the Matter of the Certificates of Elizabeth Sheehy*, Dkt. No. EDE 4106-18 (Initial Decision, June 11, 2020).

After reviewing the testimony and the record, ALJ Masin found that Sheehy did not act with a knowing purpose or intent to defraud the contracted districts. (Initial Decision, slip op. at p. 25). ALJ Masin found that Sheehy did not seek to steal from the district or that she engaged in an illicit scheme. *Id.* ALJ Masin found that "there is some inefficiency" but that it would be "highly inappropriate to sanction Ms. Sheehy's certificates and effectively end her career in this seriously important field and specialty." *Id.* at p. 41. Furthermore, ALJ Masin found that any sanction should be modest, at most 6 months. Nevertheless, he determined to dismiss the matter. *Id.*

ALJ Masin found that there is nothing to suggest that Sheehy ever had the quality of her services challenged at any other time. The only evidence suggesting a reduction in quality of service is the reduction in time spent with a student versus the IEP time requirement. *Id.* at p. 26. Further, ALJ Masin determined that there are three categories of concern in Sheehy's billing. The first is that Sheehy billed for services, but records indicate that while one or both students were present at Hawkswood, the time records do not indicate that Sheehy was at Hawkswood at the time of service. *Id.* at p. 26. The second category are days when the students were both not present, but Sheehy billed for services because she was present and ready to provide services. *Id.* at p. 27. The final category are the days where either one or both students were present as was Sheehy but notes and testimony do not concur with Sheehy's billing dates. *Id.*

As to the first category of billing, ALJ Masin found Sheehy's testimony credible in that she did not knowingly bill for dates when she knew she had not appeared at Hawkswood. Her lengthy history with the

District suggests that she would not have tried to take advantage of the District or the family. *Id.* at p 28. He found that it is not proper to bill for services on a day when the provider is not even on the premises, but that honest errors had been made and where no fraudulent intent exists, "the remedy is to reach a reasonable adjustment in the billings. Had the parties met to address the concerns raised and once the records had been examined, it is likely the proper adjustments would have been made. Here, the Board has been reimbursed." *Id.* at p. 27-28.

As to the second billing category, ALJ Masin finds that Sheehy's actions cannot be viewed as fraudulent when she bills for services where the students were not present. *Id.* at p. 30. Sheehy was present, and there was no contract that addressed how Sheehy should handle such issues or anything that establishes an allowable cancelation time, etc. ALJ Masin found that if proper advance notice was given, the provider should not bill for services, but without such notice billing is not unreasonable. *Id.*

The third category of billing issues stem from Sheehy billing for one hour of services where the IEP called for 45 minutes of services. *Id.* at p. 31. ALJ Masin found that Sheehy justified the additional 30 minutes of billing beyond the IEP service time as her travel time between the Barkalow Middle School and Hawkswood, a trip which took about 25 minutes. *Id.* The travel time was included in the contract with Wall Township and Holmdel school districts. ALJ Masin found that Sheehy's actions were not fraud or misconduct. *Id* at p. 32.

ALJ Masin also found that Sheehy regularly held sessions with L.V. that were not 45 minutes in length, but were mostly 30 minutes, with a few of even lesser length. *Id.* at p. 39. There was no evidence presented to evaluate the actual impact of the shortened session on L.V.'s progress toward goals. *Id.* Sheehy should have spoken to L.V.'s case manager regarding the shortened sessions and/or interfering conditions. ALJ Masin found that although there are "no doubt lessons here for her" the case "does not support discipline, which should be reserved for clear-cut instances of wrong doing." *Id.* at p. 40.

The Deputy Attorney General (DAG) representing the Board filed Exceptions and Sheehy filed Exceptions as well. The DAG argued that the facts warrant a finding of unbecoming conduct. Sheehy was regularly scheduled to meet with multiply disabled students to provide vision services for which she billed

90 minutes of services but only provided 71 minutes of services between the two students. Exceptions at p. 5. The DAG further argued that on seven separate occasions Sheehy actively decided to submit bills for services that she did not provide. Additionally, on more than 20 occasions, Sheehy did not provide the full 45 minutes of vision therapy services to L.V., as required by the IEP. Accordingly, Sheehy's actions demonstrate a pattern of inappropriate conduct beyond what a reasonable person would consider a mistake. *Id.* at p. 5.

The DAG further argued that although the ALJ found Sheehy's billing errors were "honest," the record demonstrates that for 4 sessions, the student was ready, willing and able to learn, yet Sheehy did not show, but billed the district. *Id.* at p. 7. Missing a session and billing for it is not an honest error. Notably, the initial decision does not address testimony given by a student's parents, indicating that Sheehy was contacted prior to a child's absence. *Id.* at p. 8. The DAG argues that a reasonable person could mistakenly bill once, but not for multiple dates.

The DAG also states that Sheehy's failure to communicate with the district regarding issues with completing a 45-minute session is concerning. The fact that Sheehy continued to bill for 45 minutes but routinely provide 30 minutes of services is a "clear lack of judgment in her billing practice" and not just simple lax billing practices. *Id.* at p. 11.

Sheehy submitted Exceptions, arguing that ALJ Masin made critical credibility determinations, finding Sheehy to be credible. Sheehy argues that there is no evidence regarding whether there was inefficiency and that the case should not pivot to a different issue. An inefficiency argument now would be improper.

The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of July 30, 2020, the Board reviewed the Initial Decision, Exceptions and Reply Exceptions. After full and fair consideration of the Decision and the other submissions, the Board voted to adopt the findings of fact contained in the Initial Decision, finding unbecoming conduct based upon the facts which warrants imposition of a suspension of certificates.

"Teachers ... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. There is no doubt that the ALJ is in the best position to render credibility determinations in this matter. Accordingly, the Board will defer to those findings. As noted above, after assessing the evidence and the credibility of the witnesses, ALJ Masin made several conclusions regarding Sheehy's conduct. He concluded that Sheehy's billing practices were unknowingly lax, that she billed for services she did not provide on several occasions, and that she overbilled for the services she actually provided. ALJ Masin rationalized those factual findings by indicating that Sheehy's conduct was not intentionally fraudulent, that her conduct was unknowing, that the contracts did not contain specific terms on how to handle cancelled sessions, etc. After reviewing the entire record, the Board accepts ALJ Masin's factual findings but believes that the facts warrant a finding of unbecoming conduct that requires a suspension of certification.

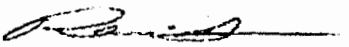
Sheehy's billing failures cannot be explained away as unknowing errors, as stated by ALJ Masin. The overbilling was repetitive. A mere error happens once or twice, not systemically. Sheehy repeatedly billed when not present, billed for longer periods of time than services were provided, and billed for student absences regularly. Missing a session but billing for a session is not an error, it is unbecoming conduct; even more so when it occurs more than just a few times. Sheehy's failure to provide the full 45 minutes of instruction per the IEP is more than just a miscommunication or a failure to communicate. The fact that Sheehy did not address this issue with the district is a significant error in judgment and more than mere errors in billing practices. The fact that there was no evidence that L.V. was harmed by the failure of services is not relevant to the Board's analysis of Sheehy's conduct. Sheehy did not bill by mistake, she knowingly overbilled, or under provided services, on a regular basis without asking any questions or seeking to correct the errors. Accordingly, Sheehy's behavior was egregious and she exhibited a lack of judgment and no sense of responsibility to make sure she provided the services for which she was paid.

The Board agrees with the DAG's argument that as a TBVI teacher for 16 years, Sheehy should have known the importance of ensuring compliance with the students' IEP and should have known to alert

the district to the failure. Moreover, Sheehy's lack of responsibility in performing the services for which she was paid is conduct far below what we expect of educators. Sheehy had multiple chances to correct some of her billing issues, but she failed to do so.

Based upon the factual findings regarding Sheehy's billing failures, the Board believes that her failure is evidence of poor judgment and unbecoming conduct. The appropriate response is a suspension of her educator certificates for a period of one (1) year.

Accordingly, on July 30, 2020, the Board voted to adopt the factual findings in the Initial Decision, find unbecoming conduct and modify the decision to include a penalty of a one-year suspension of Sheehy's certificates. On this 29th day of October 2020, the Board formally adopts the factual findings in the initial decision, finds unbecoming conduct and modifies as to the penalty. It is therefore ORDERED that Elizabeth Sheehy's a Teacher of Blind or Partially Sighted (TBVI) and Teacher of Handicapped Certificates are hereby suspended for one (1) year, effective immediately. It is further ORDERED that Sheehy return her certificates to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.



Rani Singh, Secretary
State Board of Examiners

RS/KAG

Date of Mailing: Nov 4, 2020
via certified and regular mail

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.

99-21

OAL Dkt. No. EDU 07411-20
Agency Dkt. No. 103-5/20

New Jersey Commissioner of Education

Decision

L.B., on behalf of minor child, B.C.,

Petitioner,

v.

Board of Education of the Township of Washington, Gloucester County,

Respondent.

On January 12, 2021, a final agency decision was rendered in this matter, wherein the Commissioner found L.B. liable for tuition in the amount of $18,077 for the 2019-2020 school year, plus $100.43 per school day from the beginning of the 2020-2021 school year to the date of the final agency decision,[1] representing tuition for a period of ineligible attendance by her child, B.C., in the Board's school district. The Board subsequently requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. L.B. offered no reasons why the judgment against her should not be so docketed, although given an opportunity by this agency to do so.

[1] The Board has represented that there were 78 school days between the beginning of the 2020-2021 school year and the date of the final agency decision. Accordingly, the total due from L.B. for this period of time is $7,833.54.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Lindsay Beaulieu is now subject to entry of a judgment by the court in the amount of $25,910.54, which represents the payment ordered by the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 4, 2021
Date of Mailing: May 4, 2021

100-21

Agency Dkt. No. 36-3/21

New Jersey Commissioner of Education

Final Decision

In the Matter of the Tenure Hearing of Lauren Puglisi, School District of the Township of Gloucester, Camden County.

For the Petitioner, Daniel Long, Esq.

No appearance by or on behalf of Respondent, Lauren Puglisi

This matter was opened before the Commissioner of Education on March 5, 2021, through tenure charges of excessive absenteeism and unbecoming conduct certified by John Bilodeau, Superintendent of the Gloucester Township School District ("District"), together with supporting evidence against respondent, Lauren Puglisi, a tenured teacher in the District's employ. The District provided respondent with written notice of such certification at the respondent's last known address, via certified mail, on February 24, 2021.

On March 9, 2021, the Commissioner directed the respondent, via regular mail to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *"shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,"* and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from or on behalf of the respondent.

The certified tenure charges and statement of supporting evidence filed by the District in this matter indicate that the respondent has a history of excessive absenteeism. The respondent was absent for 88.5 days during the 2019-2020 school year and between September 2021 through January 13, 2021 the respondent was absent for 55 days. Deeming the allegations to be admitted and noting that the respondent has failed to respond to the charges certified against her, the Commissioner finds that the District's charges of excessive absenteeism and unbecoming conduct have been proven and warrants the respondent's dismissal. Accordingly, summary decision is hereby granted to the District, and the respondent is dismissed from her tenured position with the District.

IT IS SO ORDERED.*

Angelina Allen-McMillan, J.d.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 4, 2021
Date of Mailing: May 4, 2021

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

103-21

103-21

OAL Dkt. No. EDU 05509-20
Agency Dkt. No. 34-2/20

New Jersey Commissioner of Education

Final Decision

J.D, on behalf of minor child, I.C.,

Petitioner,

v.

Board of Education of the Borough of Highland Park, Middlesex County,

Respondent.

The record of this matter has been reviewed, along with the advisement by the Office of Administrative Law (OAL) that counsel for respondent Highland Park Board of Education failed to appear at a telephone prehearing conference[1] on March 2, 2021.

Counsel for the Board submitted an explanation regarding the failure to appear, asserting that she did not receive the hearing notice, and if she had, she would have attended. The Board's attorney also points out that a motion to dismiss the petition has been pending in this matter for a year. Finally, counsel adds that the pandemic has been difficult professionally as many offices have been closed, and that she did not receive the notice in this circumstance.

Petitioner submitted a request that the Commissioner enter a default judgment against the Board, alleging that the Board failed to plead or otherwise defend this matter. Petitioner submitted a second request for relief, arguing that the Board failed to appear three times without explanation, and disputing the substance of the Board's motion to dismiss.

[1] The failure to appear advisement indicates that respondent did not appear at a March 2, 2021 "scheduled hearing," but the notice was for a telephone prehearing conference that day.

Upon review, the record demonstrates that the Board's counsel failed to appear at two telephone prehearing conferences on December 28, 2020 and March 2, 2021, but it is unclear whether the notices were sent electronically or through regular mail. While the failure to appear at two telephone prehearing conferences is troubling, the Commissioner understands the difficulties with retrieving mail from closed office buildings. Regardless, the Commissioner notes that this matter was improperly returned to the Department. Pursuant to *N.J.A.C.* 1:1-14.4(d):

> If the appearing party requires an initial decision on the merits, the party shall ask the judge for permission to present ex parte proofs. If no explanation for the failure to appear is received, and the circumstances require a decision on the merits, the judge may enter an initial decision on the merits based on the ex parte proofs, provided the failure to appear is memorialized in the decision.

In this matter, the appearing party was the petitioner. As such, returning the matter to the agency without an Initial Decision would achieve the opposite effect – a dismissal. The Commissioner further notes that, despite petitioner's request for a default judgment, the Board did file a responsive pleading: a motion to dismiss in lieu of an answer that is still pending a decision. As such, given counsel's explanation as to her lack of notice and the pending motion to dismiss, this matter is being returned to the OAL for further disposition, pursuant to *N.J.A.C.* 1:1-3.3(b).

Accordingly, this matter is hereby re-transmitted to the OAL for further disposition as indicated herein.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 7, 2021
Date of Mailing: May 7, 2021

105-21

105-21

New Jersey Commissioner of Education

Decision

Katherine Herbst,

Petitioner,

v.

Board of Education of the Village of Ridgefield Park, Bergen County,

Respondent.

Synopsis

Petitioner alleged that the respondent Board violated her tenure and seniority rights when it transferred her without her consent to the position of Assistant Principal for Attendance and Discipline and replaced her with a non-tenured staff member hired under a newly created and unapproved title of Director of Curriculum, Instruction and Operations (DCIO). Petitioner, who had worked for the school district since 2002, most recently holding the positions of Assistant Principal/Curriculum Coordinator (AP/CC) and Director of Curriculum (DC), claimed entitlement to this newly created position. The Board contended that petitioner was not eligible for the DCIO position because she does not possess the required school administrator endorsement. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; petitioner did not earn tenure in her positions as AP/CC and DC because those positions had district-wide responsibilities and therefore required a school administrator endorsement, which petitioner does not have; further, the DCIO position involved distinct tasks, such that it was not substantially similar to petitioner's previous positions for tenure purposes. The ALJ concluded that the Board did not violate petitioner's tenure rights when it selected a non-tenured staff member for the DCIO position. Accordingly, the ALJ granted the Board's motion for summary decision.

Upon review, the Commissioner denied the parties' cross motions for summary decision and remanded the matter to the OAL for further proceedings. In so doing, the Commissioner found, *inter alia*, that: the ALJ erred in determining that petitioner could not have earned tenure in the DC position because she did not hold a school administrator endorsement; circumstances surrounding various vacancy notices and job descriptions for the DCIO position that were identified during the proceedings raise genuine questions regarding whether additions to the job description for the DCIO position – which were made subsequent to the filing of petitioner's appeal – are meaningful; these questions are critical to determining both the appropriate endorsement and whether the DCIO position is substantially similar to the DC position, such that petitioner may assert tenure rights to the DCIO position.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

105-21

OAL Dkt. No. EDU 07213-20
Agency Dkt. No. 158-7/20

New Jersey Commissioner of Education

Final Decision

Katherine Herbst,

Petitioner,

v.

Board of Education of the Village of Ridgefield Park, Bergen County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto, have been reviewed and considered.

The petitioner in this matter, who had served as the Ridgefield Park school district's Assistant Principal/Curriculum Coordinator (AP/CC) and Director of Curriculum (DC), claims that the Board violated her tenure rights when it appointed a non-tenured staff member to the newly created position of Director of Curriculum, Instruction, and Operations (DCIO). The Administrative Law Judge (ALJ) found that the matter was appropriate for summary decision and concluded that petitioner did not earn tenure in her positions as AP/CC and DC because those positions had district-wide responsibilities and therefore required a school administrator endorsement, which petitioner does not have. The ALJ further found that the DCIO position involved distinct tasks, such that it was not substantially similar to petitioner's positions for tenure purposes. The ALJ concluded that the Board did not violate petitioner's tenure rights

when it selected a non-tenured staff member for the DCIO position. Accordingly, the ALJ granted the Board's motion for summary decision.

In her exceptions, petitioner argues that her service in the AP/CC and DC roles gave rise to tenure rights, pointing to precedent holding that when the duties of a position in which an employee has acquired tenure are substantially identical to the duties of the position that the employee seeks, a board of education may not sidestep the employee's tenure rights by merely renaming the position or tacking on additional meaningless requirements. Petitioner also contends that the plain language of *N.J.A.C.* 6A:9B-12.3(a) and (b) allows holders of a principal endorsement to serve in the director title at issue in this matter, but the ALJ disregarded the regulations and the District's own job descriptions in concluding that she could not achieve tenure because she did not possess a chief school administrator endorsement, instead improperly relying on a job description that was created only after the petition of appeal was filed. Finally, petitioner claims that the ALJ failed to take judicial notice of a communication from the Department of Education (DOE), indicating that individuals could serve as directors in a district-level role under either the chief school administrator or principal endorsements.

In reply, the Board argues that petitioner did not hold the appropriate endorsement to obtain tenure in a director position with district-wide responsibilities, and that – even if she had – she is not entitled to the new position involving operations because it is not substantially similar to her former position. The Board also contends that the ALJ properly considered all versions of the job description for the DCIO position and properly refused to take judicial notice of the DOE communication.

Upon review, the Commissioner disagrees with the ALJ that petitioner could not earn tenure as Director of Curriculum. Although *N.J.A.C.* 6A:9B-12.3(a) requires anyone

serving in a "position that involves services as a district-level administrative officer" to possess a school administrator endorsement, *N.J.A.C.* 6A:9B-12.3(b) provides that a principal endorsement is sufficient to serve in a position as "an administrative officer of a school *or other comparable unit* within a school *or school district*." (emphasis added). Notably, while the general position of assistant superintendent is a district-level position requiring a school administrator endorsement, *N.J.A.C.* 6A:9B-12.3(a), the position of assistant superintendent for curriculum and instruction is specifically identified as a position for which the principal endorsement is sufficient. *N.J.A.C.* 6A:9B-12.3(b). This distinction demonstrates that the person serving as an assistant superintendent for curriculum and instruction should be deemed to be serving as the administrative officer of a comparable unit within a school district. The Commissioner finds no reason to treat the title of "Director of Curriculum" as different than "assistant superintendent for curriculum and instruction" – indeed, if anything, "Director" would suggest a lower level of district-wide responsibility than "assistant superintendent." The Commissioner has previously noted that a principal endorsement was sufficient when the duties of a position included "some district-wide responsibilities but were nonetheless limited to the realm of instruction and/or curriculum. For such a discrete, program specific position with jurisdiction over a defined 'unit' a principal or supervisor endorsement was sufficient." *Perna v. State-Operated School District of the City of Paterson*, Commissioner Decision No. 2-12 (Jan. 4, 2012) (discussing *Matarazzo v. Bd. of Educ. of the Borough of Cliffside Park*, Commissioner Decision No. 127-04 (March 18, 2004)).[1]

However, while the Commissioner concludes that petitioner could have earned tenure as Director of Curriculum with a principal endorsement, she is unable to conclude on the

[1] Because the Commissioner bases this conclusion on the language of *N.J.A.C.* 6A:9B-12.3 that is specific to curriculum and instruction positions, as well as prior decisions, she finds it unnecessary to address the email from Robert Higgins concerning the appropriate endorsements for director titles in general.

current record whether petitioner did earn tenure. As petitioner acknowledges, her time in the DC position was not long enough to earn tenure pursuant to *N.J.S.A.* 18A:26-6, which requires service in a promotional or transfer title for two academic years plus the beginning of the next academic year. Petitioner therefore urges the Commissioner to count her time serving in the position of AP/CC, arguing that the job duties of the AP/CC and DC positions are substantially the same. While the job description for the AP/CC position appears to be substantially similar to the job description the Board approved shortly before petitioner was transferred to the DC title, that job description was revised several months later. The ALJ noted that the job duties in the revised description were more expansive but encompassed the same tasks as the original job description. However, the Commissioner finds that the differences raise genuine issues of material fact about the actual duties and responsibilities of each position that preclude summary decision on the issue of whether the positions were substantially similar, and therefore whether they can be combined for purposes of determining whether petitioner met the time requirements of *N.J.S.A.* 18A:26-6.[2]

Additionally, even if the facts demonstrate that the AP/CC and DC positions are substantially similar, and thus that petitioner obtained tenure as DC, further inquiry is necessary to determine whether she is entitled to the position of DCIO. First, additional information is needed to determine the appropriate endorsement for the DCIO position. Should the evidence demonstrate that the school administrator endorsement is appropriate, then petitioner may not

[2] The Commissioner notes that if the decision on remand concludes that the AP/CC and DC positions are substantially similar and that petitioner's time as AP/CC should be combined with her time as DC, her time as AP/CC cannot also be combined with her time as assistant principal to afford her tenure as assistant principal. *N.J.S.A.* 18A:28-5(c) provides that tenure in any of the administrative or supervisory positions enumerated in the statute – including assistant principal – shall accrue only by employment in that position. If petitioner's time as AP/CC is considered employment as DC, then petitioner will not have served as assistant principal for the time period required by law. Furthermore, service in a promotional or transfer title is only tacked onto a former title under *N.J.S.A.* 18A:28-6 if the employee does not achieve tenure in the promotional or transfer title, so if petitioner's time is included in earning her tenure as DC, this provision cannot apply to her circumstances.

serve in this role, even if she did acquire tenure as DC, because she does not possess a school administrator endorsement. While the ECS has approved the unrecognized title of DCIO with an endorsement of school administrator, the ultimate authority to determine the appropriate certification and title rests with the Commissioner. *See Nicholas Duva v. State-operated School District of the City of Jersey City, Hudson County*, State Board Decision No. 56-99 (March 6, 2002), and *Jack A. Perna v. State-Operated School District of the City of Paterson, Passaic County*, Commissioner Decision No. 2-12 (January 4, 2012). The circumstances surrounding the various vacancy notices and job descriptions for the DCIO position that have been identified during the course of the proceedings raise genuine questions regarding whether the additions to the job description for the DCIO position are meaningful; these questions are critical to determining both the appropriate endorsement and whether the DCIO position is substantially similar to the DC position, such that petitioner may assert tenure rights to the DCIO position.

Accordingly, the parties' cross-motions for summary decision are denied, and the matter is remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 13, 2021
Date of Mailing: May 18, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 07213-20
AGENCY DKT. NO. 158-7/20

KATHERINE HERBST,
Petitioner,
v.
RIDGEFIELD PARK BOARD OF EDUCATION,
Respondent.

Andrew L. Schwartz, Esq., for petitioner (Schwartz Law Group, LLC, attorneys)

Kerri A. Wright, Esq., for respondent (Porzio, Bromberg & Newman, P.C., attorneys)

Record Closed: December 29, 2020 Decided: February 11, 2021

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

Petitioner Katherine Herbst did not possess a school administrator endorsement and served in various director positions with the Ridgefield Park School District

(District), encompassing district-wide responsibilities. Did petitioner earn tenure as a director? No. Under N.J.A.C. 6A:9B-12.3(a), a district-level administrative officer must hold a school administrator endorsement for the requisite time to earn tenure under either N.J.S.A. 18A:28-5 or -6.

PROCEDURAL HISTORY

On July 16, 2020, petitioner filed a Verified Petition with the Commissioner of Education (Commissioner) contesting a non-tenured staff member's appointment to the newly created title of Director of Curriculum, Instruction, and Operations (DCIO). Petitioner asserts that because she served as an Assistant Principal/Curriculum Coordinator (AP/CC) and Director of Curriculum (DC), she attained tenure as a director under N.J.S.A. 18A:28-5 and -6, with seniority rights under N.J.A.C. 6A:32-5.1.

Petitioner maintains that the Ridgefield Park School District's action in removing petitioner from the previous DC title and replacing her with a non-tenured staff member constituted a violation of her tenure and seniority rights. Petitioner seeks reinstatement to the DCIO title with all back pay and benefits.

On August 6, 2020, the District filed a motion to dismiss the petition in lieu of answer.

On August 10, 2020, the Department of Education (DOE) transmitted this case to the Office of Administrative Law, as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -13, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On September 3, 2020, I held a pre-hearing conference wherein the parties agreed that the material facts were undisputed, and no hearing was necessary to resolve the legal issue presented. Moreover, the parties agreed that the District's

motion to dismiss would be considered a motion for summary decision. See R. 4:6-2 (motion to dismiss "shall be treated as one for summary judgment" when considering matters outside the pleadings).

On September 7, 2020, petitioner filed her response and cross-motion for summary decision, and on September 24, 2020, the District replied.

On October 15, 2020, petitioner responded to the District's opposition, and on November 2, 2020, the District presented its sur-reply.

On November 18, 2020, I scheduled oral argument via Zoom. However, petitioner desired to submit previously unavailable materials. I granted petitioner's request and rescheduled the oral argument for December 10, 2020, via Zoom. On November 20, 2020, petitioner supplemented her supporting moving papers, including a certification attaching a 2017 e-mail from the DOE, Office of Induction and Certification, and on December 1, 2020, the District replied.

On December 10, 2020, I heard oral argument and closed the record.

On December 21, 2020, however, petitioner received documents under an Open Public Records Act (OPRA) request designating the 2017 e-mail as an official record and sought consideration of these materials, and I re-opened the record.

On December 29, 2020, the District replied, and I again closed the record.

FINDINGS OF FACT

Based on the documents submitted in support of and in opposition to the motions for summary decision, when viewed in the light most favorable to the non-moving party, I **FIND** the following as **FACT** for purposes of these motions only:

The District employed petitioner as a mathematics teacher with the required mathematics teacher certificate from 2002 until September 2008, and she acquired tenure as a teacher.

From September 2008 until August 2015, petitioner served as a supervisor of mathematics with the appropriate supervisor certificate, and petitioner attained tenure as a supervisor. After that, petitioner continued her service in the District as a mathematics supervisor and began performing an assistant principal's responsibilities. Effective January 1, 2016, petitioner was promoted to the title of assistant principal, and at all times while performing assistant principal duties, petitioner possessed the principal certificate.

Petitioner does not hold a New Jersey Administrative Certificate with an endorsement as a school administrator.

On June 9, 2017, Robert Higgins, the DOE's Office of Induction and Certification director, e-mailed all executive county superintendents (ECS) and certification personnel regarding principal endorsements. Higgins advised that the DOE intended to clarify the code that "anyone holding a chief school administrator endorsement, or a principal endorsement may serve as a director either district-wide or in a school building (or its equivalent)." Notably, the director designated the e-mail as "confidential." After the e-mail, the DOE made no regulatory changes to effectuate this clarification. The e-mail is not available on the DOE website.

On June 28, 2017, the District abolished the District's Assistant Superintendent of Curriculum and Instruction position because of a reduction in force, and no longer employed any assistant superintendent. The District has several schools.

On September 1, 2017, the District transferred petitioner to the AP/CC title. Qualifications include a valid certification as a principal in New Jersey, a master's degree or higher from an accredited college or university, and a minimum of five years

of teaching experience. The position's goal was "to provide leadership, supervision, and coordination of the total educational program within the school and coordinate a K through 12 curriculum, professional development, and standardized testing." (Emphasis added). Yet, many responsibilities were district-wide. Indeed, the role included:

- The oversight and implementation of district-wide professional development plans,
- Serving as the "District Testing Coordinator,"
- Selection, placement, and orientation of new district personnel, and
- Development and coordinating district-wide educational programs with Little Ferry.

Effective July 1, 2018, the District reassigned petitioner to the DC title, established by the District's Board of Education (BOE) on May 23, 2018. The DC position included the same qualifications. Yet, the goal changed from coordination of the educational program "within the school" to "within the District." Moreover, the DC now reported to the superintendent, not the principal. The DC title now excluded the obligations of "coordinating major [Jr. Sr. High School] events (BTSN, parent-teacher conferences, sports dinner academic awards, etc.)" and the "supervision of departments as assigned." All other performance responsibilities of the AP/CC title remained the same for the DC position, including district-wide duties.

Given petitioner's service under the promotional title of assistant principal from January 1, 2016, until June 30, 2018, she attained tenure as an assistant principal.

On November 14, 2018, the BOE approved a revised job description for the DC, still noting that the position required a valid New Jersey Principal Certificate. The job description provided detailed and expanded performance responsibilities under designated headings of "curriculum and instruction," "meetings and committees," "constructive interaction with staff," "information and resources," "District Testing Coordinator," and "other" responsibilities. The District delineated thirty-four

performance responsibilities for this role compared to the fifteen listed under the May 23, 2018, job description, or the seventeen listed for the 2017 position. Even though more expansive, the 2018 job description was comparable to the prior roles. In other words, the previous duties were more general, but would broadly encompass the same tasks.

The District again employed petitioner as the Director of Curriculum and Instruction (DCI) from July 1, 2019, until June 30, 2020. The District used the DC and DCI titles interchangeably until creating a different tile in 2020. The District's organizational chart places the DCI directly below the superintendent of schools.

On September 11, 2019, petitioner corresponded to all District K–12 principals and supervisors regarding district-wide procedures for teaching staff evaluations and observations.

On April 24, 2020, the superintendent of schools verbally informed petitioner that she would be recommending petitioner's removal as DC and reassignment to the Assistant Principal, Attendance, and Discipline (APAD) title for the 2020–21 school year. Petitioner did not agree to her transfer.

On May 4, 2020, the superintendent provided written notification to petitioner of her transfer from the DC position to the APAD job.

On May 21, 2020, the superintendent posted the DC job, noting that the title required a valid New Jersey Administrative Certificate for a "district-level administrative" position. Qualifications now also included:

- Extensive knowledge of educational laws.
- Experience in grant writing.
- Ability to analyze statistical data and present findings to the public.

- Knowledge of State compliance regulations and preparation of compliance reports.
- Ability to work with diverse populations.

On June 10, 2020, the BOE approved the job description for the DCIO title replacing the DC position, advising that the role required either the New Jersey Administrative Certificate or the Principal Certificate. The November 1, 2018, and June 10, 2020, performance responsibilities only differed slightly, with thirty-eight duties in the new narrative. However, despite mirroring the new role qualifications identified in the May 20, 2020, posting, including grant writing, statistical data analysis, and preparation of State compliance reports, the June 10, 2020, performance responsibilities failed to list these duties.

Because the DCIO position is an unrecognized title, the Bergen ECS must approve the District's request to use the title and identify the appropriate certificate needed for the position under N.J.A.C. 6A:9B-5.5. In September 2020, the District submitted its proposal and revised job description for the title to the ECS, encompassing all qualifications listed in the May 21, 2020, posting. The District maintains that any delay in submitting the title for ECS approval was due to difficulties in planning for schools' re-opening during the COVID-19 pandemic. The revised description now included an "operations" section noting that the DCIO would develop programs to "support the District's commitment to social justice and to ensure an accessible, inclusive, diverse, and equitable educational environment." The "operations" section also required the analysis of statistical data, preparation of State compliance reports, and availability to assume the superintendent's duties in the superintendent's absence. Lastly, performance responsibilities included a section entitled "grant writing."

On September 16, 2020, the Bergen ECS approved the title and determined that the position required a school administrator endorsement. On that same date, the BOE approved the corrected description for the DCIO title.

Petitioner applied for the DCIO position but was not selected.

The District appointed a non-tenured staff member to the DCIO title.

On November 19, 2020, the Board made an OPRA request for "correspondence from Robert Higgins to all Executive County Superintendents regarding the certification necessary to be a Director during the period of June 5, 2017 through June 5, 2018."

On December 1, 2020, the State denied the request, stating that no such record was made or maintained by the DOE.

On December 3, 2020, petitioner made a similar OPRA request for "correspondence from the Office of Certification and Induction and/or Robert Higgins to the State County Executive Superintendent offices regarding service in the title of 'director' under either the chief school administrator or principal endorsement between the months of May 2017 and September 2017." Petitioner's request also included background information regarding the "confidential draft" letter and seeking the final official letter.

On December 21, 2020, petitioner received a copy of the June 9, 2017, e-mail as a DOE government record responsive to the OPRA request.

DISCUSSION AND CONCLUSIONS OF LAW

Summary-Decision Standard

A party may move for summary decision upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion shall be served with briefs, with or without affidavits. When the filed papers and discovery, together with any affidavits, show that no genuine issue of material fact exists and that the moving party is entitled to prevail as a matter of law, the judge may grant the motion. N.J.A.C. 1:1-12.5(b). When

such a motion is made and supported, an adverse party, to prevail, must submit an affidavit setting forth specific facts showing that a genuine issue of material fact exists that can only be determined in an evidentiary proceeding. Ibid.

Even though a statute calls for a "hearing," where a motion for summary decision is made and supported by documentary evidence and where the objector submits no evidence to demonstrate that a genuine issue of material fact exists, the motion procedure constitutes the hearing and no trial-type hearing is necessary. Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120–21 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

To determine whether a genuine issue of material fact exists that precludes summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to demonstrate that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins., 142 N.J. 520, 540 (1995).

Moreover, even if the non-movant comes forward with some evidence, the court must grant summary judgment if the evidence is "so one-sided that [the movant] must prevail as a matter of law." Ibid. at 536 (citation omitted). If the non-moving party's evidence is "merely colorable or is not significantly probative," the judge should not deny summary judgment. Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

In this case, no genuine issue as to the material facts exists, and the only question presented is whether petitioner obtained tenure in the title of director. More pointedly, no genuine issue exists that petitioner does not possess a New Jersey Administrative Certificate with a school administrator endorsement or whether she held a position with district-wide responsibilities from September 1, 2017, through June 30, 2020. During this period, petitioner possessed a principal endorsement, and the District undeniably only required the principal endorsement. Moreover, the District created the unrecognized title of DCIO for the 2020–21 school year, ultimately requiring a school

administrator endorsement, and hired a non-tenured staff member to serve in that role despite petitioner's application for the position. Since these facts are clear and undisputed, I **CONCLUDE** that this case is ripe for summary decision.

Tenure Requirements

Tenure laws, N.J.S.A. 18A:28-1 to -18, define the conditions under which teaching staff members can attain the security of tenure, and seek to aid "the establishment of a competent and efficient school system by affording teaching staff members 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528–29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)).

Courts describe tenure as a "statutory right" imposed upon a teaching staff member's contractual employment status. Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962), cert. denied, 371 U.S. 956 (1963). Indeed, the "right to tenure is created and governed entirely by statute." Breitwieser v. State-Operated Sch. Dist. of Jersey City, 286 N.J. Super. 633, 637 (App. Div. 1996).

Under N.J.S.A. 18A:28-5(a), teaching staff members must hold certificates required by their positions for a requisite time to be protected by tenure laws:

> The services of all teaching staff members employed prior to the effective date of P.L.2012, c.26 (C.18A:6-117 et al.) in the positions of teacher, principal, . . . assistant principal, vice-principal, assistant superintendent, and all school nurses . . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect . . . , shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming

> such a teaching staff member or other just cause . . . after employment in such district or by such board for:
>
> (a) Three consecutive calendar years . . . ; or
>
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years.
>
> [Emphasis added.]

Moreover, under N.J.S.A. 18A:28-6(b), a tenured or tenure-eligible teaching staff member promoted or transferred to another position will not obtain tenure until (1) the expiration of two consecutive calendar years of employment in the new position; or (2) employment in the new position for two academic years and at the commencement of the next academic year; or (3) employment within any three consecutive academic years equaling more than two academic years. Also, if service in the promotional title ceases prior to the necessary period of time to attain tenure, then "the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held." N.J.S.A. 18A:28-6(b).

Accordingly, to gain tenure a teaching staff member must: (1) work in a position that requires a teaching certificate; (2) hold the appropriate certificate; and (3) serve the requisite period of time. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 74 (1982).

Under N.J.A.C. 6A:9B-5.1(a), "any person employed as a teaching staff member by a district board of education shall hold a valid and appropriate certificate." Indeed, N.J.S.A. 18A:28-5 excludes from tenure protection those teaching staff members "who are not the holders of proper certificates in full force and effect." Also, N.J.S.A. 18A:28-4 provides that "[n]o teaching staff member shall acquire tenure in any position in the

public schools . . . who is not the holder of an appropriate certificate for such position, issued by the State Board of Examiners [State Board], in full force and effect . . . ."

The State Board issues certificates under rules and regulations prescribed by the State Board of Education. N.J.S.A. 18A:6-38. Under N.J.A.C. 6A:9B-5.3(a), the State Board issues three categories of educational certificates: Instructional, Administrative, and Educational Services. Further, the State Board designates endorsements for each type of certificate, identifying the specific area in which a certificate holder has authority to serve. Employment in a particular assignment requires that the educator hold the appropriate endorsement. Nelson v. Old Bridge Bd. of Educ., 148 N.J. 358, 363 (1997).

Here, the issue surrounds the required endorsement under an Administrative Certificate to perform the duties of the AP/CC and the DC. Under N.J.A.C. 6A:9B-12.3(a), an individual authorized to serve in "any position that involves services as a district-level administrative officer" must possess an endorsement as a school administrator. (Emphasis added.) Such positions include superintendent, assistant superintendent, and director. This endorsement also allows the holder to serve as a principal or supervisor. Holders of this endorsement can "[p]rovide educational leadership by directing the formulation of districtwide goals, plans, policies, and budgets, by recommending their approval by the district board of education and by directing their districtwide implementation." Moreover, school administrator endorsement holders have the authority to "[r]ecommend for approval by the district board of education all staff appointments and other personnel actions," as well as to "[d]irect school district operations and programs," "[s]upervise and evaluate building administrators and central office staff, including school business administrators," and "[o]versee the administration and supervision of school-level operations, staff, and programs."

Petitioner holds a principal endorsement, but no school administrator endorsement. Under N.J.A.C. 6A:9B-12.3(b), "any position that involves service as an administrative officer of a school or other comparable unit within a school or school

district" requires a principal endorsement. (Emphasis added). Such positions include assistant superintendent for curriculum and instruction, principal, assistant principal, vice principal, and director. The holder of a principal endorsement can also serve in the position of supervisor. Principal endorsement holders have authority to "[p]rovide educational leadership by directing the formulation of goals, plans, policies, budgets, and personnel actions of the school or other comparable unit, by recommending them to the chief district administrator, and by directing their implementation in the school or other comparable unit." Also, such endorsement holders can "[d]irect and supervise all school operations and programs," "[e]valuate school staff," and "[d]irect the activities of school-level supervisors."

The District contends that petitioner's district-wide duties commencing September 1, 2017, required a school administrator endorsement until June 30, 2020. Without that endorsement, service in those roles, director or not, cannot count toward tenure. Thus, the District maintains that petitioner's length of service falls short of attaining tenure. Moreover, while the District required only the principal endorsement, its error does not absolve petitioner of the need to possess the school administrator endorsement. Indeed, the District asserts that if petitioner's position were correct, this would ignore the difference between an administrator with district-wide responsibilities and a principal without district-wide authority. In essence, petitioner's view would mean that no director position would require a director to hold the administrator's endorsement to obtain tenure.

The duties performed, and not the title of a position, are controlling to ascertain tenure accrual. See Christie v. Bd. of Educ. of E. Orange, 1985 S.L.D. 307 (Comm'r). Indeed, the analysis focuses on the job descriptions' duties to determine the certification and endorsement requirements of those assignments. Duva v. State-Operated Sch. Dist. of Jersey City, EDU 9801-98, State Bd. of Educ. (March 6, 2002), https://njlaw.rutgers.edu/collections/oal/.

The analysis in Duva is instructive because the State Board addressed the unrecognized director's title and how to determine what endorsement applies to that role. In Duva, the petitioner (Duva) served as a director for the Jersey City school district (Jersey City) from 1980 until 1998, holding both an administrator and a supervisor endorsement until the school district eliminated his position. Because he served as a director, Duva claimed that he acquired tenure rights entitling him to employment as a supervisor over any non-tenured individuals. The administrative law judge (ALJ) "concluded that [Duva] had achieved tenure as a 'director,' finding that a directorship constituted a distinct position for tenure purposes." Even though Duva possessed a supervisor endorsement, the ALJ determined that Duva's tenure rights from his service as a "director" did not "permit him to claim a supervisory assignment" because "director" and "supervisor" were "separately tenurable position[s]."

The State Board disagreed, holding that because "director" and "supervisor" are not explicitly listed in N.J.S.A. 18A:28-5 "there is no basis to hold that these assignments constitute 'separately tenurable positions.'" The State Board explained that N.J.S.A. 18A:28-5 initially defines the "scope" of tenurable positions, providing that "an individual must be a teaching staff member serving either in a capacity specifically designated in the statute or serving in a 'position' requiring him to hold an appropriate certificate in order to be eligible to achieve tenure." See also Ellicott v. Frankford Twp. Bd. of Educ., 251 N.J. Super. 342, 347 (App. Div. 1991).

Further, the State Board clarified that "the starting point for determining the scope of [Duva's] tenure protection is the certification that was required . . . to serve in the capacity" in which the school district employed him. Moreover, "[b]ecause [Duva's] service as a 'director' was in an unrecognized position title," examination of Duva's duties under the job description is necessary "to ascertain the certification requirements of those assignments." The State Board recognized that this determination usually fell within the responsibility of the county superintendent. However, because Jersey City did not submit Duva's positions to the county superintendent, the State Board exercised

its jurisdiction to determine the issue, having "ultimate administrative authority to determine certification."

In reviewing the job descriptions for the director assignments held by Duva, the State Board "conclude[d] that the duties of those assignments were of such character as to require that the individual serving in them possess an Administrative Certificate with an endorsement as a school administrator . . . to [statutorily] fulfill such functions." The State Board acknowledged that under N.J.A.C. 6:11-9.3 (now N.J.A.C. 6A:9B-12.3), the school administrator and principal endorsements authorize service as a "director." Still, the State Board determined that "an Administrative Certificate with an endorsement as a principal would not constitute appropriate certification," because "every job description under which [Duva] served involved district-level responsibilities," and the principal endorsement would not have authorized him to fulfill those responsibilities.

However, because Duva held a school administrator endorsement while serving as a director, the State Board found that "he fulfilled the statutory requirements of N.J.S.A. 18A:28-5." Moreover, "[Duva's] tenure protection under his Administrative Certificate extended to all assignments for which he was qualified by virtue of possessing a supervisor's endorsement," and, therefore, "upon abolishment of his director's assignment, [Duva] was entitled to be employed in assignments requiring a supervisor endorsement in preference to any non-tenured individuals." In other words, Duva earned tenure under his school administrator endorsement authorizing district-wide responsibilities, which extended to other assignments, such as a supervisor, for which he held an appropriate endorsement. See also N.J.A.C. 6A:9B-12.3(a) (holders of a school administrator endorsement may serve as a principal or supervisor).

The District primarily relies upon Perna v. State-Operated School District of Paterson, EDU 09761-09, Initial Decision (November 10, 2011), aff'd, Comm'r (January 4, 2012), http://njlaw.rutgers.edu/collections/oal/, which follows Duva's conclusions regarding the scope of school administrator endorsements. In Perna, the

Commissioner held that although Perna served in various district-wide director positions over the requisite three years, Perna did not earn tenure because he failed to possess the required school administrator endorsement. See also City Ass'n of Supervisors & Adm'rs v. State-Operated Sch. Dist. of Newark, EDU 00849-13, Initial Decision (August 27, 2014), https://njlaw.rutgers.edu/collections/oal/, adopted, Comm'r (August 13, 2015),[1] https://nj.gov/education/legal/ (where the ALJ explained in EDU 00849-13 that "the principal endorsement is intended to authorize its holder to perform school building level administrative functions," while the administrator endorsement holder is "responsible for . . . tasks at the central office or district-wide level").

As in this case, Perna's deciding issue was whether a principal endorsement was appropriate for service in various district-wide director positions. Similarly, the Paterson school district also failed to require the correct administrator endorsement for district-wide assignments. Regardless, the Commissioner held that the staff member must ensure that he or she has the proper endorsement for the position even where a district "improperly assigned the employee duties for which the employee is not certificated." Perna, EDU 09761-09, Comm'r, http://njlaw.rutgers.edu/collections/oal/. In essence, statutory requirements establish tenure by holding the "correct certificate and endorsement" for the position rather than by "intentional or unintentional actions of local school districts." Ibid.; see also Ledwitz v. Manalapan-Englishtown Bd. of Educ., 1988 S.L.D. 2497 (St. Bd.), aff'd, No. A-2861-87 (App. Div. Feb. 16, 1989) (holding that it is the "primary responsibility" of the staff member to obtain appropriate certification). In Perna, the Commissioner confirmed that he had discretion to send controversies to the OAL, and that an ALJ can make determinations about the appropriate certification for the Commissioner's consideration.

Moreover, a board of education does not have the authority to establish certification requirements that contradict the tenure laws. Jennings v. Bd. of Educ. of

[1] Initially, the Commissioner remanded the case for additional fact-finding, but later affirmed both Initial Decisions (EDU 00788-15, Initial Decision on Remand of EDU 00849-13 (July 13, 2015), https://njlaw.rutgers.edu/collections/oal/, adopted, Comm'r (August 13, 2015), https://nj.gov/education/legal/).

Highland Park, 1989 S.L.D. 1085 (St. Bd.). In Jennings, the petitioner (Jennings) held an endorsement to teach physical education but did not possess an endorsement to teach health, despite being hired to teach health. However, the State Board concluded that the school district's "improper action in assigning [Jennings] to teach health without the appropriate certification cannot be used to excuse [Jennings'] failure to acquire a health endorsement." Further, any reliance on the school district's actions was not reasonable given the "clear regulations to the contrary." Under the incorrect endorsement, Jennings' service did not count toward tenure despite his teaching health and the school district's representation that Jennings acquired tenure.

Petitioner here disagrees that she did not acquire tenure, noting that courts interpreting the tenure laws should "look to the substance rather than the form" of the title. Viemeister, 5 N.J. Super. at 218 (holding that a district cannot avoid tenure laws by abolishing one title and creating a substantially similar position under a different name). Petitioner served as the AP/CC from September 1, 2017, until June 30, 2018, and as the DC from July 1, 2018, through June 30, 2020. Petitioner maintains that she performed these services under a principal endorsement that contemplates the district-wide responsibilities she undertook in these roles, regardless of any limitations placed on an individual possessing only a principal endorsement. Indeed, the "principal" endorsement permits service as a "director" and "assistant superintendent for curriculum and instruction." Given petitioner's service as a "director" for the requisite time, she asserts that she earned tenure entitling her to the DCIO position. The District abolished the Assistant Superintendent for Curriculum and Instruction title and replaced it with variations of the same job. Thus, the District violated her tenure rights in hiring a non-tenured staff member for the DCIO job. Petitioner asserts that the District's attempt to change job titles while maintaining the position's substance should not discredit petitioner's service.

To support her position, petitioner relies upon Jacquelin v. Dennis Township Board of Education, EDU 9335-10, Initial Decision (November 16, 2012), aff'd, Comm'r (December 21, 2012), http://njlaw.rutgers.edu/collections/oal/. Petitioner highlights that

the Commissioner upheld the Jacquelin decision after Perna, and considers this decision to be analogous to her situation. In Jacquelin, the ALJ concluded that "[w]hile the expressed scope of authority granted to 'directors' under the administrator's endorsement versus a principal's endorsement is not perfect, clearly the [L]egislature authorized the holder of a principal's endorsement to be a 'director' with significant authority." Moreover, "[t]o upset the district's management alignment on a questionable interpretation of the term 'director' as it appears in both section (a) and (b) of the statute in question, after [the employee] has been in that title for [seven] years, would be a disservice to the district, the staff and students."

However, Jacquelin is distinguishable from this case. In 2005, the Dennis school district (Dennis) hired the current director of special education. In 2010, Dennis eliminated Jacquelin's director of curriculum and instruction position in a reduction in force, and Jacquelin only then contested the director of special education qualifications. Jacquelin possessed an administrator endorsement while the holder of the director of special education title did not. Yet, the current director of special education held a principal certificate with an endorsement as a teacher of the disabled. Significantly, the Commissioner concurred with the ALJ, noting that "the position of Director of Special Education/Child Study Team . . . did not require a School Administrator Endorsement because the position was not a district-wide administrative position." (Emphasis added.) Indeed, special-education services may be a "comparable unit within a school or district," as the director may have responsibilities to students throughout the district, but not the district as a whole. However, despite petitioner's urging, a DC cannot be considered an "administrative head" of a "unit of curriculum and instruction within the school district" without resolving the position's duties. Indeed, all positions held by petitioner included clear district-wide administrative responsibilities, and Jacquelin does not support petitioner's entitlement to tenure.

Petitioner also relies upon Still v. State-Operated School District of Camden, EDU 14246-16, Initial Decision (January 4, 2017), aff'd, Comm'r (February 21, 2017), http://njlaw.rutgers.edu/collections/oal/. In Still, the Commissioner noted that "holding

[Still] accountable in any way for the Board's administrative failure would contravene the principles of fairness and equity." Still served in the Camden school district (Camden) for nearly fourteen years as the technology coordinator, a position for which Camden required a teaching certificate. For less than two school terms, Still then served Camden in the lead educator title under a provisional principal certificate. Camden terminated Still as lead educator, advising her that she had no entitlement to other positions within Camden. Specifically, Still did not accrue tenure under the teaching certificate because technology coordinator was a non-instructional position. The ALJ rejected this argument, concluding that Camden required a teaching certificate, that Still possessed the certificate, and that Still accrued sufficient time to earn tenure under the certificate. Here, petitioner held the certificate required by the District's approved job descriptions, and, therefore, petitioner maintains that she earned tenure as a director under the principal endorsement.

Yet, Still also presents a different situation. In Still, Camden required a teaching certification, and Still possessed this certificate. Unlike this case, Camden did not assign duties to Still for which Still did not hold a required certificate or endorsement. The ALJ concluded that Camden's later attempt to dispute Still's tenure as a teacher because the technology coordinator position was "non-instructional" was unfair because Still held a teaching certificate. Indeed, the Commissioner rejected Camden's arguments regarding Still's lack of classroom instruction as a technology coordinator because "a teaching staff member has tenure in all positions for which his instructional certificate qualifies him." Still, EDU 14246-16, Comm'r Decision, http://njlaw.rutgers.edu/collections/oal/ (quoting Ellicott, 251 N.J. Super. at 349). On the contrary, the "director" position is an unrecognized title under N.J.S.A. 18A:28-5, where the determination of the necessary endorsement requires analysis of the duties performed in that role. Petitioner does not hold a school administrator endorsement authorizing her to perform district-wide tasks, whereas Still possessed a teaching certificate qualifying her to teach. Therefore, Still does not support petitioner's entitlement to tenure.

While petitioner relies upon a confidential e-mail to all ECS and certification personnel to support that a principal endorsement permits the holder to perform district-wide administrative responsibilities, the regulations do not allow those activities. To date, the Department of Education proposed no administrative code changes to effectuate a clarification of permitted duties under the principal or school administrator endorsements. Under N.J.S.A. 52:14B-4(a), such code amendments would require publication and a public comment period before adoption. In Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313, 331–32 (1984), the Supreme Court explained that administrative guidance must often occur by rule-making, including when it "prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization," or "reflects an administrative policy that . . . was not previously expressed in any official and explicit agency determination, adjudication or rule."

Moreover, under N.J.S.A. 52:14B-3a(b), "[n]o State agency shall utilize regulatory guidance documents that have not been adopted as rules . . . unless the agency makes such documents readily available to the regulated community through appropriate means, including but not limited to posting in a prominent place on the website for the agency." Further, a regulatory guidance document not yet adopted as a rule cannot "impose any new or additional requirements that are not included in the State or federal law or rule that the regulatory guidance document is intended to clarify or explain." N.J.S.A. 52:14B-3a(c)(1).

The e-mail contains a confidential designation and is not posted on the DOE website or other DOE source. Moreover, the e-mail cannot be considered readily available to the regulated community if OPRA requests yield differing results concerning its status. Significantly, the clarification would permit a principal endorsement holder to effectuate district-wide responsibilities not previously authorized under the regulation; it requires rulemaking. Therefore, I **CONCLUDE** that considering the e-mail as dispositive, or even guidance, on the responsibilities allowed under the principal endorsement is not appropriate.

A review of the various job descriptions reveals that, while serving as an AP/CC and DC, petitioner was responsible for planning and implementing district-wide professional-improvement plans, acting as the "District Testing Coordinator," and selecting and placing new personnel in the District. Even though the DC's and AP/CC's duties appear comparable, the focus is whether petitioner performed district-wide responsibilities or did not. Like in Duva and Perna, petitioner's obligations specified in each job description under which she served involved district-level tasks. However, unlike in Duva, petitioner does not possess a school administrator endorsement.

Although a principal endorsement lists "director" as a position under the endorsement, N.J.A.C. 6A:9B-12.3(b) provides that "[t]he principal endorsement . . . [applies to] service as an administrative officer of a school or other comparable unit within a school or school district." The job descriptions for the titles held by petitioner demonstrate that petitioner's duties extended beyond the school and involved service as a district-level administrative officer outside the scope of petitioner's endorsement as a principal. Like in Perna, petitioner did not possess the administrator endorsement while serving in director positions with district-wide responsibilities. Therefore, I **CONCLUDE** that petitioner did not earn time toward tenure in the AP/CC or the DC position given her district-wide responsibilities without a school administrator endorsement. Moreover, I **CONCLUDE** that petitioner was primarily responsible for ensuring that she possessed the appropriate certification and endorsement for the positions she held, but she did not.

Even if petitioner obtained tenure, the DCIO title must be substantially similar to the DC position she held to provide petitioner with tenure rights over the non-tenured staff member. The District points to Dennery v. Passaic County Regional High School District #1, 131 N.J. 626, 640 (1993), which held that "[a] mere overlap in duties . . . does not mean that two positions are equivalent for tenure purposes. If a newly created position is similar to a tenure holder's abolished position but also requires additional

duties or different responsibilities, then the newly-created position is not considered to be substantially similar to the former position."

Undeniably, all roles involved district-wide responsibilities. However, the District highlights that the May 21, 2020, posting and the June 10, 2020, job description required different qualifications above and beyond those in the previous DC title. The new title involved operational tasks, including preparation of State compliance reports and implementing a diversity plan in educational programming, and required the availability to step into the superintendent's role in the superintendent's absence. Notably, the job also required knowledge and experience in grant writing. Yet, the June 10, 2020, performance responsibilities largely matched the duties in the November 1, 2018, job description, inadvertently not addressing the new tasks. Regardless, the job description submitted for ECS approval did not change the intended qualifications, but only included operations and grant-writing duties to match the new requirements. Petitioner's suggestion that the District added new duties to evade tenure obligations after filing her petition is unsupported. Instead, I **CONCLUDE** that the evidence demonstrates that the District intended the DCIO title to include distinct operational and grant-writing tasks, but the June 10, 2020, responsibilities were incomplete, and later corrected.

Petitioner also asserts that administrative errors do not allow school districts to avoid tenure rights accrued by individuals. Indeed, a school district that terminates an employee prior to earing tenure but allows the individual to remain in that role, whether under a different title or not, cannot discount time after discharge for tenure purposes. See Platia v. Bd. of Educ. of Hamilton, Mercer Cty., 434 N.J. Super. 382, 393 (App. Div. 2014) (citation omitted) (holding that "'because Platia was employed for the equivalent of more than three academic years . . . ,' tenure was conferred upon her"). Similarly, an "administrative oversight" that allowed an individual to complete the requisite period needed for tenure did not preclude that individual from earning tenure protections. Cohen v. Bd. of Educ. of East Brunswick, OAL Dkt. No. EDU 5643-81, Initial Decision (August 11, 1982), aff'd, Comm'r (September 30, 1982). However, neither case

involves a situation where the staff member did not hold the proper certification for the position at issue. Irrespective of the delay in presenting the DCIO title to the ECS for approval, this oversight is not of the same nature. Moreover, the incomplete job description approved on June 10, 2020, does not alter the new duties intended through the additional qualifications. The job description submitted to the ECS for authorization and then approved by the BOE included other responsibilities consistent with the new qualifications. Unlike in Platia and Cullen, the District terminated petitioner, and she did not serve in the new DCIO title.

Thus, I **CONCLUDE** that the DCIO title has several distinct additional job-performance responsibilities, making it dissimilar to petitioner's DC positions for tenure purposes. Moreover, the ECS determined that the title required a school administrator endorsement, which petitioner does not hold. Accordingly, I **CONCLUDE** that the District acted consistently with tenure and seniority requirements when it selected a non-tenured staff member to serve as the DCIO, and is entitled to prevail as a matter of law.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the District be **GRANTED** summary decision, and that petitioner be **DENIED** summary decision. I further **ORDER** that petitioner's Petition of Appeal be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 11, 2021

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: February 11, 2021

Date Mailed to Parties: February 11, 2021

ljb

106-21

106-21

New Jersey Commissioner of Education

Decision

Melanie Sohl,

Petitioner,

v.

Board of Education of the Town of Boonton, Morris County,

Respondent.

Synopsis

Petitioner, a tenured teacher in the respondent Board's school district, appealed the Board's decision to affirm the results of a harassment, intimidation, and bullying (HIB) investigation into petitioner's conduct. The HIB investigation had concluded that the petitioner committed an act of HIB when she allegedly said to an overweight student who was walking slowly to the front of the classroom, "[i]f there was a cupcake up there, you would move faster." Petitioner maintained that she had a good relationship with the student in question and did not commit an act of HIB. Further, she contended that the Board failed to comply with the due process requirements of the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq*. Petitioner filed a motion for summary decision, which was opposed by the Board.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; petitioner's due process rights were violated because the Board did not comply with the procedural mandates of the Act; the Board failed to provide petitioner with the opportunity to review the HIB investigatory report, as well as all witness statements and documentary evidence, as required pursuant to *N.J.S.A.* 18A:37-15b(6)(d); the Superintendent failed to submit a written summary of the HIB investigation in order to provide information about the content of the HIB report and any discipline imposed to the Board, as required under *N.J.S.A.* 18A:37-15b(6)(c); and after the HIB hearing, the Board – not the Superintendent – should have issued a detailed written decision in keeping with *N.J.S.A.* 37-15b(6)(e). Accordingly, the ALJ granted petitioner's motion for summary decision, remanded the matter to the Board for an HIB hearing in accordance with petitioner's due process rights under *N.J.S.A.* 18A:37-15 and ordered that the letter of reprimand be removed from the petitioner's personnel file.

Upon review, the Commissioner, *inter alia*, disagreed with the ALJ's determination that the petitioner was not afforded due process and that the Board failed to comply with the procedural requirements of the Act. As such, the Commissioner rejected the ALJ's decision to remand this matter for a Board hearing and instead remanded it to the OAL for a hearing on the merits. Petitioner will have the opportunity to challenge whether the Board's finding of HIB was arbitrary, capricious or unreasonable as this matter proceeds at the OAL. Additionally, the Board is not required to remove the letter of reprimand from petitioner's personnel file at this time. Accordingly, the Initial Decision was rejected and the matter was remanded to the OAL for a determination on the merits.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

106-21
OAL Dkt. No. EDU 05070-20
Agency Dkt. No. 102-5/20

New Jersey Commissioner of Education

Final Decision

Melanie Sohl,

Petitioner,

v.

Board of Education of the Town of Boonton, Morris County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) been reviewed and considered, as have the exceptions filed by the respondent Boonton Town Board of Education (Board), pursuant to *N.J.A.C.* 1:1-18.4. The petitioner did not file a reply.

This matter concerns an allegation of harassment, intimidation, and bullying (HIB) committed by a teacher against a student. Petitioner is alleged to have told an overweight student who was walking slowly to the front of the classroom, "[i]f there was a cupcake up there, you would move faster," in addition to other food-related comments. The student reported the alleged comment on January 15, 2020, and the following day, the school's Principal met with petitioner, along with the District's anti-bullying coordinator and the Boonton Education Association President. The anti-bullying coordinator then conducted an interview with petitioner on January 27, 2020, with the Board attorney, petitioner's attorney and the Principal in attendance. Thereafter, the Superintendent informed petitioner in writing that the HIB allegation was confirmed and that she would be required to undergo sensitivity training as a remedial

measure and would be issued a letter of reprimand. The Principal issued the letter of reprimand on February 4, 2020, which recounted that petitioner had admitted making the alleged "cupcake" comment and other food-related comments to the same student. Petitioner responded by letter clarifying that she had a good relationship with the student and "did not realize that the student might have taken the comment to mean anything other than a motivating comment to get them to the board quicker." She also explained that the student had previously asked for snacks or complained of being hungry, and while she denied making food comments toward the student, she has had many students who are motivated by snacks.

Prior to the Board hearing, the Superintendent submitted to the Board a summary of the HIB investigation and determination but did not appear to discuss discipline. Petitioner then appeared with her attorney in an executive session at the February 10, 2020 Board meeting, during which no testimony on behalf of the district was presented. The Board voted to uphold the finding of HIB, which was communicated to petitioner in a letter from the Superintendent the following day.

The Administrative Law Judge (ALJ) found that petitioner's due process rights were violated because the Board did not comply with the procedural mandates of the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* The ALJ remanded the matter so that petitioner could be afforded a new Board hearing, specifically finding: (1) pursuant to *N.J.S.A.* 18A:37-15b(6)(d), the Board should provide petitioner with the opportunity to review the HIB investigatory report, as well as all witness statements and documentary evidence; (2) the Superintendent's written summary to the Board regarding the HIB investigation should inform the Board of the contents of the HIB report and any discipline imposed, as required by *N.J.S.A.* 18A:37-15b(6)(c); (3) the Board, not the Superintendent, should issue a detailed written decision

after the hearing, in keeping with *N.J.S.A.* 37-15b(6)(e); and (4) the February 4, 2020 letter of reprimand should be removed from petitioner's personnel file. However, the ALJ found that there was no due process violation with respect to petitioner's opportunity to confront and cross-examine witnesses because the Act does not require a full adversarial hearing.

By way of exceptions, the Board argues that the ALJ erred in her analysis of the due process requirements under the HIB statute. Specifically, the Board argues that *N.J.S.A.* 18A:37-15b(6)(e) does not prohibit the Superintendent – the "CEO" of the Board – from conveying the Board's HIB determination to petitioner, and notes that this issue was not raised or briefed by either party. Additionally, the Board maintains that *N.J.S.A.* 18A:37-15b(6)(c) does not require that the Superintendent's report to the Board on the HIB investigation be written, and since this issue was decided *sua sponte* by the ALJ, the Board did not have the opportunity to submit a certification as to the verbal summary made to the Board during the hearing. The Board also points out that the ALJ improperly required that a "detailed written decision" be issued after the Board hearing because *N.J.S.A.* 18A:37-15b(6)(e) only requires that the Board affirm, reject, or modify the Superintendent's decision.

The Board also argues that the ALJ erred in remanding the matter back to the Board for a new hearing and removal of the reprimand because petitioner's due process rights were not violated. According to the Board, *N.J.S.A.* 18A:37-15b(6)(d) only requires that petitioner be informed as to the nature of the investigation, whether the district found HIB, and any discipline imposed, and does not require that the Board produce the full investigatory file, such as the witness statements or the HIB report. The Board maintains that petitioner was not deprived of a life, liberty or property interest and, nevertheless, she was fully aware of the allegations and had the opportunity to be heard at the Board hearing. Additionally, the Board

contends that the reprimand was issued to petitioner as a result of her inappropriate statements to a student – and not as an outcome to the HIB investigation – so she would have had to challenge it through the locally negotiated grievance process rather than as part of her HIB petition. For these reasons, the Board urges the Commissioner to reject the Initial Decision.

Upon review, the Commissioner disagrees with the ALJ's determination that the petitioner was not afforded due process and that the Board failed to comply with the procedural requirements of the Act. As such, the Commissioner rejects the ALJ's decision to remand this matter for a Board hearing and will instead remand this matter to the OAL for a hearing on the merits.

The Commissioner will address the three relevant provisions of the Act in turn. First, and most pertinent to this matter, *N.J.S.A.* 18A:37-15b(6)(d) states:

> [P]arents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within 5 school days after the results of the investigation are reported to the board. A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request. The board shall meet in executive session for the hearing to protect the confidentiality of the students. At the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents[.]

The Commissioner has previously established that teachers and other staff members who are accused of HIB are entitled to the same due process protections that are provided to students under the Act. *Ruth Young-Edri v. Board of Education of the City of Elizabeth, Union County,* Commissioner's Decision No. 174-19, decided July 8, 2019; *Stephen Gibble v. Board of*

Education of the Hunterdon Central Regional School District, Hunterdon County, Commissioner's Decision No. 254-16, decided July 13, 2016.

Here, petitioner was provided with two written communications regarding the investigation prior to the February 10, 2020 Board hearing: a January 28, 2020 letter from the Superintendent and a February 4, 2020 letter of reprimand from the Principal. The Superintendent's letter informed petitioner that the HIB investigation into her alleged actions was confirmed, and that the Board would vote on the results at its February 10 meeting. The letter further explained that the following measures were taken to address the situation: (1) Remedial Measures – Sensitivity Training; and (2) Consequence – Letter of Reprimand. The February 4, 2020 letter of reprimand memorialized the January 16, 2020 conversation:

> During our meeting, you admitted saying, "If there was a cupcake up there, you would move faster" to a student who was slowly making their way towards the front of the room to participate in answering a question. You had also mentioned that "food comments" were made, by yourself, to the same student during the study hall that you supervise. Regardless of rapport with a student, comments of this nature are improper, unprofessional, and must not be repeated. As the adult in the classroom, you are expected to act professionally at all times.

The Commissioner finds that when the two written communications are viewed in conjunction, petitioner was informed of the nature of the investigation, specifically of the cupcake comment that she was alleged to have said, along with the finding that she had admitted to making the comment. She was also informed that the district found evidence of HIB, and of the discipline being imposed in the form of sensitivity training and a letter of reprimand. Accordingly, as petitioner was provided with information about the investigation in advance of the Board hearing, the Commissioner finds that the Board met the requirements of *N.J.S.A.* 18A:37-15b(6)(d).

The ALJ relied upon *Young-Edri, supra*, in which, among other procedural violations, the petitioner was not provided with a written summary of the HIB investigation. The written letter of reprimand that Young-Edri received only informed her that she was a perpetrator in an HIB case, but did not recount any of the factual basis for that determination. *Id.* Additionally, in another matter, the Appellate Division issued an unpublished decision remanding an HIB matter for a new Board hearing and ordered the disclosure of the full HIB record, including the underlying investigative report and any reports or summaries. *J.L., on behalf of minor child, A.L. v. Board of Education of the Bridgewater-Raritan Regional School District, Somerset County*, A-2022-16T1 (App Div. Oct. 16, 2018).

Those cases are easily distinguishable from this matter. Contrary to *Young Edri*, petitioner did receive a written summary of the investigation; the letter of reprimand petitioner received explained the specific allegation against her. Additionally, the distinguishing factor in *J.L.* is that the accused child's parents were not informed about the HIB investigation until after the Board voted. Here, petitioner was aware of the HIB investigation: she participated in two meetings regarding the allegations, received two written communications, responded to the letter of reprimand acknowledging that she "did not realize that the student might have taken the comment to mean anything other than a motivating comment to get them to the board quicker," and she was represented by an attorney at the Board hearing. Petitioner was aware of the investigation and its findings, had the opportunity to be heard, and availed herself of her procedural due process rights.

The Commissioner agrees with the ALJ, however, that petitioner was not entitled to a trial-type adversarial hearing with the opportunity to cross-examine witnesses. The Act requires that a hearing be conducted in executive session and that the Board "*may* hear from the

school anti-bullying specialist about the incident, recommendations for discipline, or services, and any programs instituted to reduce such incidents." *N.J.S.A.* 18A:37-15b(6)(d) (emphasis added). Here, petitioner had the opportunity to present her own witnesses and evidence to refute the findings against her. As such, despite petitioner's arguments to the contrary, the Commissioner cannot find a procedural violation of *N.J.S.A.* 18A:37-15b(6)(d) that would require a new Board hearing.

Second, *N.J.S.A.* 18A:37-15b(6)(c) provides:

> [T]he results of each investigation shall be reported to the board of education no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent[.]

Here, following the completion of the HIB investigation, the Superintendent submitted a notice to the Board describing the allegations and the HIB determination. While the written notice does not appear to reference the discipline imposed, the statute does not specify the manner in which the Board must be informed. As it was not addressed by the parties in the briefing or certifications, it is unclear from the record what happened verbally at the Board meeting and whether the discipline imposed on petitioner was reported to the Board. As such, the Commissioner cannot find a procedural violation of *N.J.S.A.* 18A:37-15b(6)(c).

Finally, *N.J.S.A.* 18A:37-15b(6)(e) requires:

> [A]t the next board of education meeting following its receipt of the report, the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision. The board's decision may be appealed to the Commissioner of Education, in accordance with the procedures set forth in law and regulation, no later than 90 days after the issuance of the board's decision[.]

Following the Board's vote to sustain the HIB determination on February 10, 2020, the Superintendent advised petitioner by letter the following day that "the Board upheld your incident of January 14, 2020." The Commissioner disagrees with the ALJ that the statute prohibits the Superintendent from communicating the Board's decision. Additionally, the statute does not require a detailed decision. The statute simply requires that the Board "affirm, reject, or modify the superintendent's decision." *N.J.S.A.* 18A:37-15b(6)(e). As such, there is no evidence that the Board failed to comply with the requirements of *N.J.S.A.* 18A:37-15b(6)(e)

As the Commissioner has not found procedural deficiencies with the conduct of the Board's HIB investigation, a remand to the Board for a new hearing is inappropriate. Petitioner will have the opportunity to challenge whether the Board's finding of HIB was arbitrary, capricious or unreasonable as this matter proceeds at the OAL. Additionally, the Board is not required to remove the letter of reprimand from petitioner's personnel file at this time.[1]

Accordingly, the Initial Decision is rejected, and this matter is remanded to the OAL for a determination on the merits.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 18, 2021
Date of Mailing: May 18, 2021

[1] The Commissioner declines to address the Board's argument that the reprimand was not issued as an outcome of the HIB investigation, but rather as discipline subject to a challenge through the locally negotiated grievance process, as it is not necessary for this decision.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 05070-20
AGENCY DKT. NO. 102-5/20

MELANIE SOHL,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,
Respondent.

Joshua M. Forsman, Esq., for petitioner (Caruso Smith Picini, attorneys)

James L. Plosia Jr., Esq., for respondent (Plosia Cohen, attorneys)

Record Closed: February 3, 2021 Decided: February 24, 2021

BEFORE **SARAH H. SURGENT, ALJ**:

STATEMENT OF THE CASE

Petitioner Melanie Sohl (Sohl), a tenured teacher employed by respondent, the Board of Education of the Township of Boonton, Morris County (Board), appeals from its determination that she committed an alleged hate, intimidation, bullying (HIB) act against

an overweight student by referencing a "cupcake" as he walked toward the classroom chalkboard, along with making other "food comments" in his study hall. Sohl maintains her innocence and contends that the Board failed to comply with the due process requirements of the Anti-Bullying Bill of Rights Act (ABRA), N.J.S.A. 18A:37-13, et seq., and that its determination must therefore be reversed with prejudice. Sohl also maintains that in the alternative, if the matter is remanded, the Board must be ordered to comply with the ABRA at a subsequent Board hearing. The Board maintains that it did not violate Sohl's ABRA due process rights and that Sohl's motion for summary decision should be denied.

PROCEDURAL HISTORY

Sohl's petition of appeal with exhibits was filed by Crystal A. Alonso, Esq., (Alonso) of Caruso Smith Picini, P.C., with the Commissioner of Education (Commissioner) on or about April 30, 2020. (P-1). The Board's answer was filed with the Commissioner on or about May 19, 2020. (R-1). The matter was transmitted to the Office of Administrative Law (OAL) on May 20, 2020, where it was filed on June 2, 2020, to be heard as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. (C-1).

On a July 23, 2020 telephone conference, the parties indicated they would be cross-moving for summary decision, a briefing schedule was set, and Alonso represented that Sohl did not deny referencing a "cupcake," but asserted there were due process issues regarding discovery and the Board's February 10, 2020 hearing. The parties were directed to submit a joint exhibit list and joint stipulation of facts by August 14, 2020. On August 14, 2020, the Board sent a letter requesting a telephone conference and indicating that Alonso responded on August 13, 2020 via email to the Board's proposed joint submissions stating "I cannot agree to a Joint Exhibit List at this time as there are documents on your proposed list that have never been provided to me." (R-2). The Board indicated that Alonso failed to address its proposed joint statement of facts and the Board requested that the matter be set down for a plenary hearing.

On August 19, 2020, Alonso filed a motion for summary decision with supporting exhibits and certifications by Alonso and Sohl, pursuant to N.J.A.C. 1:1-12.5, denying Sohl's alleged HIB conduct and asserting due process issues. (P-2). The Board's opposition brief was filed on August 28, 2020, (R-3), along with a supporting certification by Judy Sorochynskyj, the District's anti-bullying coordinator (ABC), (R-4). The Board did not cross-move for summary decision, as there were no joint exhibits or stipulations to material facts.

Alonso filed Sohl's reply brief and exhibit on September 10, 2020. (P-3). On October 14, 2020, Joshua M. Forsman, Esq., (Forsman) represented Sohl on a telephone conference, and indicated that Alonso had left his law firm. Forsman indicated that the parties were trying to settle the case. On December 14, 2020, another telephone conference was held with the parties, who did not reach a settlement. Oral arguments on Sohl's motion were heard on January 13, 2021. On that date, the parties agreed that a genuine issue of material fact exists as to whether Sohl committed and/or admitted to the alleged HIB conduct, precluding summary decision on that issue. Thus, the issue of this summary decision is limited to whether Sohl received ABRA due process prior to and at the Board hearing.

The record was left open for ten days, so that the Board could forward the HIB investigation discovery it provided to Alonso on August 4, 2020, (R-7), fifteen days before Alonso filed Sohl's motion. The Board also volunteered to send letters exchanged between the Board and Alonso prior to the February 10, 2020 Board hearing, but Forsman wanted to pre-screen them, with an opportunity to object. Not having heard about the disposition of those letters, I held the record open and contacted the parties about their status on January 27, 2021.

A telephone conference was held on that issue on February 2, 2021. The Board had produced to Forsman all correspondence in its file related to this case, but conceded it was not sure why any of that correspondence was relevant to the due process issues

at hand. After hearing Forsman's objections to the relevance of the letters, the parties agreed that the Board would only submit to this forum a February 6, 2020 letter from the Superintendent to Alonso, and that Sohl would be estopped from arguing any due process issues about the letters Forsman urged to be excluded, should the matter be remanded to the Board. The February 6, 2020 letter was received from the Board on February 3, 2021, (R-5), and the record closed.

FACTUAL DISCUSSION AND FINDINGS

These salient facts are undisputed. I therefore **FIND**:

Sohl is a tenured mathematics teacher who has been employed by the Board for eleven years. Aside from the subject of this decision, there is no evidence that she has any prior disciplinary history as a teacher for the District. She was Boonton High School student G.T.'s mathematics teacher during the 2019–2020 school year and also supervised G.T.'s study hall. G.T. was at that time an overweight adolescent in the ninth grade.

On January 15, 2020, G.T. spoke with Jason Klebez, the school Principal (Principal), and alleged that on January 14, 2020, as he was walking to the chalkboard to do a math problem, Sohl said, in front of the entire class, "I bet if there was a cupcake up here you'd move a lot faster." G.T. reported that he was upset and embarrassed by the alleged comment. On January 16, 2020, the District's ABC interviewed G.T. about the alleged incident, with the Principal in attendance. G.T. confirmed the "cupcake" comment he had reported to the Principal, and further alleged that on several occasions in study hall, Sohl had made other food-related comments, such as "what are you doing over here; there's no food here." G.T. reported that he was embarrassed and humiliated by such comments, particularly because they were heard by other students, and he believed they disparaged his "physique."

On January 16, 2020, the Principal held a meeting with Sohl, the District's ABC, and Bob Davis, the Boonton Education Association President. The Principal questioned Sohl about the alleged "cupcake" comment. The parties now disagree as to whether during that interview Sohl "recalled" making that specific comment or any other alleged comments about food to G.T., and whether or not she volunteered that she had made other "food" comments to G.T. during study hall. At the conclusion of the meeting, the Principal advised Sohl that she would be contacted by the ABC for further investigation of the alleged HIB violation.

On January 16, 2020, the Board's attorney received a letter from Alonso stating that "[g]iven the nature of the underlying allegations, Ms. Sohl is more than willing to cooperate with the District by participating in an interview." (R-4 Ex. A). On January 27, 2020, Sohl was interviewed by the ABC, with Alonso, the Board's attorney, and the Principal in attendance. The parties now disagree as to whether during that interview Sohl admitted, denied, or did not recall making the alleged comments.

By letter dated January 28, 2020, Robert Presuto, the Boonton Superintendent of Schools (Superintendent) advised Sohl:

> In accordance with the provisions of the New Jersey Anti-Bullying Bill of Rights Act and the Boonton Board of Education Policy #5512, parents or guardians of the student who are parties of a HIB investigation shall receive information about the outcome of the investigation.
>
> You were reported to have committed an act of . . . (HIB) on January 14, 2020. The complaint was investigated by our staff and determined to be a **Confirmed Incident** of HIB. At its February 10th meeting, the Boonton Board of Education will vote on the results of the investigation.
>
> All acts of HIB are taken very seriously and we have taken every measure to ensure that the situation was addressed appropriately, which had included but not limited to [sic] the following:

Remedial Measures – Sensitivity Training
Consequence – Letter of Reprimand

We continue to be committed to providing a safe and productive educational environment.

If you acknowledge the result, no further action is necessary. If you are not in agreement with this result, you may request and receive a hearing with the Board of Education. This request must be received in writing within 45 days of this notice. This hearing shall be held within ten days of the request.

Please do not hesitate to contact my office with any questions or concerns you may have regarding this matter.

[(P-2 Ex. A) (bold and emphasis in original).]

By letter dated February 4, 2020, the Principal advised Sohl:

This letter confirms and memorializes our conversation on January 16, 2020 regarding the concern of inappropriate comments towards a student.

During our meeting, you admitted saying, "If there was a cupcake up there, you would move faster" to a student who was slowly making their way towards the front of the room to participate in answering a question. You had also mentioned that "food comments" were made, by yourself, to the same student during the study hall that you supervise. Regardless of rapport with a student, comments of this nature are improper, unprofessional, and must not be repeated. As the adult in the classroom, you are expected to act professionally at all times.

I have reviewed your personnel file and determined what disciplinary consequences are warranted. After much consideration I have decided that a positive approach to discipline would be beneficial for you and your classroom environment. The attached improvement plan must be completed by Friday, February 21, 2020.

Please review and sign this letter prior to February 5, 2020. You may choose to provide a written explanation of your behavior, and I would be happy to attach it to this letter. If you

> refuse or fail to sign the copy of this letter by February 5, 2020, the letter will still be placed in your personnel file.
>
> I, Melanie Sohl have met with administration and had an opportunity to review this reprimand. I have received a copy and have been given the opportunity to provide a written response.
>
> [(P-2 Ex. C).]

The Superintendent was copied on that letter, which was signed by the Principal and Sohl, who wrote under her signature, "IN RECEIPT ONLY." By letter dated February 4, 2020, Sohl wrote and signed a lengthy written response stating, in relevant part, that during the January 16, 2020 meeting,

> I did not recall the exact wording of such made comment, I did however confirm there was a reference to food made to serve as a motivating factor.
>
> I proceeded to explain my relationship with the student and that I did not realize that the student might have taken the comment to mean anything other than a motivating comment to get them to the board quicker.
>
> . . . .
>
> I had asked the Principal if I was allowed to apologize to the student as my words were never intended to be hurtful in anyway [sic].
>
> [(P-2 Ex. C).]

By letter also dated February 4, 2020, Alonso wrote to the Board's attorney, confirming that she had received the Superintendent's January 28, 2020 letter to Sohl, and requesting that a Board hearing be scheduled "at your earliest convenience," so that Sohl could "present her appeal." (P-2 Ex. D). Sohl and Alonso appeared before the Board in an executive session on February 10, 2020.

Sohl now alleges that prior to and during the Board hearing,

> [n]o evidentiary materials or discovery from the investigation were ever provided to me. I never received witness statements. I never received a findings report from the HIB investigator. At the "hearing," no evidence was presented against me by neither [sic] the Board nor [sic] Superintendent. The Superintendent was present at the "hearing" and remained silent throughout. My attorney and I were permitted to make brief statements to the Board.
>
> [(P-2 Sohl Certif. ¶¶ 13-14).]

By letter dated February 11, 2020, the Superintendent advised Sohl that at the February 10, 2020 Board meeting, "the Board upheld your incident of January 14, 2020. The incident will remain confirmed." (R-6). That was the entirety of the communique.

The HIB file discovery which the Board provided to Ms. Alonso on August 4, 2020 and to this Tribunal on January 13, 2021 includes Sohl's February 4, 2020 above-described response letter to the Principal's February 4, 2020 letter, and a three-page "Harassment, Intimidation, & Bullying Incident Report Form" dated January 15, 2020, which contains no new information. (R-7). However, it also includes an undated, unsigned two-page summary of G.T.'s January 16, 2020 interview and Sohl's January 27, 2020 interview, along with a conclusion that the alleged incident was "a confirmed HIB." (R-7).

The summary of G.T.'s interview contains information that was not conveyed to Sohl by the Principal's February 4, 2020 letter, including that some of G.T.'s peers laughed at the alleged "cupcake" comment, while others told G.T., "[t]his is messed up." (R-7). It also states that G.T.'s friend, whose name was redacted, encouraged G.T. to report the incident to a Mrs. Soni (Soni), which G.T. did, that Soni referred it to a Mr. Nash, and that G.T. also reported the incident to his mother. (R-7). It describes G.T.'s feelings in much greater detail, including that he felt Sohl frequently belittled him, made him "look dumb," and that he wanted to switch to another math class to get away from Sohl. (R-7).

The Board's August 4, 2020 discovery production also includes a one-page Investigation Report Form, an Investigation Flowchart and Timelines, and an unsigned document entitled "BHS HIB #7 Confirmed # 036854," which summarizes the investigation and findings. (R-7). "Exec 1/27/20" and "Affirm 2/10/20" are handwritten on that document, which corresponds with the Board's January 27, 2020 meeting at which the Superintendent was to present a summary of the allegations and factual findings, and Sohl's February 10, 2020 hearing before the Board. (R-7).

The Parties' Written and Oral Arguments

By way of Alonso's moving and reply briefs, Sohl argues that the Board violated her due process rights under N.J.S.A. 18A:37-15b(6)(d) because "she never received crucial information about the HIB investigation, including, but not limited to, the evidence gathered during the course of the investigation," and because "[d]uring the hearing, the Board failed to produce any evidence in support of [the Superintendent's] determination that Ms. Sohl was guilty of violating the [ABRA]." She complains that the Superintendent did not testify or speak at the hearing, and that she had no opportunity "to face her accuser, cross-examine witnesses or challenge whatever evidence was gathered during the HIB investigation," because "[n]o one testified to their alleged statements and accusations at the 'hearing.'"

Sohl argues that those alleged violations of her due process rights "severely prejudiced her ability to defend against the [HIB] allegation." She relies upon an unpublished Appellate Division decision, J.L. v. Bd. of Educ., No. A-2022-16T1 (App. Div. Oct. 16, 2018), https://njlaw.rutgers.edu/collections/courts/appellate/a2022-16.opn.html, (C-2), and Young-Edri v. Bd. of Educ. of City of Elizabeth, 2019 N.J. AGEN LEXIS 403 (May 30, 2019), adopted Comm'r, 2019 N.J. AGEN LEXIS 845 (July 8, 2019), (P-3 Ex. A), for the proposition that she was denied due process because she did not receive the entire HIB investigation file and a "full and proper hearing" before the Board.

At oral arguments on Sohl's motion, the parties agreed that the HIB investigation file was not provided to Sohl prior to the Board hearing, that it was provided to Alonso on August 4, 2020,[1] fifteen days prior to Alonso's filing of Sohl's motion, and that there are no other documented witness statements aside from G.T.'s and Sohl's.

Forsman maintained that all HIB discovery was required to be provided under the ABRA prior to the hearing, whether or not Alonso requested it. However, he conceded that Alonso was an experienced attorney at the time of the Board hearing, that she did not request any discovery prior to the hearing, and that he did not know why she proceeded to the hearing without it, because Sohl's law firm was well aware of N.J.S.A. 18A:37-15. Forsman asserted that although there were no other witness statements, full discovery may have improved Sohl's defense by triggering further investigation and potential interviews with other students who may have witnessed the alleged incident.

The Board's opposition brief asserts that Sohl's due process rights were not violated, as she "was fully apprised of the nature of the allegations against her," and "she acknowledged making the offending statements to the student." The Board relies upon L.K. v. Mansfield Twp. Bd. of Educ., 2019 N.J. AGEN LEXIS 62 (Jan. 16, 2019), rejected on other grounds Comm'r, 2019 N.J. AGEN LEXIS 345 (April 22, 2019), for the proposition that the Board was not required to produce testimonial evidence at the hearing. It also relies upon DeFalco v. Hamilton Twp. Bd. of Educ., 2019 N.J. AGEN LEXIS 515 (June 25, 2019), adopted Comm'r, 2019 N.J. AGEN LEXIS 732 (July 26, 2019), for the proposition that the ABRA does not mandate a judicialized discovery and trial process, and merely requires that an accused staff member be apprised of the alleged HIB charge, the evidence upon which it is based, and the opportunity to present evidence, witness testimony, and oral arguments to the Board.

[1] On January 28, 2021, I inquired about what appeared to be missing pages 2-3 of the Board's Investigation Report Form, which was supplied by the Board to Alonso on August 4, 2020. (R-7). On February 4, 2021, the Board responded by supplying a three-page SSDS Incident Report Form, (R-8), which was not previously produced to this Forum or, according to Forsman, Alonso. The Board has not produced any additional pages of its Investigation Report Form, which contains the redacted names of two witnesses.

At the OAL oral arguments, the Board maintained that it was not required to produce HIB discovery sua sponte, and that Sohl had adequate notice of the charge against her, as outlined in the Principal's February 4, 2020 letter to Sohl. The Board accused Sohl's law firm of "playing a gotcha game," in essence, by inviting the alleged due process error. The Board argued that N.J.S.A. 18A:37-15(d) contemplates, at most, that only Loudermill[2] due process was arguably required – that is, notice of the allegations and an opportunity to be heard, because no property rights were lost – Sohl was merely reprimanded, not suspended or dismissed.

The Board explained that there were no other witness statements because G.T.'s allegation was investigated by interviewing Sohl first, and she allegedly admitted to the allegation, obviating the need to cause further disruption by interviewing other potential witnesses. For the same reason, the Board felt no need to call witnesses for what it believed to be an undisputed statement, and reiterated that it was not obliged to present witnesses in any event. The Board represented that it did not believe the HIB investigative report was provided to the Board prior to the hearing, and that the District's procedure is to provide that report to the Superintendent, who then renders a decision which is conveyed to the parent, teacher, and the Board before the hearing.

LEGAL ANALYSIS AND CONCLUSIONS

Summary Decision Standard

A summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). That rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules. See R. 4:46-2; Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

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2 Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

In Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

> "[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'"
>
> [Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).]

In evaluating the merits of the motion, "[a]ll inferences of doubt are drawn against the movant and in favor of the opponent of the motion." Judson, 17 N.J. at 75. "When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). "If the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, he[/she] will not be heard to complain if the court grants summary judgment." Judson, 17 N.J. at 75 (internal quotation marks and citations omitted). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 252.

Having reviewed the parties' submissions and heard their oral arguments, I **CONCLUDE** that no genuine issues of material fact exist which require an evidentiary hearing, and that this matter is therefore ripe for summary decision as to the alleged due process issues.

ABRA Due Process Requirements

The purpose of the ABRA is to promote "a safe and civil environment in school" by preventing "conduct that disrupts both a student's ability to learn and a school's ability to educate its students in a safe environment." N.J.S.A. 18A:37-13. It was promulgated "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of [HIB] of students that occur in school and off school premises." N.J.S.A. 18A:37-13.1f. It requires all school districts to adopt policies "prohibiting harassment, intimidation or bullying," N.J.S.A. 18A:37-15a, and procedures for reporting and investigating complaints of HIB, N.J.S.A. 18A:37-15b(5)-b(6).

> [A] procedure for prompt investigation of reports of violations and complaints . . . shall at a minimum provide that:
>
> > (a) the investigation shall be initiated by the principal or the principal's designee within one school day of the report of the incident and shall be conducted by a school anti-bullying specialist. The principal may appoint additional personnel who are not school anti-bullying specialists to assist in the investigation. The investigation shall be completed as soon as possible, but not later than 10 school days from the date of the written report of the incident of harassment, intimidation, or bullying. In the event that there is information relative to the investigation that is anticipated but not yet received by the end of the 10-day period, the school anti-bullying specialist may amend the original report of the results of the investigation to reflect the information;
> >
> > (b) the results of the investigation shall be reported to the superintendent of schools within two school days of the completion of the investigation, and in accordance with regulations promulgated by the State Board of Education pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), the superintendent may decide to provide intervention services, establish training programs to reduce harassment, intimidation, or bullying and enhance school climate, impose discipline, order counseling as a result of the findings of the investigation, or take or recommend other appropriate action;

> (c) the results of each investigation shall be reported to the board of education no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent;
>
> (d) parents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within 5 school days after the results of the investigation are reported to the board. A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request. The board shall meet in executive session for the hearing to protect the confidentiality of the students. At the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents;
>
> (e) at the next board of education meeting following its receipt of the report, the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision. The board's decision may be appealed to the Commissioner of Education, in accordance with the procedures set forth in law and regulation, no later than 90 days after the issuance of the board's decision.
>
> [(N.J.S.A. 18A:37-15b(6)(a)-(e)) (emphasis added).]

N.J.A.C. 6A:16-7.7 provides further instruction to aid school districts in complying with statutory HIB requirements. The due process protections embodied in the law have equal applicability where, as here, a teacher is a target of a HIB investigation. Young-Edri, 2019 N.J. AGEN LEXIS 403 at 6; Gibble v. Bd. of Educ. of Hunterdon Cent. Reg'l Sch. Dist., 2016 N.J. AGEN LEXIS 1108 at 8 (July13, 2016).

The parties disagree about the import of N.J.S.A. 18A:37-15b(6)(d), with respect to what discovery must be provided to a HIB investigation target prior to a board hearing. That provision has been interpreted in two relatively recent decisions. In Young-Edri, which was adopted by the Commissioner, a teacher accused of HIB conduct against a student was not provided with the district AB[C]'s written report about the investigation, which included information the teacher was unaware of, and was not conveyed in the principal's subsequent letter of reprimand. Young-Edri, 2019 N.J. AGEN LEXIS 403 at 3. There was no evidence that the ABC's findings were shared with either the superintendent or the board, or that any investigatory materials were shared with Young-Edri prior to her OAL appeal of the board's determination that she had bullied the student. Ibid. The superintendent did not render a decision about the bullying allegations and investigation, even though the board was required to issue a written decision affirming, rejecting, or modifying the superintendent's decision. Id. at 6.

Persuaded by those facts and a similar fact pattern in J.L., No. A-2022-16T1, the ALJ concluded that the board had violated Young-Edri's due process rights embodied in N.J.S.A. 18A:37-15b(6)(d)-(e), and remanded the matter to the board, ordering the board to have the superintendent review the ABC's determination, ordering that the results of the ABC's investigation be shared with the board, ordering that Young-Edri be supplied with the investigatory file, including witness statements and the ABC's written report, and ordering that Young-Edri be permitted to present witnesses and documentary evidence to the board at a subsequent hearing. Young-Edri, 2019 N.J. AGEN LEXIS 403 at 6-8.

In this case, a written summary of the ABC's investigation was not provided to Sohl until almost six months after the Board hearing, and that investigation report contains information which was not conveyed in the Superintendent's January 28, 2020 letter or the Principal's February 4, 2020 letter to Sohl, including the extent of G.T.'s statements, how the alleged incident was initially reported to the Principal, by whom, and the names and roles of other individuals involved in the process and potential student witnesses who are alleged to have laughed at or frowned upon the alleged "cupcake" comment. (R-7). Moreover, contrary to N.J.S.A. 18A:37-15b(6)(e), the Superintendent's February 11, 2020

letter simply notified Sohl that "the Board upheld your incident," (R-6), when the Board itself should have issued a written decision detailing with specificity the conduct it determined to be HIB, based upon the Superintendent's January 28, 2020 letter, which does not describe the alleged conduct at all, (P-2 Ex. A). See Young-Edri, 2019 N.J. AGEN LEXIS 403 at 3-4 (finding that Board's letter notifying teacher that it upheld a HIB determination "did not detail with specificity the conduct or incidents that were perceived to have risen to a violation of law").

Under these circumstances, I **CONCLUDE** that Sohl's ABRA due process rights were violated with respect to the mandates of N.J.S.A. 18A:37-15b(6), that this matter should be remanded to the Board, and that Sohl should be given an opportunity to review the ABC investigatory report and any and all available statements and other documentary evidence within five school days after the results of the investigation are reported to the Board. N.J.S.A. 18A:37-15b(6)(d). I further **CONCLUDE** that what appears to be the Superintendent's written summary to the Board, entitled "BHS HIB #7 Confirmed," (R-7), does not adequately inform the Board of the discipline imposed or the contents of the HIB investigation report, and that the written investigation report "along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent" is required to be provided to the Board pursuant to N.J.S.A. 18A:37-15b(6)(c).

As to procedure at the Board hearing, I **CONCLUDE** there was no due process violation with respect to an opportunity to confront and cross-examine G.T. or any other witness. The ABRA does not require a full adversarial hearing, and only requires that it be conducted in executive session and that "the board may hear from the anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents." N.J.S.A. 18A:37-15b(6)(d) (emphasis added); Young-Edri, 2019 N.J. AGEN LEXIS 403 at 7-8. Thus, the ABC's testimony is not required by the ABRA, nor is the Superintendent's. The purpose of the Board hearing is to allow Sohl the opportunity to present her own witnesses, evidence, and arguments in her defense against the charge and the discipline imposed. The Board need not

present testimony by the accuser or any other witness, and Sohl would have no right to confront or cross-examine such witnesses in any event. DeFalco, 2019 N.J. AGEN LEXIS 515 at 7-8, 11-12, 26-27; L.K., 2019 N.J. AGEN LEXIS 62 at 59.

Should Sohl receive an unfavorable result after the Board hears this matter on remand, she will then have an opportunity for a full adversarial hearing if she wishes to appeal from the Board's determination to the Commissioner. Young-Edri, 2019 N.J. AGEN LEXIS 403 at 7 n.1.

ORDER

Based on the foregoing, it is **ORDERED** that Sohl's motion for summary decision is hereby **GRANTED**, and this matter is **REMANDED** to the Board to afford Sohl a HIB hearing in keeping with her due process rights under N.J.S.A. 18A:37-15. This requires that the February 4, 2020 letter of reprimand be removed from Sohl's personnel file, that the Superintendent comply with the mandates of N.J.S.A. 18A:37-15b(6)(c), that the Board provide Sohl with the investigatory file, including all witness statements, the ABC report, and all other documentary evidence, in keeping with N.J.S.A. 18A:37-15b(6)(d) and J.L., No. A-2022-16T1, that Sohl be permitted to present witnesses and evidence at the hearing, and that the Board, not the Superintendent, issue a detailed written decision after the hearing, in keeping with N.J.S.A. 18A:37-15b(6)(e) and Young-Edri, 2019 N.J. AGEN LEXIS 403 at 3-4.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 24, 2021
DATE

Sarah H. Surgent
SARAH H. SURGENT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

APPENDIX

EXHIBITS

For the Judge:

C-1 EDU 05070-20 May 20, 2020 Transmittal from Department of Education Office of Controversies and Disputes

C-2 J.L. v. Bd. of Educ., No. A-2022-16T1 (App. Div. Oct. 16, 2018), https://njlaw.rutgers.edu/collections/courts/appellate/a2022-16.opn.html

For Petitioner:

P-1 Petitioner's Petition of Appeal and Exhibits A-D dated April 30, 2020

P-2 Petitioner's motion brief, Exhibits A-D, and certifications of Alonso and Sohl dated August 14, 2020

P-3 Petitioner's reply brief and Exhibit A dated September 4, 2020

For Respondent:

R-1 Respondent's Answer to Petition of Appeal dated May 19, 2020

R-2 Respondent's letter to this Tribunal dated August 14, 2020

R-3 Respondent's opposition brief dated August 28, 2020

R-4 Certification of Judy Sorochynskyj and Exhibit A in support of Respondent's opposition dated August 28, 2020

R-5 Letter from Superintendent to Alonso dated February 6, 2020

R-6 Letter from Superintendent to Sohl dated February 11, 2020

R-7 Documents produced by Board to Alonso on August 4, 2020

R-8 Email from Board dated February 4, 2020 with attached Student Safety Data System (SSDS) Incident Report Form dated January 27, 2020

107-21

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OAL Dkt. No. EDU 03427-21
Agency Dkt. No. 54-4/21

New Jersey Commissioner of Education

Order on Emergent Relief

Christopher Iasiello,

Petitioner,

v.

Board of Education of the Township of Wyckoff, Bergen County, and Kerry L. Postma, in her official capacity as Superintendent,

Respondents.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 18, 2021
Date of Mailing: May 18, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION FOR
EMERGENT RELIEF
OAL DKT. NO. EDU 03427-21
AGENCY DKT. 54-4/21

CHRISTOPHER IASIELLO.,

Petitioner,

v.

WYCOFF SCHOOL DISTRICT,

Respondent.

Stephen J. Edelstein, Esq. appearing on behalf of petitioner (Weiner Law Group, LLP, attorneys)

Stephen R. Fogarty, Esq. appearing on behalf of respondent (Fogarty & Hara, attorneys)

Record Closed: April 20, 2021 Decided: April 21, 2021

BEFORE **NANCI G. STOKES**, ALJ:

FACTUAL DISCUSSION AND PROCEDURAL HISTORY

Petitioner, Christopher Iasiello, brings this action challenging the January 15, 2021, decision of the Wyckoff School District's (District or Board) Superintendent of Schools, Kerry Postma, Ed.D., to suspend Iasiello from his position as the Principal of the Eisenhower Middle School in the District.

Iasiello has been the Principal since 2012 and is a tenured employee. Before he served as the Principal, Iasiello served as the Assistant Principal for the Eisenhower Middle School since 2010. Iasiello's evaluations in these roles were uniformly excellent.

Kerry Postma, Ed.D., served as the District's Superintendent role since July 2020.

Superintendent Postma's January 15, 2021, suspension letter, sent via email, states that:

> I am hereby suspending you with pay from her position as principal of the Eisenhower Middle School [in the District], as a result of serious allegations concerning your failure to properly follow the Board's policies and procedures to investigate a report of a sexting incident that occurred on or about October 16, 2020. You shall be suspended pending a further investigation and further Board action . . .
> My action is being taken with the approval of the President of the Board, pursuant to the provisions of N.J.S.A. 18A:25-6 and N.J.S.A. 18A:6-8.3. During the period of your suspension, you are not to be present on any of the Wyckoff School District's property for any reason without prior written authorization from me. Your suspension shall be reported to the Board of Education fortwith and, the Board shall determine what further action is appropriate.

On February 8, 2021, the Wyckoff Board of Education (Board) met and approved the appointment of an Acting Principal for the Eisenhower Middle School, effective immediately. The Board took no specific action regarding Iasiello at this meeting.

On February 26, 2021, the District removed Iasiello's name from its website.

Counsel for Iasiello exchanged numerous emails with the Board's counsel attempting to ascertain more specific information concerning the Board's policies and procedures that Iasiello allegedly violated. On January 23, 2021, the Board's counsel advised Iasiello's counsel that the Superintendent was concerned that the events on October 16, 2020, might qualify as a harassment, bullying, and harassment (HIB) violation

that the middle school administration did not properly report or investigate.[1] Further, the Superintendent had concerns that the middle school administration did not report the incident to the Wyckoff Police Department. Moreover, the Superintendent first learned of the incident on January 14, 2021, and after speaking with Iasiello, concluded that she should immediately suspend Iasiello to investigate the incident properly. Ultimately, the October 16, 2020, incident led to findings of HIB violations committed by several students against Iasiello's daughter.

Still, the emails reflect that while investigating the October 16, 2020, incident and the middle school administration's investigation handling, employees and former employees reported other misconduct by Iasiello. In other words, the scope of the initial investigation expanded, and the investigation continues. Thus, Iasiello's counsel was aware of the reasons for the continued investigation. Although the Superintendent is considering recommending tenure charges, she has yet to determine the extent of those charges.

Iasiello maintains that he learned of the October 16, 2020, incident on October 19, 2020, and that the matter involved his daughter, a student at the Eisenhower Middle School. Iasiello asserts that he correctly recused himself from the investigation given his apparent conflict and entrusted the investigative process to the Assistant Principal, Christopher Giordano. Notably, the Board disputes that Iasiello remained uninvolved in the incident's investigation.

On March 17, 2021, Iasiello and his family served a Tort Claim Notice to the Board and Wyckoff Township, asserting reputational damage and severe emotional distress.

On April 13, 2021, Iasiello filed a petition of appeal and motion for emergent relief against the Board and Superintendent Postma with the Commissioner of Education. Specifically, Iasiello maintains that his suspension was improper, and the District violated

[1] Under the Anti-Bullying Rights Act (ABRA), N.J.S.A. 18A:37-13 to -37, each school district must adopt a HIB policy that meets minimum statutory requirements including "a procedure for prompt investigation of reports of violations and complaints." N.J.S.A. 18A:37-15(b)(6).

its discipline policy in failing to provide an adequate explanation for the suspension. Thus, Iasiello asserts that he is legally entitled to reinstatement.

District Policy 3150 for the Wyckoff Board of Education (Policy 3150), addressing discipline, directs all teaching staff members to observe New Jersey statutes, rules of the State Board of Education, Board policies, and administrative rules and regulations governing staff conduct. Moreover, "violations of those statutes, rules, policies, and regulations will be subject to discipline," and the Superintendent will deal with disciplinary matters on a "case-by-case basis." Indeed, "penalties may include suspensions, withholding of increments, and dismissal." Policy 3150 also addresses notice to staff members:

> In the event disciplinary action is contemplated, notice will be given to the teaching staff member in ordinary and concise language of the specific acts and omissions upon which the disciplinary action is based; the text of the statute, policy, or rule that the member is alleged to have violated; and date when the member may be heard and the administrator who will hear the matter; and the penalty that may be imposed.

On April 15, 2021, the Department of Education, Office of Controversies and Disputes, transmitted this case to the Office of Administrative Law (OAL) for hearing as a contested case and resolution of Iasiello's motion for emergency relief.

On April 19, 2021, I conducted a telephone status conference, directed the Board to submit its response to the motion, and permitted a reply by Iasiello. On April 19, 2021, the OAL received these submissions, including a corrected submission by Iasiello after his initial reply.

In the Board's response, the Board highlights that Iasiello's suspension was with pay, that the Superintendent acted with statutory authority in doing so and has yet to complete her investigation to determine if discipline is warranted.

On April 20, 2021, an oral argument proceeded via Zoom because of the COVID-19 health crisis, and the record closed.

LEGAL ANALYSIS AND CONCLUSION

Under N.J.S.A. 18A:6-9, the Commissioner's jurisdiction is defined, and is limited to "controversies and disputes arising under the school laws." In Dunellen Bd. of Educ. v. Dunellen Ed. Assoc., 64 N.J. 17, 23 (1973), the New Jersey Supreme Court concluded that "the Legislature enacted provisions entrusting school supervision and management to local school boards . . . subject to the supervisory control [of] . . . the State Commissioner of Education."

The regulations governing such disputes before the Commissioner of Education provide that "[w]here the subject matter of the controversy is a particular course of action by a district board of education or any other party subject to the jurisdiction of the Commissioner, the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case." N.J.A.C. 6A:3-1.6(a). The regulations further provide that the Commissioner may "[t]ransmit the motion to the OAL for immediate hearing on the motion." N.J.A.C. 6A:3-1.6(c)(3).

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief and instructs that:

> 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;
> > 2. The legal right underlying petitioner's claim is settled;
> > 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
> > 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.

[N.J.A.C. 6A:3-1.6(b).]

Indeed, the moving party must demonstrate each element "clearly and convincingly." Waste Management of N.J. v. Union County Utilities Authority, 399 N.J.

Super. 508, 520 (App. Div. 2008). Emergent relief is designed "to 'prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.'" Crowe, 90 N.J. at 132 (citation omitted).

Irreparable harm

Harm is generally considered irreparable if monetary damages cannot adequately redress it. Id. at 132-33. In other words, irreparable harm is described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). A claimant must demonstrate more than a risk of irreparable harm. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief requires a "'clear showing of immediate irreparable injury,'" or a "'presently existing actual threat; (an injunction) 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 common law.'" Ibid.
(citation omitted).

Iasiello's submits that irreparable harm is clear. Specifically, he maintains that the Superintendent "removed from his position . . . without explanation" or the Board of Education's approval of the suspension, only to be "replaced by an 'Acting Principal,'" despite the absence of a vacancy. Further, that he is receiving pay cannot address the more significant damage to his future.

In Migliaccio v. Board of Education of Paterson, 1990 S.L.D. 294, a tenured School Business Administrator sought emergent relief challenging his suspension absent tenure charges. Essentially, Migliaccio maintained that the provisions of N.J.S.A.18A:8.3, permitting a suspension with pay, were not applicable. Instead, N.J.S.A.18A:6-14, part of the Tenure Employees Hearing Laws, N.J.S.A.18A:6-10 – 18.1, allowed a suspension with or without pay after the Board issued charges. Therefore, Migliaccio asserted entitlement to the protections afforded the tenure process. However, the Commissioner disagreed, concluding that the Legislature did not afford the same protections afforded an employee subject to tenure charges to those suspended with pay under N.J.S.A.

18A:6-8.3. Id. at 300. Moreover, the Commissioner held that Migliaccio could not establish irreparable harm because "he has suffered no monetary loss at all." Ibid. The Commissioner explained that the Business Administrator was "not in jeopardy since he has not been dismissed from said position, nor have tenure charges been filed against him. Rather, he has been merely suspended with pay." Id. at 301.

Similarly, Iasiello's suspension is with pay, and his continued suspension will not cause irreparable harm. While Iasiello suggests the Board's actions damaged his reputation, this alone does not afford due process protections. Instead, to make out a due process claim for deprivation of a liberty interest in reputation, a plaintiff must show a stigma to his reputation *plus* deprivation of some additional right or interest. "Hill v. Borough of Kutztown, 455 F.3d 225, 236 (3d Cir. 2006) (emphasis in original). Hill described this as the "stigma-plus" test. Id. at 236; see Edwards v. California Univ., 156 F.3d 488, 493 (3d Cir. 1998) (holding that while a suspended professor's might suffer damage to his reputation, this action "does not constitute a deprivation of employment" because he continued to receive pay) (citing Strum v. Clark, 835 F.2d 1009, 1012 (3d Circ. 1987). Notably, Iasiello also filed a Tort Claim Notice concerning many of the same issues in this application seeking monetary damages for his alleged reputational injury based on the District's misconduct.

Iasiello relies on Sanchez v. Bd. of Educ. of the City of Camden, Commissioner's Decision 107-03 (March 6, 2003), affirmed, State Bd. of Educ. (June 4, 2003), http://njlaw.rutgers.edu/collections/oal/, in which the Commissioner found that the District's transfer of a tenured principal to an acting vice-principal position with no salary loss would, nonetheless, suffer irreparable harm to her reputation if not returned to a principal role to which she was legally entitled. Indeed, "the illegal transfer and the consequent de facto demotion to the separate and subordinate position of Acting Vice Principal can never be adequately addressed over time, nor can monetary damages ameliorate the blemish on her professional standing among her peers and her reputation in the school district and in the community." Significantly, the transfer violated Sanchez's tenure rights.

Here, the District has not transferred Iasiello to another position without his consent, dismissed him, reduced his pay, or received tenure charges against him. In

other words, the District did not violate Iasiello's tenure rights. Instead, the Superintendent suspended Iasiello with pay pending an investigation into suspected misconduct as authorized by N.J.S.A. 18A:25-6 and N.J.S.A 18A:6-8.3.

Instead, Iasiello's circumstances are similar to those of the petitioner in Packard v. Board of Education of Carteret, EDU 06241-17, Order on Emergent Relief (May 11, 2017), http://njlaw.rutgers.edu/collections/oal/. The Carteret Board suspended Packard, a Supervisor of Buildings and Grounds, who sought immediate reinstatement to his position through emergent relief. Since he was on a paid suspension, the ALJ concluded that his "continued suspension will not cause him irreparable harm." Significantly, ALJ rejected the petitioner's claim of damage to reputation during the suspension as being "vague descriptions of community gossip and rumors about him due to his suspension" that could not "clearly and convincingly show that his reputation will be damaged irreparably." Indeed, Iasiello must submit evidence to support his claim of irreparable harm beyond "general statements." Diaz v. Bd. of Educ. of Mahwah, EDU 13998-08, Initial Decision (Dec. 18, 2008), http://www.nj.gov/education/legal/commissioner.

Settled Legal Right

Emergent relief "should be withheld when the legal right underlying plaintiff's claim is unsettled." Crowe, 90 N.J. at 133 (citing Citizens Coach Co. v. Camden H. R. Co., 29 N.J.Eq. 299, 304-305 (E & A 1878)).

Each school district is obligated to provide a thorough and efficient education system to all children residing in its school district. N.J. Const. art. VIII, § 4, ¶ 1; N.J.S.A. 18A:33-1. To carry out this policy, local boards of education have discretionary authority under N.J.S.A. 18A:11-1C. The boards adopt rules for the management of the district's public schools and act in a manner to ensure the lawful and proper conduct of the district's public schools. Yet, statutory requirements also apply to actions by a school district or a board of education.

Under N.J.S.A. 18A:6-8.3 "any employee or officer of a board of education in this State who is suspended from his employment, office, or position, other than by reason of

indictment, *pending any investigation*, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension. (emphasis supplied).

Moreover, N.J.S.A. 18A:25-6 permits the Superintendent, with the consent of the Board President, to suspend a principal. Once reported to the board, "[t]he Board or boards, each by a recorded roll call majority vote of its membership, shall take such action for the restoration or removal of such person as it shall deem proper[.]" Ibid. Thus, given the Board President's consent, the Superintendent had the authority to suspend Iasiello. While N.J.S.A. 18A:25-6 contemplates board action to remove or restore a suspended principal, there is no requirement that it be at the next board meeting or within a prescribed time.

Under N.J.S.A. 18A:6-11, if a tenure charge is filed with the school board, the board reviews it and the accompanying statement of supporting evidence, and any written statement submitted by the employee. The board then determines whether probable cause exists for the charge, and that the charge, if credited, sufficiently warrants a dismissal or reduction in pay. After the board certifies its probable cause determination, the Board forwards its determination to the Commissioner of Education. Once tenure charges are filed, the employee is entitled to a copy of the charges and supporting statement of evidence and a copy of the board's determination of probable cause. Ibid. After certification of the charge, the board may suspend the employee with or without pay under N.J.S.A. 18A:6-14.

Here, it is not settled that the Superintendent must provide greater detail in the suspension notice to Iasiello or that he has a legal right to an order immediately reinstating him to his position during the District's investigation into his conduct.

Iasiello focuses on Policy 3150 to assert the suspension was improper. Policy 3150 states that certain information is required when "contemplating discipline." Still, this policy cannot reasonably preclude an investigation from determining what statutes, regulations, policies, and procedures the employee may have violated. In other words, while the District must supply certain information to an employee against whom tenure charges are filed, the same cannot reasonably apply to an investigation of conduct before the Superintendent files tenure charges or determines if violations occurred. The

Superintendent first learned of the October 16, 2020, incident on January 14, 2021, and suspended Iasiello on January 15, 2021, noting the suspension related to that incident. To then require a detailed recitation of policies, statutes, procedures, or regulations that the employee may have violated is arguably premature. Suspensions with pay are permitted "pending an investigation." Notably, a suspension without pay permitted under N.J.S.A. 18A:6-14 ***after*** filing tenure charges requiring notice of those charges and a statement of supporting evidence.

Given the statutory framework permitting suspensions with pay during an investigation and tenure charge procedures, a more consistent consideration of "contemplating discipline" means when the Superintendent or other authorized person files tenure charges. At that point, the tenured employee is entitled to the notice and procedural protections under and the Tenure Employees Hearing Laws, N.J.S.A.18A:6-10 –18.1, as similarly stated in Policy 3150. Regardless, the email exchange between counsel provides additional information regarding the Superintendent's concerns regarding the October 16, 2020, incident, and the expansion of her investigation.

Iasiello cites two cases to support a school district's obligation to follow its rules, but neither are relevant, address similar circumstances, or involve emergent relief. In, EDU 1914-02 and EDU 5616-02, Partial Initial Decision (September 12, 2002), aff'd, Comm'r (Nov. 1, 2002), http://njlaw.rutgers.edu/collections/oal/, the Commissioner addressed whether a school district could permanently expel a student under the Zero Tolerance for Guns Act without finding that the student possessed a firearm. In that situation, the Board's failure to follow its policies resulted in "substantive and procedural infirmities" requiring the expulsion to be set aside. Similarly, In re Deans, CSV 01134-09, Initial Decision (May 5, 2009), aff'd, Commission (June 15, 2009), http://njlaw.rutgers.edu/collections/oal/, the Civil Service Commission addressed whether a civil service employer could terminate an employee for testing positive for marijuana where there was no evidence the employee was under the influence at work or in possession of drugs at work in violation of the employer's drug policy. Yet, the employee was still subject to discipline.

Instead, the Board highlights that the Commissioner distinguishes those policies protecting a vested right and those that do not. For example, in Blessing v. Bd. of Educ. of Palisades Park, 1974 S.L.D. 1133, 1135-36 (Dec. 2, 1974), the Commissioner concluded that boards of education were not absolutely bound by its policies. Instead, "it has been consistently held that a local board of education is not bound by its policies and rules when no vested rights are involved." (citing Polonsky v. Bd. of Educ. of Red Bank, 1967 S.L.D. 93; Noonan and Arnot v. Paterson City Board of Education, 1938 S.L.D. 331 (1925), aff'd State Board of Education, 1938 S.L.D. 336 (1925); Silvestris v. Bayonne Board of Education, 1959-60 S.L.D. 184.)

Regardless, no evidence exists that the Superintendent imposed Iasiello's paid suspension as a punishment or penalty for misconduct, e.g., discipline. Under N.J.A.C. 6A:32-4.1(d), each school must have "the services of a full-time non-teaching principal to be responsible for administration and supervision of the school." Hence, the Board had to choose an Acting Principal while the investigation continued during Iasiello's suspension. Thus, the District's removal of Iasiello from its website also does not constitute discipline. Instead, the District needed to update the website to provide current contact information for the Acting Principal.

In sum, Iasiello's right to reinstatement under Policy 3150 is not clear given the statutory authority under provisions of N.J.S.A. 18A:6-8.3 and N.J.S.A. 18A:25-6, and because the Superintendent has not filed tenure charges against him.

Likelihood of Success on the Merits

Under the third emergent relief standard, "a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits." Crowe, supra, 90 N.J. at 133 (citing Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115-16 (E. & A. 1930)). This requirement if often implicitly tied to whether the right to the underlying claim is settled.

A presumption of lawfulness and good faith applies to a board of education's actions. In challenges to board actions, the challenger bears the burden of proving that

such acts were unlawful, arbitrary, capricious, or unreasonable. Schuster v. Bd. of Educ. Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Ed. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962).

The "arbitrary, capricious and unreasonable" standard of review imposes a heavy burden on challengers of board actions, and "means having no rational basis." Piccoli v. Ed. of Educ. of Ramapo Indian Hills Regional School District, OAL DKT. EDU 1839-98 (January 22, 1999) (citing Bayshore Sewage Co. v. Dent. of Envir. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974).

Iasiello fails to meet this burden because he has not demonstrated that the Superintendent did not have the authority to suspend Iasiello with pay until completing her investigation or failing to recite specific violations justifying the suspension entitles his reinstatement. Moreover, his continued suspension has a rational basis of which he was aware.

Balancing of the Equities

Lastly, Iasiello fails to meet the fourth emergent relief standard, which involves "the relative hardship to the parties in granting or denying relief." Crowe, 90 N.J. at 134 (citing Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J.Eq. 506, 515 (Ch.1941), mod. on other grounds, 132 N.J.Eq. 613 (E. & A. 1942)). Iasiello must demonstrate that he will suffer more significant harm than the Board if this tribunal does not grant the requested relief. If emergent relief is denied, Iasiello will continue to serve a suspension *with pay*. Any suspension may carry the risk of rumors or speculation concerning the suspended employee, but suspensions with pay are permitted and serve as an investigative tool to school districts.[2]

[2] However, this tool does not permit an indefinite suspension of Iasiello. See Migliaccio, 1990 S.L.D. at 302 (concluding that the school district must complete its investigation within sixty days even though authorized under N.J.S.A 18A:6-3 to suspend petitioner with pay).

However, if emergent relief is granted, the Board will be forced to reinstate an employee accused of misconduct before completing the investigation of that misconduct. Thus, the equities favor the Board.

Based on the above discussion, I **CONCLUDE** that Iasiello has failed to establish the existence of irreparable harm, that Iasiello's request for emergent relief relies upon settled law, that Iasiello is likely to prevail on the merits, or that the equities favor Iasiello. Thus, I **CONCLUDE** that Iasiello's request for emergent relief does not meet requirements under N.J.A.C. 6A:3-1.6 and must be **DENIED**.

ORDER

Therefore, I **ORDER** that petitioner's request for emergency relief be and is hereby **DENIED.**

This order on application for emergency relief may be adopted, modified, or rejected by the Commissioner of Education, who 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 (45) days following the entry of this order. If the Commissioner 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.

April 21, 2021

DATE

NANCI G. STOKES, ALJ

Date Mailed to Parties: April 21, 2021

ljb

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OAL Dkt. No. EDU 10056-18
Agency Dkt. No. 123-5/18

New Jersey Commissioner of Education

Final Decision

David Herron,

Petitioner,

v.

Board of Education of the Township of Montclair, Essex County, and Franklin Turner,

Respondents.

The record of this matter, the proposed Settlement Agreement and General Release (Agreement), and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 21, 2021
Date of Mailing: May 21, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10056-18

AGENCY DKT. NO. 123-5/18

DAVID HERRON,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR,ESSEX COUNTY AND FRANKLIN TURNER,

Respondents.

David Herron, pro se

Isabel Machado, Esq for the BOE of Township of Montclair (Machado Law Group, attorneys)

Rita Barone, Esq., for Franklin Turner (Purcell Murphy Flanagan, attorneys)

Record Closed: September 11, 2018 Decided: April 6, 2021

BEFORE **ANDREW M. BARON**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination

as a contested case on October 10, 2019, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Resolution setting forth the terms of their agreement, which is attached and fully incorporated herein.

Having reviewed the record and the Resolution setting forth the terms of the parties' agreement, I **FIND**:

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

April 6, 2021
DATE

ANDREW. BARON, ALJ

Date Received at Agency: 4/16/21

Date Mailed to Parties: 4/16/21

mm

PURCELL, MULCAHY & FLANAGAN, LLC
RITA F. BARONE, ESQ. (038211995)
One Pluckemin Way
P.O. Box 754
Bedminster, NJ 07921
(908) 658-3800
Attorneys for Respondent, Franklin D. Turner
Our File: 300-25900 (RFB)

DAVID HERRON, Pro Se, Petitioner, vs. FRANKLIN D. TURNER, Respondent.	COMMISSIONER, NEW JERSEY DEPARTMENT OF EDUCATION BUREAU OF CONTROVERSIES AND DISPUTES AGENCY DOCKET NO. 123-5/18 EDU Docket No. 10056-18

This Settlement Agreement and General Release ("Agreement") is made and entered into by and between David Herron ("Petitioner/Plaintiff"), Franklin Turner (Respondent) and the Montclair Board of Education (the "Board"), (Petitioner/Plaintiff, Respondent and the Board collectively referred to as the "Parties").

WHEREAS, a dispute arose between Petitioner/Plaintiff and Respondent regarding his eligibility to serve as a Montclair Board of Education member and between Petitioner/Plaintiff and the Board regarding implementation of the requirements of the Open Public Meetings Act pertaining to a Board Meeting that occurred on April 11, 2018; and

WHEREAS, the Parties desire to settle all outstanding claims, controversies, demands, or causes of action with regard to the claims set forth in the Petition of Appeal and Superior Court Action, Essex County under Docket No. L-003823-18 and without admitting any liability or wrong doing; and

WHEREAS, the Parties deem it in their best interests to set forth in a formal written agreement their respective rights, duties and obligations.

NOW THEREFORE, in consideration of the mutual promises, covenants and other good and valuable consideration, set forth herein, it is hereby agreed by and between the Parties hereto as follows:

1. On or before October 31, 2018, Franklin Turner will resign as a Montclair Board of Education member. Within two weeks of the agreement being signed by Petitioners and Board approval, Mr. Turner will provide the Board President a letter of resignation advising of an effective date on or before October 31, 2018.
2. In consideration, the Petitioner/Plaintiff will withdraw the within Petition of Appeal and the Superior Court action, Essex County, under Docket No. L-003823-18 filed against the Montclair Board of Education upon receipt of the resignation letter of Mr. Turner and Board approval of this Agreement. Petitioner/Plaintiff agrees to prepare and sign a Stipulation of Dismissal of the Superior Court action referenced above and file same with the Essex County Superior Court with a copy to the attorney for Montclair Board of Education with 7 days after Board approval of this Agreement.
3. This Agreement is made without any admission of liability, wrong doing or responsibility by Respondent Turner or the Board and shall not be construed as an admission by Respondent Turner that he was not, at all times relevant hereto, an eligible board member

on the Montclair Board of Education or that the Board, at all times relevant hereto, did not hold its meeting on April 11, 2018 in accordance with the Open Public Meetings Act.

4. The Petitioner/Plaintiff hereby releases, acquits and forever discharges Respondent Turner and the Board, its current and former members, officers, directors, servants, employees, agents, successors, attorneys, assigns and affiliates, of and from any and all issues, causes of action, claims, liabilities, demands, indemnities, arising out of Respondent Turner's complete tenure on the Montclair Board of Education and from any and all issues, causes of action, claims, liabilities, demands, indemnities, arising out of the actions taken during the April 11, 2018 Board meeting that is subject of the Superior Court action under Docket no. L-003823-18 including, but not limited to, any and all claims and demands under the laws and regulations governing eligibility of a citizen to be a public school board member under N.J.S.A. 18A:12-1, et. seq., acts or codes of ethics governing school board members under N.J.S.A. 18A:12-24, et seq. and N.J.S.A. 18A:12-24.1, et seq., claims under OPRA, OPMA and any regulations promulgated under any of the aforementioned laws, or any other State or Federal law, statute, rule or regulation, and regardless of the forum for the claim.
5. The Parties covenant not sue, initiate, or continue any legal or administrative proceeding or appeals with regard to any or all claims released herein, provided, however, that this shall not preclude any claims pertaining to breach or enforcement of this Agreement.
6. This Settlement Agreement and Release represents the entire Agreement between the parties and will not be modified in whole or in part except by a mutual subsequent written and signed Agreement.

7. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily, without duress or coercion.
8. Petitioner/Plaintiff hereby states that he is signing this Agreement voluntarily of his own free will and not under duress or coercion of any kind.
9. This Agreement shall be construed fairly according to the plain language of its terms and not for or against any party hereto.
10. All parties are bound by this Agreement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns are also bound. This agreement is made for the benefit of all parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors or assigns.
11. The terms of this Agreement shall be held in strictest confidence by all Parties and shall not be publicized or disclosed in any manner whatsoever, except that: the Board may disclose of Mr. Turner's resignation during the regular course of a Board meeting and disclose this Agreement as necessary to fulfill its obligation under the Open Public Records Act.
12. This Agreement constitutes the full and complete agreement of the Parties hereto with respect to its subject matter, it supersedes any prior or contemporaneous representations, whether oral or written, and it may not be modified or amended except by a written instrument signed by all parties hereto.
13. This Agreement is subject to review and approval by the Board at its next regularly scheduled meeting, which is September 5, 2018, following its execution by the Petitioner/Plaintiff and the Respondent Turner and is not effective as to the Board

without said approval. In the event that the Board fails to approve this Agreement, the failure to approve the Agreement shall be without prejudice to all Parties' positions and shall not be used as evidence by either party in any subsequent proceeding.

14. This Agreement shall be governed by the laws of the State of New Jersey. The Parties agree that the courts of the State or District Court of New Jersey shall be the sole forum in which any legal action concerning or relating to this agreement shall be brought.
15. In the event that any provision of this contract is held to be void or unenforceable by any court or regulatory authority having jurisdiction thereof, such ruling will not affect the validity of this contract; the remaining provisions shall continue to be in full force and effect.
16. This Agreement may be executed in one or more original, emailed or telecopied counterparts, all of which together shall be one instrument, and all of which shall be considered duplicate originals.
17. This Agreement may only be amended in writing by way of a document signed by all Parties and counsel.
18. The Parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to obtain the full force and effect of the basic terms and interest of this Settlement Agreement and General Release.

FOR Montclair Board of Education

BY: _____ DATED: 9/5/18

, Board President

BY: _____ DATED: 9/5/18

, Board Secretary

Witnessed:

Petitioner/Plaintiff, Mr. Herron

BY: David Herron DATED: 8/31/2018

David Herron

Witnessed:

Respondent, Mr. Turner

BY: _____ DATED: 8-31-18

Franklin Turner

Witnessed:

MONTCLAIR BOARD OF EDUCATION
MONTCLAIR, NEW JERSEY

APPROVAL OF SETTLEMENT AGREEMENT

RESOLVED, that the Montclair Board of Education approves settlement agreement with respect to Docket No. EDU-10056-18 and Docket No. L-003823-18, as discussed in executive session.

APPROVED BY ACTION OF THE
MONTCLAIR BOARD OF EDUCATION

Emidio D'Andrea, Business Administrator

Date: July 16, 2018

109-21

OAL Dkt. No. EDU 11392-19
Agency Dkt. No. 152-6/19

New Jersey Commissioner of Education

Final Decision

D.D. on behalf of minor child, R.D.,

Petitioner,

v.

Board of Education of the Caldwell-West Caldwell School District, Essex County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 21, 2021
Date of Mailing: May 21, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11392-19
AGENCY DKT. NO. 152-6/19

D.D. ON BEHALF OF MINOR CHILD R.D.,
Petitioner,
v.
BOARD OF EDUCATION OF CALDWELL WEST CALDWELL SCHOOL DISTRICT, ESSEX COUNTY,
Respondents.

D.D., pro se, for petitioner for minor child R.D.

Shifra Tarica, Esq., for respondent BOE of (Methfessel & Werbel, attorneys)

Record Closed: December 26, 2019 Decided: April 7, 2021

BEFORE **ANDREW M. BARON**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on August 16, 2019 pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement and Release setting forth the terms of their agreement, which is attached and fully incorporated herein.

Having reviewed the record and the Settlement Agreement and Release setting forth the terms of the parties' agreement, I **FIND**:

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

April 7, 2021 _____
DATE **ANDEW M. BARON**, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

mm

Montaner, Maria

From: Shifra Tarica <tarica@methwerb.com>
Sent: Monday, December 30, 2019 10:26 AM
To: Montaner, Maria
Cc: MW emails
Subject: [EXTERNAL] R.D. v. Caldwell EDU 11392-2019 N
Attachments: 6199511_1.pdf; 6204010_1.docx

Hi Maria:

Please apologize to Judge Baron for the inadvertent error in sending this originally to Judge Buck.

Please let me know if the Court requires anything further at this time.

Happy New Year and have a wonderful day.

Very truly,

Shifra Tarica | Counsel
Methfessel & Werbel, P.C.
2025 Lincoln Highway | Suite 200 | Edison, NJ 08818
Direct: 732-650-6532
Cell: 845-558-7484
Fax: 732-248-2355 | www.methwerb.com



New Jersey's Top Insurance Law Firm
- New Jersey Law Journal, 2014, 2015, 2016, 2017

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JOEL N. WERBEL>
JOHN METHFESSEL, JR.>
FREDRIC PAUL GALLIN*+^
STEPHEN R. KATZMAN#
WILLIAM S. BLOOM>*
ERIC L. HARRISON*+
MATTHEW A. WERBEL>
LORI BROWN STERNBACK*+
I. BLAKELEY JOHNSTONE, III+*
GINA M. STANZIALE>
PAUL J. ENDLER JR.>

Of Counsel
JOHN METHFESSEL, SR.> (1964-1995)
DON CROWLEY=
MARC DEMBLING*+
ED THORNTON>

Counsel
CHRISTIAN R. BAILLIE+
SARAH K. DELAHANT+
JAMES FOXEN^
GERALD KAPLAN>
JARED P. KINGSLEY*+
JOHN R. KNODEL*
LESLIE A. KOCH+
CHARLES T. MCCOOK, JR.*>
MARC G. MUCCIOLO>
RICHARD A. NELKE~
STEVEN K. PARNESS+
BRENT R. POHLMAN+
AMANDA J. SAWYER^
SHIFRA TARICA+

Associates
EDWARD D. DEMBLING>
JASON D. DOMINGUEZ+
NATALIE DONIS+
MICHAEL R. EATROFF>
DAVID INCLE, JR.>
FRANK J. KEENAN+^
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Associates, Cont'd
ALLISON M. KOENKE>
OLIVIA R. LICATA+
ASHLEY E. MALANDRE^
ANTHONY J. MANCUSO>
JAMES V. MAZEWSKI+
CHRISTEN E. MCCULLOUGH^
DIAA J. MUSLEH+
KAJAL J. PATEL>
RAINA M. PITTS^
WILLIAM J. RADA+
NABILA SAEED^
JARED S. SCHURE>
TIFFANY D. TAGARELLI>
STEVEN A. UNTERBURGER+
LEVI E. UPDYKE+^

*Certified by the Supreme Court of New Jersey as a Civil Trial Attorney
+Member of NY & NJ Bar
^Member of PA & NJ Bar
>Member of NJ Bar only
#Member of NJ & LA. Bar
<Member of NJ & DC Bar
≥Member of NJ, PA & DC Bar
~Member of NY, NJ & DC Bar
=Retired from the practice of law

Please reply to New Jersey

December 17, 2019

VIA EMAIL: darrendaniolowicz@gmail.com
Kristin and Darren Daniolowicz
20 Caton Terrace
Caldwell, NJ 07006

RE: **D.D. O/B/O R.D. VS. CALDWELL/WEST CALDWELL BOE**
Our File No. : 87918 STA
Docket No. : 152-6/19

Dear Mr. and Mrs. Daniolowicz:

As you are aware, I represent the Caldwell-West Caldwell Board of Education ("Board" or "District") with respect to this matter.

Please accept this correspondence memorializing the agreement between the parties. Please sign below and return a copy to my attention. Upon receipt of the executed copy, I will forward same to the District as well as the Honorable Carl Buck, ALJ, for incorporation into a Final Order.

The parents, individually and on behalf of R.D., and the District agree as follows:

1. Any reference to discipline related to the incidents investigated by the District in January 2019 and/or referenced within the HIB investigation report dated January 23, 2019 will be removed from R.D.'s records.

2. There will be no reference in R.D.'s school records to the alleged incidents investigated by the District in January 2019 and/or referenced within the January 23, 2019 HIB investigation report.

3. There will be no reference in R.D.'s school records to any HIB violation related to the January 23, 2019 investigation report and findings.

4. This agreement resolves the issues raised in the parents' pending petition of appeal.

5. Except as required by law, the Parties agree to keep confidential and not disclose to any third party the terms and conditions of this agreement.

6. By entering into this agreement, neither party makes any admission of any wrongdoing.

Please do not hesitate to contact me with any questions or concerns.

Very truly yours,

METHFESSEL & WERBEL, ESQS.

Shifra Tarica

Shifra Tarica
tarica@methwerb.com
Ext. 205

We have read this correspondence and fully understand the terms set forth herein. This accurately reflects our understanding of the agreement with the Caldwell-West Caldwell Board of Education.

Kristin Daniolowicz

Kristin Daniolowicz, individually and o/b/o R.D. — Dated 12.17.19

Darren Daniolowicz

Darren Daniolowicz, individually and o/b/o R.D. — Dated 12.17.19

110-21

110-21

OAL Dkt. No. EDU 15420-19
Agency Dkt. No. 230-9/19

New Jersey Commissioner of Education

Final Decision

Louise Clarke,

Petitioner,

v.

Board of Education of the Carlstadt-East Rutherford Regional School District, Bergen County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that the Agreement references actions that were to take place in a time frame that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 21, 2021
Date of Mailing: May 21, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 15420-19
AGENCY DKT. NO. 230-9/19

LOUIS CLARKE,
Petitioner,
v.
CARLSTDAT-EAST RUTHERFORD REGIONAL SCHOOL DISTRICT, BOARD OF EDUCATION, BERGEN COUNTY
Respondents.

Allan Genitempo, Esq., for petitioner (Piro, Zinna, Cifelli & Paris & Genitempo, attorneys)

Francis J. Leddy and **Sunil S. Tilak**, Esq., for respondent (Cipriani & Werner, attorneys)

Record Closed: February 16, 2021 Decided: April 7, 2021

BEFORE **ANDREW M. BARON**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination

as a contested case on November 1, 2019 pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement and Release setting forth the terms of their agreement, which is attached and fully incorporated herein.

Having reviewed the record and the Settlement Agreement and Release setting forth the terms of the parties' agreement, I **FIND**:

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

April 7, 2021
DATE

ANDEW M. BARON, ALJ

Date Received at Agency:

Date Mailed to Parties:

mm

CARLSTADT-EAST RUTHERFORD
REGIONAL BOARD OF EDUCATION

120 PATERSON AVENUE
EAST RUTHERFORD, N.J. 07073

NICHOLAS ANNITTI
BUSINESS ADMINISTRATOR/
BOARD SECRETARY

TELEPHONE: (201) 935-4940
FAX: (201) 935-3047

H.P. BECTON REGIONAL HIGH SCHOOL
120 PATERSON AVENUE
EAST RUTHERFORD, N.J. 07073

FINANCE: (Mr. Anderson)

F7. Approve the following settlement agreement:

Moved: Mr. Anderson Second: Mr. Young Approved: Unanimous

CARLSTADT-EAST RUTHERFORD BOARD OF EDUCATION

RESOLUTION No. 291 – 21 - 22

WHEREAS, be it resolved, the Board of Education hereby accepts the within Settlement Agreement and the Release in the matter of Employee No. 4013 (Louise Clarke) v. Carlstadt-East Rutherford Board of Education a/k/a Carlstadt-East Rutherford Regional School District, Docket No.: EDU-15420-2019 N.

NOW THEREFORE, BE IT RESOLVED, the Board of Education hereby accepts the Settlement Agreement and Release in the above-referenced matter.

Nicholas Annitti, Board Secretary/
Business Administrator

DATE: 2/11/2021

MEMBER	YES	NO	MEMBER	YES	NO
Mr. Anderson	X		Dr. Lahullier	X	
Mr. Bulger	X		Ms. Landolfi	X	
Mr. DeLizio	X		Ms. Wiebe	X	
Mr. Grabowski	X		Mr. Young	X	
Mr. Kandiel	X		Ms. Fukushima	X	

CERTIFICATION:

I, Nicholas Annitti, Board Secretary/Business Administrator of the Carlstadt-East Rutherford Regional Board of Education do hereby certify that the above is an extract from the minutes of the February 10, 2021 regular public meeting of the Carlstadt - East Rutherford Regional Board of Education.

Nicholas Annitti
Board Secretary/Business Administrator
Dated: February 11, 2021

RELEASE OF CLAIMS AGREEMENT

This Release of Claims ("Release") made and given this day of 2021, by Petitioner, **LOUISE CLARKE** (collectively, "PETITIONER" or "I") to CARLSTADT-EAST RUTHERFORD BOARD OF EDUCATION A/K/A RUTHERFORD REGIONAL SCHOOL DISTRICT ("Respondent"), and **AXA XL** ("AXA")

Terms of the Release of All Claims

Payment by AXA and Respondent. *Payment by AXA*: AXA will pay the sum of Fifty-Two Thousand Five Hundred dollars and zero cents ($52,500.00) to Petitioner in full and final satisfaction of all past claims asserted against Respondent, or which could have been asserted by Petitioner in the action entitled, Louise Clarke v. Carlstadt-East Rutherford Board of Education a/k/a Rutherford Regional School District brought before the Commissioner of Education under Agency Docket No. 230-9/19 and OAL Docket No. EDU-15420-2019 N (the "OAL Action"). This amount includes the supervisor stipends for the 2019-2020 and 2020-2021 scholastic years, attorneys' fees, and compensation for additional classes taught by Petitioner through January 23, 2021. This payment will be made payable to the firm of "Piro, Zinna, Cifelli, Paris and Genitempo in Trust for Louise Clarke, and said payment to be made within fifteen (15) days of Respondent's receipt of a fully executed copy of this release by the Petitioner as well as the completed Form W-9 from the firm of Piro, Zinna, Cifelli, Paris and Genitempo. The above sum includes the following:

2019-2020 school year: $25,327.00 (inclusive of the supervisor stipend of $8,400.00 for the 2019-2020 school year, and one-fourteenth (1/14) of Petitioner's base salary for every class taught above three (3).

2020-2021 school year: $17,292.00 (inclusive of the supervisor stipend of $8,400.00 for the 2020-2021 school year, and one-fourteenth (1/14) of Petitioner's base salary for every class taught above three (3), prorated from the beginning of the 2020-2021 school year through January 23, 2021.

Attorneys Fees: $10,000.00

Payment by Respondent: Respondent agrees to pay Petitioner, in addition to her normal salary and salary related benefits, the following from January 24, 2021 through the end of the 2020-2021 scholastic year as follows: one-fourteenth (1/14) of her base salary for every class taught above the four (4) maximum allowable for instruction supervisors, prorated from January 24, 2021 through the end of the 2020-2021 school year.

Respondent agrees to pay Petitioner, in addition to her normal salary and salary related benefits, the following from the 2021-2022 scholastic year and every succeeding scholastic year: 1/14 of her base salary for every class taught above the maximum allowable for instruction supervisors, as set forth by the applicable collective bargaining agreement(s) and other agreed upon contract(s); the stipend for instructional supervisors, as set forth by the applicable collective bargaining agreement(s) and other agreed upon contract(s).

Dismissal of Action. Petitioner agrees to promptly seek, obtain and be bound by a dismissal of the claims against Respondent with prejudice in the OAL Action only. Each party will bear its costs and expenses, including attorney's fees, but for what has been outlined in the preceding paragraph, incurred by it in the prosecution and defense of the OAL Action, only.

Release of Claims. Petitioner releases and gives up any and all claims and rights which she may have against Respondent and AXA, its employees, officers, directors, shareholders, successors and/or assigns that refer, reflect, or otherwise relate to claims set forth in the OAL Action only. The within Release does not extinguish claims Petitioner and Respondent have in the concurrent action, within the Superior Court of New Jersey, Passaic Vicinage, entitled Clarke v. Sforza, et al., PAS-L-533-19 ("Law Division Action"). Petitioner does not release claims of retaliation for Respondent's failure to make Petitioner a supervisor, as set forth in the Law Division Claim. Petitioner releases and gives up any and all claims and rights which she may have against Respondent or any other parties in the Law Division Action, or related entities, as to past, present and future economic claims as to stipends and additional classes set forth in this release as well her past present and future right to be reinstated to a supervisors title or position. This releases all economic claims that refer, reflect, or otherwise relate to that which has been set forth in the OAL Action, including those of which the parties are not aware and those not

mentioned in this Release. This Release applies to all claims that refer, reflect, or otherwise relate to the OAL Action, or claims within, resulting from anything which has happened up to now.

Definition of Claims. The matters encompassed by this Release are "Claims," which, as used herein, include, but are not limited to, claims, actions, suits, causes of action, accounts, judgments, attorney's fees, arbitration awards, agreements, promises, debts, damages, losses, liabilities, wages, bad faith claims, salary damages, punitive damages, extra-contractual damages, demands, losses, liabilities disputes and controversies of every nature in law or in equity actions, whether arising by statute, at common law, at equity or otherwise, whether arising under federal, state, foreign, or other law, whether assertable directly or in any representative capacity whatsoever, and whether discovered or accrued at any time related to or arising out of the OAL Action.

Representations and Warranties. By executing this Release, Petitioner acknowledges that she:

(a) has read the document;

(b) understands that it is a Release of Claims;

(c) intends to be legally bound by this document; and

(d) represents and warrants she is the sole owner of the claims settled and have not made or suffered any transfer of any interest in the claims to any third party.

No Admission of Liability. Neither the settlement of the claims, nor the payment of the consideration for the herein Release shall be construed as an admission of any liability by or on the part of Respondent and/or AXA; it is understood that such payment is made solely for purposes of terminating the OAL Action and resolving claims arising out of or related to the OAL action.

Independent Counsel. Petitioner has had full opportunity to consult, and indeed has, legal counsel and received legal advice with respect to this Release before signing it and has been represented by legal counsel in the Action and in the negotiation of this Release and its terms.

Interpretation. Should any provision of this Release require interpretation or construction, the court, administrative body or other entity interpreting or construing it shall not apply any presumption that its provisions are to be more strictly construed against one party than against the other.

Binding Affect. This Release shall be binding upon Petitioner and inures to the benefit of Respondent, each of their heirs, assigns, next of kin, dependents, parents, children, administrators, and attorneys, as well as Respondent, AXA and their administrators, predecessors, successors, assigns, divisions, subsidiaries, parents, affiliates and/or other related entities and/or other related entitles and each of their past, present and future directors, trustees, fiduciaries, administrators, officers, agents, employees, servants, stockholders and attorneys.

Liens. Petitioner expressly agrees to satisfy any and all liens of any and all kinds from the proceeds of this settlement and further agree to indemnify, defend and hold harmless Respondent, and AXA, and their attorneys, administrators, predecessors, successors, assigns, divisions, subsidiaries, parents, affiliates and/or other related entities and/or other related entitles and each of its past, present and future directors, trustees, fiduciaries, administrators, officers, agents, employees, servants and stockholders in the event that any lienholder asserts a claim or right to reimbursement.

Entire Agreement. The agreement set forth in the Release and waiver contain the entire agreement and understanding between the parties and constitute a full and final agreement in and all issues relating to the OAL Action only, except that the parties reserve their right to enforce the within agreement, if necessary.

Choice of Law. The agreement set forth in the Release shall be governed by the laws of the State of New Jersey.

Binding Effect. The parties shall be bound by the terms and conditions of the agreement set forth in the Release as to the OAL Action only, finding it to be in the best interests of the public, consistent with public policy, fair and equitable under all circumstances surrounding the OAL Action only.

Voluntary Agreement. The parties have entered into the agreement set forth in the Release freely and voluntarily with a full understanding of their rights and contents of the within agreement set forth in the Release as to the OAL Action only.

Breach. If a court determines that either party breached the agreement set forth in the Release, as to the OAL Action only, the breaching party shall bear the costs of the non-breaching party of any litigation or efforts to have such breach corrected or compensated for, including but not limited to, reasonable attorneys' fees.

Good Faith. The parties expressly agree that they shall not in good faith and ensure implementation of the agreement set forth in the Release.

Modifications: The agreement set forth in the Release may not be altered amended or modified except in writing, signed and duly authorized all parties.

Any person who knowingly files a statement of claim containing any false or

misleading information is subject to criminal and civil penalties.

IN WITNESS WHEREOF, I hereunto set my hand and seal this 15th day of February 2021.

LOUISE CLARKE

Louise Clarke

STATE OF New Jersey)

) ss.

COUNTY OF Essex)

I CERTIFY that on 2/15, 2021, LOUISE CLARKE personally came before me and stated to my satisfaction that he:

(a) was the maker of the foregoing Release; and

(b) executed this Release on his own act.

Notary Public

Alan Centempo
an attorney at law
State of New Jersey

CIPRIANI & WERNER

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

FRANCIS J. LEDDY, III
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A Mid-Atlantic Litigation Firm

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January 6, 2020

PRIVILEGED & CONFIDENTIAL MEDIATION STATEMENT - ATTORNEY WORK PRODUCT

VIA EMAIL ONLY to Carol.Cohen@oal.nj.gov
Hon. Carol Cohen, ALJ
Office of Administrative Law
33 Washington Street, 7th Floor
Newark, NJ 07102

RE: *Louise Clarke v. Carlstadt-East Rutherford Board of Education*
Docket No: EDU 15420-19

Dear Judge Cohen:

As you know, this office represents The Carlstadt-East Rutherford Board of Education ("Respondent" or "BOE") in the above matter. In advance of the settlement conference before Your Honor, please accept the following position statement of the BOE.

Background Case Facts

There is ongoing litigation taking place in the Superior Court of New Jersey, Passaic County. Counsel for Petitioner Louise Clarke has made many allegations in her complaint including those involving, 1) sexual harassment under NJLAD; (2) hostile work environment under NJLAD; (3) gender discrimination under NJLAD; (4) retaliation under NJLAD; (5) wrongful termination under CEPA; (6) breach of contract; (7) violation of NJ Equal Pay Act; (8) violation of NJCRA; and (9) aiding and abetting under NJLAD. Respondent vehemently has denied these allegations. Respondent has also filed a counterclaim against Petitioner covering multiple grounds including breach of contract, good faith and fair dealing, theft of services,

destruction of records, and conspiracy to defraud Respondent. However, the basis behind the allegations are not germane to the issues at hand in the within matter.

Petitioner Louise Clarke ("Clarke") was formerly the Superintendent of the Carlstadt-East Rutherford School District. At the conclusion of the 2017-2018 scholastic year, Clarke's contract was not renewed. She subsequently was placed on paid leave for the 2018-2019 year. While on leave, a request was provided to Clarke as to her intentions or the 2019-2020 school year, as to whether she wanted to return to the district, which she responded in the affirmative indicated her desire to return to the District for the 2019-2020 school year. She allegedly provided her notice and was assigned a Spanish teacher position.

On September 18, 2019, Plaintiff filed a Petition of Appeal with the New Jersey Department of Education, asserting that she has been assigned to a regular teaching position for the 2019-2010 school year, even though she has tenured status of a supervisor. She further alleges that this assignment is in furtherance of the retaliation asserted in the lawsuit, and that she is being deprived of a supervisor's compensation. Respondent has filed an Answer denying the allegations made by Petitioner. There was no opening for the supervisor position she sought.

Petitioner's Specific Allegations

Petitioner, without any basis states that she has been "retaliated" against since she returned due to her position as teacher because of her lawsuit. Petitioner claimed that she received the "least desirable" schedule, without providing the schedules of any other teachers to provide any context. In reality, Petitioner did not receive the least desirable schedule. This has been verified by the analysis we have received from our school liability expert in the litigated matter, who reviewed the other schedules. If this matter continues with the Office of Administrative Law, we will provide these schedules through discovery.

Settlement Negotiations

Respondent does not concede any liability arguments against Petitioner in this matter. However, for the purposes of this mediation, Respondent is willing to negotiate in good faith as to the difference in pay Petitioner would have received if she was in a supervisory position for a reasonable amount of time. At the outset we note that Petitioner has been with the district since approximately 1980 and is close to retirement. Petitioner's current total salary, inclusive of longevity, is $124,456. The difference she would have received if operating in a supervisory capacity the past two years would have been the supervisory stipend of $8,200 per year.

Petitioner would be entitled thus far to the stipend for the 2019-2020 school year and half of the 2020-2021 school year. Petitioner, is also seeking attorneys' fees and costs. Given Petitioner's age and proximity in time to retirement, Respondent is willing to resolve this matter for the stipend which was not provided in the 2019-2020 and half of the 2020-2021 school year. Additionally, Respondent is willing to include in the settlement the stipend for a reasonable amount of time Petitioner expects to work in the future. This would obviously include the rest of the 2020-2021 school year. Lastly, Respondent is willing to include in the settlement an additional reasonable amount for the continuation of this action. We note that written discovery has not been exchanged on either side. Expert discovery has also not been exchanged on either side. Additionally, no depositions have been taken to date.

Very truly yours,
CIPRIANI & WERNER, P.C.



SUNIL S. TILAK, ESQ.
FRANCIS J. LEDDY, III, ESQ.

SST
Cc: The Hon Andrew Baron, ALJ (via email to Andrew.Baron@oal.nj.gov)
Maria Montaner (via email Maria.Montaner@oal.nj.gov)

111-21

OAL Dkt. No. EDU 04611-20
Agency Dkt. No. 56-3/20

New Jersey Commissioner of Education

Final Decision

D.B., on behalf of minor child, T.B.,

Petitioner,

v.

Board of Education of the Rancocas Valley Regional School District, Burlington County,

Respondent.

The record of this matter, the proposed Settlement Agreement and General Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 21, 2021
Date of Mailing: May 21, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT

D.B. on behalf of minor child, T.B.,
Petitioner,
v.
VALLEY REGIONAL HIGH SCHOOL BOARD OF EDUCATION, BURLINGTON COUNTY,
Respondent.

OAL DKT. NO. EDU 04611-20
AGENCY DKT. NO. 56-3/20

Mark J. Molz, Esq., for petitioner (Mark Molz Law Offices, attorneys)

Frank Cavello, Jr., Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: April 1, 2021 Decided: April 6, 2021

BEFORE **SARAH G. CROWLEY,** ALJ:

On May 11, 2020, the Department of Education Office of Controversies and Disputes transmitted the matter along with the petition of appeal to the Office of Administrative Law.

The parties have agreed to a settlement and have prepared a Settlement Agreement and General Release indicating the terms thereof, and submitted the Resolution of the Valley Regional High School Board of Education accepting the Settlement Agreement and Board Resolution, which are attached and fully incorporated herein. (J-1.)

I have reviewed the terms of settlement and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the Settlement Agreement and Board Resolution.

2. The settlement fully disposes of all issues in controversy.

I CONCLUDE that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties shall comply with the settlement terms.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 6, 2021
DATE

Sarah G. Crowley
SARAH G. CROWLEY, ALJ

Date Received at Agency: 4/6/2021

Date Mailed to Parties: 4/7/2021
SGC/nd

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement Agreement and Board Resolution

File No. 1265-6
Law Offices
PARKER McCAY P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054
(856) 596-8900
Attorneys for Respondent, Rancocas Valley Regional High School District Board of Education

D.B. o/b/o minor child T.B. **Petitioners,** vs. **RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION** **Respondent.**	**BEFORE THE COMMISSIONER OF EDUCATION** **STATE OF NEW JERSEY** **OAL DOCKET NO.** **AGENCY REF. NO. 56-3/20** **CIVIL ACTION** **SETTLEMENT AGREEMENT**

This Settlement Agreement and General Release (the "Agreement") is entered into on this ____ day of December, 2020 by and between D.B. o/b/o T.B., and the Rancocas Valley Regional High School District Board of Education (hereinafter "District"), with its mailing office located at 520 Hedding Jacksonville Rd., Mount Holly, NJ, 08060 ("D.B. o/b/o T.B. and District" hereinafter collectively, "the Parties").

WHEREAS, T.B. is a student currently enrolled in the Rancocas Valley Regional High School Public School District;

WHEREAS, T.B. ~~is currently~~ D.B. WAS ALLEGED TO BE domiciled outside of the Rancocas Valley Regional High School Public School District;

WHEREAS, a dispute arose as to T.B.'s current domicile and his enrollment as a student in the Rancocas Valley Regional High School Public School District; and

WHEREAS, D.B. filed a Petition of Appeal with the Commissioner of Education challenging the removal of T.B. from the District; and,

WHEREAS, the District filed an Answer and Counterclaim seeking payment of tuition; and,

WHEREAS, the matter was transmitted to the Office of Administrative Law for a Hearing; and,

WHEREAS, the Parties in conducted negotiations and have reached a resolution of the claims contained in the Petition of Appeal and the Answer and Counterclaim filed on behalf of the Parties;

The Parties hereby agree as follows:

1. As of November 16, 2020, T.B. shall be withdrawn as a student in the Rancocas Valley Regional High School Public School District and enroll in the public school district of his current residence.

2. D.B. agrees to sign any necessary forms that may require her signature for the transfer of T.B.'s student records to the school in which he will be enrolled for the 2020-2021 school year.

3. The District will waive any entitlement to payment of tuition by D.B. o/b/o T.B. for T.B.'s attendance at the Rancocas Valley Regional High School Public School District up until November 16, 2020.

4. This Agreement is dispositive of all issues in dispute between the Parties hereto, and is intended to constitute a final resolution of the dispute between the Parties.

5. D.B o/b/o T.B. acknowledges that she has read and understands the terms of this Agreement, that she has had the opportunity to have the Agreement reviewed by counsel, that she is satisfied with the advice of her respective counsel, and that she is entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

IN WITNESS HEREOF, the Parties have set their hands this 10TH day of MARCH, 2020

BY: _____ DATED: _____
Charles S. Miller, President
Rancocas Valley Regional High School
Board of Education

BY: _____ DATED: 3-10-21
D.B. o/b/o T.B.

DR. CHRISTOPHER HEILIG
Superintendent
MR. JOSEPH R. MARTIN
Principal

RANCOCAS VALLEY REGIONAL HIGH SCHOOL
520 JACKSONVILLE ROAD
MOUNT HOLLY, NEW JERSEY 08060
Telephone: (609) 267-0830
FAX: (609) 265-9204

MS. LISA GIOVANELLI
Business Administrator
Board Secretary

March 29, 2021

I, Lisa Giovanelli, certify that the following resolution is a true and accurate copy of the resolution adopted by the Rancocas Valley Regional High School Board of Education on March 23, 2021.

RESOLVED; on motion by Mrs. Daily, seconded by Mr. Don, the Board of Education approved the acceptance of the signed executed final settlement agreement as per attachment.

On a roll call vote the following was recorded:

Mrs. Daily – yes
Mr. Don – yes
Mr. Donnelly – yes
Mr. Fueger - yes
Mr. Hollowell - yes
Mr. Sapp - yes
Mrs. Solan - yes
Mr. Miller - yes
The motion was carried.

LISA GIOVANELLI
BUSINESS ADMINISTRATOR/BOARD SECRETARY

LG:lh

112-21

112-21
OAL Dkt. No. EDU 00275-21
Agency Dkt. No. 235-11/20

New Jersey Commissioner of Education

Final Decision

Board of Education of the Borough of Mountain Lakes, Bergen County,

Petitioner,

v.

S.T. and S.T.,

Respondents.

The record of this matter, the proposed Settlement Agreement and Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. In so doing, the Commissioner notes that Paragraphs One and Two of the Agreement reference actions that occurred before the consideration of this matter by the Commissioner. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the above, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 21,2021
Date of Mailing: May 21, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00275-21
AGENCY DKT. NO. 235-11/20

BOARD OF EDUCATION OF THE BOROUGH, OF MOUNTAIN LAKES, BERGEN COUNTY,

Petitioner,

v.

S.T. AND S.T.

Respondents.

David Ulric, Esq., for petitioner (Fogarty & Hara, attorneys)

John Horan, Esq., for respondent (Horan & Aronowitz, attorneys)

Record Closed: March 1, 2021 Decided: April 9, 2021

BEFORE **ANDREW M. BARON**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on January 4, 2021 pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement and Release setting forth the terms of their agreement, which is attached and fully incorporated herein.

Having reviewed the record and the Settlement Agreement and Release setting forth the terms of the parties' agreement, I **FIND**:

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

April 7, 2021
DATE

ANDEW M. BARON, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

mm

FOGARTY & HARA, ESQS.
21-00 Route 208 South
Fair Lawn, NJ 07410
(201) 791-3340
(201) 791-3432 Telecopier
Attorneys for Petitioner,
Mountain Lakes Board of Education
Our File No. 6/115

MOUNTAIN LAKES BOARD OF EDUCATION Petitioner, v. Sm.T. and Sn.T., Respondents.	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY/OFFICE OF ADMINISTRATIVE LAW OAL Docket No.: EDU-00275-21 Agency Docket No.: 235-11/20 SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement (hereinafter "Agreement") is made this 1st day of March, 2021, by and between the Mountain Lakes Board of Education (hereinafter "Board"), which has offices located 400 Boulevard, Mountain Lakes, New Jersey 07046, and Sam and Sandra Trimble, parents of S.T. and E.T. (hereinafter "Parents"), residing at 44 Midvale Road, Unit A, Mountain Lakes, New Jersey 07046.

WITNESSETH

WHEREAS, the Mountain Lakes School District (hereinafter "District") is a pre-kindergarten through twelfth grade school district for students who are domiciled in Mountain Lakes, New

Jersey or are otherwise eligible for a free public school education in accordance with N.J.S.A. 18A:38-1; and

WHEREAS, the Board became aware that, for an indeterminate period of time, the Parents were not domiciled withing the lawful boundaries of the District, although S.T. and E.T. were enrolled in and attending school in the District on a tuition-free basis; and

WHEREAS, having determined that the Parents were not domiciled within the District, the Board found S.T. and E.T. ineligible for a free public school education in the District pursuant to N.J.S.A. 18A:38-1; and

WHEREAS, A hearing was held before the Board at which the Parents had an opportunity to testify and to present evidence relevant to their residency; and

WHEREAS, the parties are desirous of resolving this matter without resorting to litigation and bearing the additional costs and inconveniences associated therewith.

NOW, THEREFORE, in consideration of the mutual promises and covenants of the parties set forth below, the Board and the Parents hereby agree as follows:

1. The Parents agree to remit to the Board a total sum of $5,000.00 for the period that S.T. and E.T. were not entitled to receive a free education in the District.

2. Payment shall be made within ten (10) days from the date of this Agreement and payable to: "The Mountain Lakes Board of Education" and forwarded to:

The Mountain Lakes Board of Education
Attn: Mr. Alex Ferreira
Board Secretary/Business Administrator
400 Boulevard
Mountain Lakes, New Jersey 07046

3. This Agreement is without prejudice to the Board's right to conduct investigations of the Parents' continued residency in the District. If the District determines that the Parents are no longer domiciled in the District, the Parents shall be provided with a notice of ineligibility in accordance with N.J.S.A. 18A:38-1.

4. The Parents agree that they will be in default of this Agreement if Payment is not received by the Board within the time period specified herein. The Parents acknowledge and agree that the Board has the right to institute a civil proceeding in Superior Court to collect said amounts by way of summary proceeding and shall be entitled to a judgment for the amounts due and owing the Board, in addition to any attorneys' fees and costs incurred in connection with a default.

5. The Board hereby waives any and all claims it may have against the Parents in connection with their residency status up to the date of this Resolution, and shall not cause

any suit, demand, administrative, judicial or other proceeding, claim, complaint or other action of any kind to be brought against the Parents in connection with this matter.

6. The Parents hereby waive any and all claims they may have against the Board in connection with tuition allegedly owed for S.T. and E.T.'s attendance in the District up to the date of this Resolution, and shall not cause any suit, demand, administrative, judicial or other proceeding, claim, complaint, or other action of any kind to be brought against the Board in connection with this matter.

7. It is expressly understood, however, that either party may bring an action to enforce the terms of the within Agreement. It is understood that all parties shall bear their own attorney's fees and costs in connection with this matter, except as expressly provided in paragraph four (4) of this Agreement.

8. The parties recognize that they sign this Agreement as their own voluntary acts and deeds, and they fully understand the duties and obligations enumerated herein. This Agreement shall be subject to the laws of the State of New Jersey.

9. This Agreement is subject to the Board's approval at its meeting on March 1, 2021.

10. The Board President and Business Administrator are duly authorized to sign any and all documents necessary to effectuate the terms of the within Settlement Agreement.

11. Should any part, term or provision of this Agreement be declared or determined in a court, administrative proceeding, arbitration, or other venue of competent jurisdiction, applying New Jersey law, to be illegal, invalid or unenforceable, the legality, validity or enforceability of the remaining parts, terms or provisions shall not be affected.

12. This Agreement constitutes the entire understanding of the parties hereto with respect to its subject matter.

13. This Agreement may be signed in counterparts, which, taken together, shall constitute but a single document when executed by all parties. This Agreement shall not be effective until such time as it has been duly authorized and executed by all parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

WITNESS:

John E. Horan

DATED: 2/24/2021

SAM TRIMBLE

SANDRA TRIMBLE

DATED: 2.24.21

WITNESS:

ALEX FERREIRA
Business Administrator/Board Secretary

DATED: 3.9.21

MOUNTAIN LAKES BOARD OF EDUCATION

BY: JOANNE CALABRIA BARKAUSKAS
Board President

DATED: 3-10-21

FOGARTY & HARA
COUNSELLORS AT LAW

RODNEY T. HARA
STEPHEN R. FOGARTY
VITTORIO S. LAPIRA
STACEY THERESE CHERRY

JANET L. FIKE
NICHOLAS A. SOTO
ROBERT D. LORFINK
JOSEPH R. MARSICO
DAVID J. ULRIC
ASHLEY L. ROESSLER

21-00 ROUTE 208 SOUTH
FAIR LAWN, NEW JERSEY 07410

(201) 791-3340
TELECOPIER (201) 791-3432

March 1, 2021

VIA FEDEX

Alex Ferreira
Business Administrator/
Board Secretary
Mountain Lakes Board of Education
96 Powerville Road, Suite 1
Mountain Lakes, New Jersey 07046

Re: Mountain Lakes Board of Education/ In the Matter of E.T. and S.T. Residency

Dear Mr. Ferreira:

Attached please find the Settlement Agreement and Release between the Mountain Lakes Board of Education and Sam and Sandra Trible, which has been executed by the Tribles. Also attached is a check in the amount of $5,000 payable to the Mountain Lakes Board of Education. Kindly provide our office with a fully executed copy of the Settlement Agreement once it is approved by the Board.

If you have any questions, of course, do not hesitate to contact us.

With kind regards, we are

Very truly yours,

FOGARTY & HARA

BY: /s/ Stephen R. Fogarty
STEPHEN R. FOGARTY

SRF:up
Enclosures

117-21

OAL Dkt. No. EDU 15066-17
Agency Dkt. No. 174-8/17

New Jersey Commissioner of Education

Final Decision

Tara Beams,

Petitioner,

v.

Board of Education of the Township of Edison, Middlesex County,

Respondent.

The record of this matter, the proposed General Release and Settlement Agreement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that the Agreement references actions that were to take place in a time frame that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 28, 2021
Date of Mailing: May 28, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 15066-17
AGENCY DKT. NO. 174-8/17

TARA BEAMS,
Petitioner,
v.
TOWNSHIP OF EDISON BOARD OF EDUCATION, MIDDLESEX COUNTY,
Respondent.

Armen McOmber, Esq., for petitioner (McOmber, McOmber & Luber, P.C., attorneys)

Brent R. Pohlman, Esq., for respondent (Methfessel & Werbel, P.C., attorneys)

Record Closed: April 13, 2021 Decided: April 19, 2021

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

This appeal was filed on August 9, 2017. On October 12, 2017, the Department of Education Office of Controversies and Disputes transmitted the matter along with the petition of appeal to the Office of Administrative Law.

The parties have agreed to a settlement and have prepared a General Release and Settlement Agreement indicating the terms thereof, and submitted the General Release and Settlement Agreement and the Resolution of the Edison Township Board of Education (Board), dated March 23, 2021, authorizing the Board President to execute the General Release and Settlement Agreement on behalf of the Board, which are attached and fully incorporated herein. (J-1.)

I have reviewed the terms of settlement and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the General Release and Settlement Agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties shall comply with the settlement terms.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Tricia M Caliguire

April 19, 2021
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: 4/19/2021

Date Mailed to Parties: 4/20/2021

mph

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 General Release and Settlement Agreement and Board Resolution

Ge.eral Release & Settlement Agreement – Former Employee No. 107713

BE IT
RESOLVED: that upon the recommendation of the Superintendent of Schools, the Edison Township Board of Education hereby approves the General Release and Settlement Agreement in the matter of former Employee No. 107713 v. Edison Township Board of Education, Docket No. 174-8/17/EDU 150660-2017 S, and authorizes the Board President to execute the General Release and Settlement Agreement on behalf of the Board.

THIS IS CERTIFIED TO BE A TRUE AND COMPARED COPY OF A RESOLUTION ADOPTED BY THE EDISON BOARD OF EDUCATION ON MARCH 23, 2021.

SECRETARY

GENERAL RELEASE AND SETTLEMENT AGREEMENT

The General Release and Settlement Agreement (hereinafter referred to as the "Agreement") is made by Releasor Tara Beams (hereinafter also referred to as "Beams" or "Releasor" (includes herself and her legal representatives and agents), for the benefit of the Board of Education of the Township of Edison, its Elected Officials, Agents, Employees and Representatives (hereinafter also collectively referred to as "the Board," including its administrators, officers, agents and employees), for the following purposes and with reference to the following background.

BACKGROUND

A. Tara Beams was formerly employed with the Board of Education of the Township of Edison; and

B. Tara Beams filed a Petition of Appeal with the State of New Jersey Department of Education, Bureau of Controversies and Disputes, EDU 15066-17, claiming a violation of *N.J.S.A.* 18A:27-4.1 *et seq.* in connection with her employment; and

C. The Board of Education of the Township of Edison has denied, and continues to deny, any liability for the claims alleged by Tara Beams that the Board of Education of the Township of Edison violated any laws or engaged in any unlawful or wrongful conduct, or discriminated against her, or deprived her of any of her rights in any manner; and

D. The Parties desire to make a full and final settlement of any and all of the Releasor's claims and potential claims against Board of

Education of the Township of Edison, known or unknown, asserted or unasserted, based on any facts, events, acts or omissions, whether now known or unknown, occurring on or before the effective date of their Release, without any judicial, administrative, or arbitral resolution of them and without any admission with respect to any issues presented or capable of being presented.

NOW THEREFORE, in consideration of the mutual promises contained herein and for other good and valuable consideration, and intending to be legally bound, the undersigned parties agree as follows:

1. Non-Admission. The Agreement is not, and shall not in any way be considered or construed as, an admission by the Board or Releasor of any tortious conduct, or of any violation of any law, common law, or federal, state or local statute or regulation, or of any alleged duty owed by the Board to or from Tara Beams, or of any unlawful or wrongful acts whatsoever by the Board or Releasor. The payment hereunder is made by the Board's liability insurer and is made solely to avoid the inconvenience and cost of litigation and to resolve completely all of Releasor's claims against the Board, known or unknown, asserted or unasserted, as more fully detailed in Paragraph 7, below.

2. Cooperation. Releasor agrees to cooperate fully in connection with any steps required to be taken as part of her obligations under the Agreement.

3. Withdrawal and Dismissal of Lawsuit and Promise Not to Sue. Releasor understands that the Agreement extinguishes any claims or potential claims as to the Board, and agrees not to file, revive any claims, or open a lawsuit in any way. Releasor further agrees not to file any other Charges with any state or federal agency against the Board and/or any of its current or former elected officials, employees, agents or administrators based on any matter, fact or event occurring prior to the effective date of the Agreement.

Releasor further agrees that neither she, nor any person, organization, agency, or other entity on her behalf, will file, charge, claim or sue, or cause to be filed, charged, claimed or sued, any lawsuit, legal proceeding, action, or claim of any nature with any court or agency (including any action for damages, attorneys fees, injunction, declaratory, monetary, equitable or other relief) against the Board based on any matter, fact or event occurring prior to the effective date of the Agreement, whether now known or unknown, or involving any continuing effects of any acts or practices which may have arisen or occurred prior to the effective date of the Agreement, whether now known or unknown.

Releasor understands and agrees that she will not be considered a prevailing party under any statute, common law, or otherwise as a result of the Agreement.

The Board represents that there are no pending lawsuits, charges or other claims of any nature whatsoever by them against Releasor in any

state or federal court, agency or other administrative body, and that the Board, nor any person, organization, agency, or other entity on its behalf, will file, charge, claim or sue, or cause to be filed, charged, claimed or sued, any lawsuit, legal proceeding, action, or claim of any nature with any court or agency (including any action for damages, attorneys fees, injunction, declaratory, monetary, equitable or other relief) against the Releasor based on any matter, fact or event occurring prior to the effective date of the Agreement, whether now known or unknown, or involving any continuing effects of any acts or practices which may have arisen or occurred prior to the effective date of the Agreement, whether now known or unknown.

4. Consideration. In exchange for the promises, Releases, and legal releases stated herein, and other good and valuable consideration, the Board's insurance carrier will pay Tara Beams the sum of Forty Thousand Dollars ($40,000.00), within thirty (30) days from the effective date of the Agreement. The effective date of the Agreement shall be the date upon which the Board approves acceptance of the executed Agreement and receives W-9 forms on behalf of Tara Beams and McOmber McOmber & Luber P.C., and a child support search report from her attorney, whichever occurs last. Payment shall be issued as follows: one check in the amount of Thirty-Two Thousand Dollars ($32,000) to Beams and another check in the amount of Eight Thousand Dollars ($8,000) to McOmber McOmber & Luber, P.C.

5. Beams's Tax Indemnification. Tara Beams represents and warrants that neither the Board nor counsel to the Parties provided any advice regarding the taxability of the settlement amount paid pursuant to paragraph 4. Tara Beams acknowledges and agrees that she is solely responsible for payment of any and all federal, state and local taxes which may be due from the settlement sum in the event that it is determined that any taxes are owed based on the taxation laws in effect on the date of the execution of the Agreement or become due at any time in the future because of a change to the laws governing the taxation of such settlement proceeds. Releasor agrees to indemnify and hold the Board and counsel to the Parties harmless from any and all federal, state, and local tax liabilities, deficiencies, levies, interest, and penalties that may be assessed as a result of not withholding income and payroll taxes on the monies paid pursuant to the Agreement if she fails to properly pay any taxes to which her settlement may be subject.

6. Full and Complete Settlement. Releasor agrees that the payment described in paragraph 4 will be received by Tara Beams in full and complete settlement, as more fully detailed in paragraph 7, below, of all known or unknown claims, asserted or unasserted, of Releasor allegedly arising out of any and all conduct or actions of the Board and/or relationship with the Board, as more fully detailed in Paragraph 7, below.

7. General Release and Waiver of all Claims by All Signatories to the Agreement. In consideration for the payment and promises described

in paragraphs 3 and 4, and elsewhere in the Agreement, all signatories to the Agreement fully release and forever discharge each other of and from any and all claims, actions, causes of action, back pay, front pay, contracts, agreements, compensation, pay, promises, charges, judgments, grievances, obligations, rights, demands, debts, sums of money, salaries, wages, benefits, physical injury, pain, suffering, emotional distress, compensatory damages, punitive damages, attorneys' fees, expenses, costs, losses liabilities, damages, or accountings of whatever nature, whether known or unknown, disclosed or undisclosed, asserted or unasserted, in law or equity, contract or tort or otherwise (herein collectively designated "Claim" or "Claims"), through the effective date of the Agreement, including, but not limited to, any and all Claims of race, gender, sex, age and national origin discrimination, retaliation, and any and all tort Claims or contract Claims or Claims for general damages, and any and all Claims arising under, made, regarding, or involving: any federal, state or local laws or under the common law; violations of any federal, state or local fair employment practices or civil rights laws or ordinances; Claims for personal injury, defamation, wrongful conduct, or wrongful discharge; the Civil Rights Acts of 1866 and 1871, as amended, 42 U.S.C. §1981; the Civil Rights Act of 1964, as amended, including Title VII; the Americans with Disabilities Act; the Age Discrimination in Employment Act, as amended; the Older Workers Benefit Protection Act; the Employee Retirement Income Security Act; the Fair Labor Standards

Act; the Rehabilitation Act of 1973; Executive Order 11246; the federal Family and Medical Leave Act; state Family and Medical Leave Acts; Claims alleging retaliation under the Worker's Compensation Act; the Unemployment Compensation Law; the National Labor Relations Act, as amended; any and all state wage payment and collection laws; Pickering's policies, practices, collective bargaining agreements, contracts, benefits or understandings; any Claims arising out of any relationship, including employment relationship, between or among Tara Beams and the Released Parties predating the effective date of the Agreement; and all Claims for employment, reemployment, or reinstatement of employment to the Board; any and all grievances, or demands for mediation or arbitration, or Claims or demands under the Board's policies and procedures; and any and all Claims asserted, or which could have been asserted, in a state court Lawsuit referenced above, including any Claims against any current or former agents or employees of the Board.

The signatories to the Agreement hereby specifically waive, release and give up all Claims and rights, as described in the preceding paragraph, whether now known or unknown, which she have or may have, against the Board and the Released Parties, based on any fact, act, event, or omission, whether now known or unknown, occurring before the Effective Date of the Agreement. Releasor understands that she is waiving, releasing and giving up all Claims and rights that she knows about and all Claims and rights that she may not know about. The release does not

apply to Claims based on facts occurring after the Effective Date of the Agreement or claims against the Board or failure to perform any of her obligations under the Agreement

8. Neutral Job Reference. In the event the Board is contacted by any person or entity seeking a professional, personal, or character reference related to Tara Beams and/or her employment with the Board, all parties agree that such inquiry shall be directed to the Human Resources Manager, who shall advise such person or entity that it is the policy of the Board solely to provide information verifying employment, dates of hire and separation, salary and title. Beams will not seek future employment with the Board.

9. Mutual Non-Disparagement. Beams understands and agrees that she will not defame, disparage, demean, or in any other manner, make negative statements, whether written or oral (including, but not limited to, on social media and/or electronic blogs), nor do anything that derogates the Board, their services, compliance with the law, products, reputations, their officers, former and current employees, financial status, or operations, nor that damages the Board in any business relationships. The Board understands that they shall not defame, disparage or demean Beams, whether written or oral, nor do anything that derogates Beams.

10. Liens. It is further understood that as a condition of the settlement, all claims and/or liens, past, current and/or future arising out of the settlement or asserted against the proceeds of the settlement are to

be satisfied by Tara Beams (herein "Releasor"), including but not limited to any Medicare or Medicaid claims and/or liens, Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including but not limited to claim based on subrogation or any other legal or equitable theory. Releasor therefore agrees, upon prompt presentation of any such claims and/or liens, to defend the Release Parties against any such claims and/or liens, and to indemnify and hold the Released Parties harmless against any judgment entered against the Released Parties based on such claims and/or liens, including the payment of any fines, charges and attorneys fees incurred as a result of any such lien. Failure to satisfy any such lien shall be considered a breach of the Agreement, and Releasor agrees to pay all costs, interest and attorneys fees relative to any such lien.

11. Attorneys' Fees, Costs, and Expenses. Each party shall be responsible solely for its or her own attorneys' fees, costs, and expenses. Releasor specifically waives all claims to attorneys' fees, costs, and expenses from the Board, including all claims for reimbursement to the Board or her attorneys, agents, or family members, of any attorneys' fees, costs, and expenses she has incurred or paid, or which were paid on her behalf.

12. Applicable Law and Severability. The Release shall be governed by and construed in accordance with the laws of New Jersey, except where federal law controls. Should any provision of the Release be declared or determined by any Court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of the Release.

13. Entire Release. The Release sets forth the entire Release between the parties and fully supersedes any and all prior Releases or understandings between the parties.

14. Tara Beams' Certification. Tara Beams agrees, certifies, acknowledges, and represents: (a) that she has been and is hereby advised in writing to consult with an attorney of her choice and at her expense, prior to signing the Release; (b) that she has had adequate time and opportunity to review and discuss, and has reviewed and discussed all of the terms and sections of the Release thoroughly with her attorney; (c) that her attorney has explained the entire Release to her; (d) that she does not waive any rights or claims that may arise after the date the Release becomes effective; (e) that she shall have and was given at least twenty-one (21) days to consider the terms and conditions of the Release before signing it; (f) that her waiver of Claims and the General Release shall not become effective until the effective date of the Release.

If Tara Beams decides to sign the Release before the expiration of the 21-day period, Tara Beams specifically acknowledges that she has had sufficient time and opportunity to review and understand the terms of the Release and specifically waives and gives up any rights for additional time or opportunity to review it.

The check for payment of the amounts set forth in paragraph 4 shall be delivered to McOmber McOmber & Luber, P.C. in the foregoing manner: Lawyers Service.

TARA BEAMS FURTHER CERTIFIES, ACKNOWLEDGES, AND REPRESENTS THAT SHE IS ABLE TO READ AND UNDERSTAND ENGLISH, THAT SHE UNDERSTANDS ALL OF THE PROVISIONS HEREIN, WITH THE ADVICE AND ASSISTANCE OF HER ATTORNEY, AND THAT SHE MAKES THE RELEASE KNOWLINGLY AND VOLUNTARILY. TARA BEAMS ACKNOWLEDGES THAT SHE HAS NO PHYSICAL OR MENTAL PROBLEM, CONDITION, OR IMPAIRMENT OF ANY KIND WHICH HAS INTERFERED WITH HER ABILITY TO READ AND UNDERSTAND THE MEANING OF THE RELEASE OR ITS TERMS. TARA BEAMS FURTHER REPESENTS THAT IN SIGNING THE RELEASE, SHE DOES NOT RELY ON ANY PROMISES OR REPRESENTATIONS MADE BY ANYONE OTHER THAN THOSE STATED SPECIFICALLY HEREIN.

15. Full Knowledge. Tara Beams further warrants, represents, and agrees that in signing the Release, she does so with full knowledge of

any and all rights which she may have with respect to the Board and other Released Parties, or the Lawsuit.

16. Headings. The headings of the paragraphs in the Release are for convenience only and shall not control or affect the meaning or construction of, or limit the scope or intent of, any of the provisions of the Release.

17. Effective Date. The effective date of the Release shall be the date upon which the Board receives Tara Beams's signed and notarized Release, a W-9 form, and a child support search report.

18. Settlement Subject to Approval by Governing Body. Tara Beams understands that the agreement will not be binding unless and until it is formally approved by the Board of Education of the Township of Edison. Should it not be approved by the Board, its terms will be null and void and Tara Beams will have the right to continue to prosecute her civil claims against the Board.

IN WITNESS WHEREOF, and intending to be legally bound, Tara Beams has executed the Release as of the dates set forth below.

Tara Beams

(Signature)

Tara Beams

Dated: 3/8/21

(Type or Print Name)

STATE OF NEW JERSEY, COUNTY OF Monmouth :

I CERTIFY that on March 8, 2021, Tara Beams personally came before me and acknowledged under oath, to my satisfaction, that the person (or if more than one, each person):

(a) is named in and personally signed the document; and

(b) signed, sealed and delivered the document as her or her act and deed.

(Notary Public)

(Raised seal)

COURTNEY A. DERBY
NOTARY PUBLIC
STATE OF NEW JERSEY
MY COMMISSION EXPIRES NOV. 20, 2025

Board of Education of the Township of Edison

By _____
(Signature)

Jingwei "Jerry" Shi, President
Dated: 3/23/21
(Type or Print Name)
JINGWEI SHI

118-21

118-21

OAL Dkt. No. EDU 06023-19
Agency Dkt. No. 175-8/17

New Jersey Commissioner of Education

Final Decision

Kathleen Miller,

Petitioner,

v.

Board of Education of the Township of Edison, Middlesex County,

Respondent.

The record of this matter, the proposed General Release and Settlement Agreement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that the Agreement references actions that were to take place in a time frame that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 28, 2021
Date of Mailing: May 28, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 06023-19
AGENCY DKT. NO. 175-8/17

KATHLEEN MILLER,

Petitioner,

v.

BOARD OF EDUCATION OF THE
TOWNSHP OF EDISON, MIDDLESEX COUNTY,

Respondent.

Armen McOmber, Esq., for petitioner (McOmber, McOmber & Luber, P.C., attorneys)

Brent R. Pohlman, Esq., for respondent (Methfessel & Werbel, P.C., attorneys)

Record Closed: April 13, 2021 Decided: April 19, 2021

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

This appeal was originally filed on August 4, 2017, and transmitted to the Office of Administrative Law (OAL) by the Department of Education Office, of Controversies and Disputes (Department) for hearing as a contested case on September 13, 2017, where it was docketed as EDU 13584-17. The matter was returned to the Department following the failure of both parties to appear for a hearing on July 16, 2018. Petitioner appealed and on August 20, 2018, the Commissioner of the Department ordered the matter re-transmitted to the OAL for further disposition pursuant to N.J.A.C. 1:1-3.3(b). On May 6, 2019, the Department re-transmitted the matter to the OAL, and it was docketed as EDU 06023-19.

The parties have agreed to a settlement and have prepared a General Release and Settlement Agreement indicating the terms thereof, and submitted the General Release and Settlement Agreement and the Resolution[1] of the Edison Township Board of Education (Board), dated March 23, 2021, authorizing the Board President to execute the General Release and Settlement Agreement on behalf of the Board, which are attached and fully incorporated herein. (J-1.)

I have reviewed the terms of settlement and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the Settlement Agreement and General Release.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties shall comply with the settlement terms.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

[1] The Board Resolution makes reference only to the original OAL docket number, EDU 13584-17.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Tricia M Caliguire

April 19, 2021
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: 4/19/2021

Date Mailed to Parties: 4/20/2021

mph

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 General Release and Settlement Agreement and Board Resolution

General Release & Settlement Agreement – Former Employee No. 108113

BE IT
RESOLVED: that upon the recommendation of the Superintendent of Schools, the Edison Township Board of Education hereby approves the General Release and Settlement Agreement in the matter of former Employee No. 108113 v. Edison Township Board of Education, Docket No. 175-8/17/EDU 13584-2017 S, and authorizes the Board President to execute the General Release and Settlement Agreement on behalf of the Board.

THIS IS A TRUE AND COMPARED COPY OF
A RESOLUTION ADOPTED BY THE EDISON
TOWNSHIP BOARD OF EDUCATION ON
MARCH 23, 2021.

SECRETARY

GENERAL RELEASE AND SETTLEMENT AGREEMENT

The General Release and Settlement Agreement (hereinafter referred to as the "Agreement") is made by Releasor Kathleen Miller (hereinafter also referred to as "Miller" or "Releasor" (includes herself and her legal representatives and agents), for the benefit of the Board of Education of the Township of Edison, its Elected Officials, Agents, Employees and Representatives (hereinafter also collectively referred to as "the Board," including its administrators, officers, agents and employees), for the following purposes and with reference to the following background.

BACKGROUND

A. Kathleen Miller was formerly employed with the Board of Education of the Township of Edison; and

B. Kathleen Miller filed a Petition of Appeal with the State of New Jersey Department of Education, Bureau of Controversies and Disputes, EDU 06023-19, claiming a violation of *N.J.S.A.* 18A:27-4.1 *et seq.* in connection with her employment; and

C. The Board of Education of the Township of Edison has denied, and continues to deny, any liability for the claims alleged by Kathleen Miller that the Board of Education of the Township of Edison violated any laws or engaged in any unlawful or wrongful conduct, or discriminated against her, or deprived her of any of her rights in any manner; and

D. The Parties desire to make a full and final settlement of any and all of the Releasor's claims and potential claims against Board of

Education of the Township of Edison, known or unknown, asserted or unasserted, based on any facts, events, acts or omissions, whether now known or unknown, occurring on or before the effective date of their Agreement, without any judicial, administrative, or arbitral resolution of them and without any admission with respect to any issues presented or capable of being presented.

NOW THEREFORE, in consideration of the mutual promises contained herein and for other good and valuable consideration, and intending to be legally bound, the undersigned parties agree as follows:

1. Non-Admission. The Agreement is not, and shall not in any way be considered or construed as, an admission by the Board or Releasor of any tortious conduct, or of any violation of any law, common law, or federal, state or local statute or regulation, or of any alleged duty owed by the Board to or from Kathleen Miller, or of any unlawful or wrongful acts whatsoever by the Board or Releasor. The payment hereunder is made by the Board's liability insurer and is made solely to avoid the inconvenience and cost of litigation and to resolve completely all of Releasor's claims against the Board, known or unknown, asserted or unasserted, as more fully detailed in Paragraph 7, below.

2. Cooperation. Releasor agrees to cooperate fully in connection with any steps required to be taken as part of her obligations under the Agreement.

3. Withdrawal and Dismissal of Lawsuit and Promise Not to Sue. Releasor understands that the Agreement extinguishes any claims or potential claims as to the Board, and agrees not to file, revive any claims, or open a lawsuit in any way. Releasor further agrees not to file any other Charges with any state or federal agency against the Board and/or any of its current or former elected officials, employees, agents or administrators based on any matter, fact or event occurring prior to the effective date of the Agreement.

Releasor further agrees that neither she, nor any person, organization, agency, or other entity on her behalf, will file, charge, claim or sue, or cause to be filed, charged, claimed or sued, any lawsuit, legal proceeding, action, or claim of any nature with any court or agency (including any action for damages, attorneys fees, injunction, declaratory, monetary, equitable or other relief) against the Board based on any matter, fact or event occurring prior to the effective date of the Agreement, whether now known or unknown, or involving any continuing effects of any acts or practices which may have arisen or occurred prior to the effective date of the Agreement, whether now known or unknown.

Releasor understands and agrees that she will not be considered a prevailing party under any statute, common law, or otherwise as a result of the Agreement.

The Board represents that there are no pending lawsuits, charges or other claims of any nature whatsoever by them against Releasor in any

state or federal court, agency or other administrative body, and that the Board, nor any person, organization, agency, or other entity on its behalf, will file, charge, claim or sue, or cause to be filed, charged, claimed or sued, any lawsuit, legal proceeding, action, or claim of any nature with any court or agency (including any action for damages, attorneys fees, injunction, declaratory, monetary, equitable or other relief) against the Releasor based on any matter, fact or event occurring prior to the effective date of the Agreement, whether now known or unknown, or involving any continuing effects of any acts or practices which may have arisen or occurred prior to the effective date of the Agreement, whether now known or unknown.

4. Consideration. In exchange for the promises, Releases, and legal releases stated herein, and other good and valuable consideration, the Board's insurance carrier will pay Kathleen Miller the sum of Eighty Two Thousand Five Hundred Dollars ($82,500.00), within thirty (30) days from the effective date of the Agreement. The effective date of the Release shall be the date upon which the Board approves the executed Agreement and receives W-9 forms on behalf of Kathleen Miller and McOmber McOmber & Luber P.C., and a child support search report from her attorney, whichever occurs last. The funds shall be distributed in two (2) checks: one to Kathleen Miller in the amount of Seventy Thousand Dollars ($70,000), and another check in the amount of Twelve Thousand Five Hundred Dollars (12,500) to the firm of McOmber McOmber & Luber, P.C.

5. Miller's Tax Indemnification. Kathleen Miller represents and warrants that neither the Board nor counsel to the Parties provided any advice regarding the taxability of the settlement amount paid pursuant to paragraph 4. Kathleen Miller acknowledges and agrees that she is solely responsible for payment of any and all federal, state and local taxes which may be due from the settlement sum in the event that it is determined that any taxes are owed based on the taxation laws in effect on the date of the execution of the Agreement or become due at any time in the future because of a change to the laws governing the taxation of such settlement proceeds. Releasor agrees to indemnify and hold the Board and counsel to the Parties harmless from any and all federal, state, and local tax liabilities, deficiencies, levies, interest, and penalties that may be assessed as a result of not withholding income and payroll taxes on the monies paid pursuant to the Agreement if she fails to properly pay any taxes to which her settlement may be subject.

6. Full and Complete Settlement. Releasor agrees that the payment described in paragraph 4 will be received by Kathleen Miller in full and complete settlement, as more fully detailed in paragraph 7, below, of all known or unknown claims, asserted or unasserted, of Releasor allegedly arising out of any and all conduct or actions of the Board and/or relationship with the Board, as more fully detailed in Paragraph 7, below.

7. General Release and Waiver of all Claims by All Signatories to the Agreement. In consideration for the payment and promises described

in paragraphs 3 and 4, and elsewhere in the Agreement, all signatories to the Agreement fully release and forever discharge each other of and from any and all claims, actions, causes of action, back pay, front pay, contracts, agreements, compensation, pay, promises, charges, judgments, grievances, obligations, rights, demands, debts, sums of money, salaries, wages, benefits, physical injury, pain, suffering, emotional distress, compensatory damages, punitive damages, attorneys' fees, expenses, costs, losses liabilities, damages, or accountings of whatever nature, whether known or unknown, disclosed or undisclosed, asserted or unasserted, in law or equity, contract or tort or otherwise (herein collectively designated "Claim" or "Claims"), through the effective date of the Agreement, including, but not limited to, any and all Claims of race, gender, sex, age and national origin discrimination, retaliation, and any and all tort Claims or contract Claims or Claims for general damages, and any and all Claims arising under, made, regarding, or involving: any federal, state or local laws or under the common law; violations of any federal, state or local fair employment practices or civil rights laws or ordinances; Claims for personal injury, defamation, wrongful conduct, or wrongful discharge; the Civil Rights Acts of 1866 and 1871, as amended, 42 U.S.C. §1981; the Civil Rights Act of 1964, as amended, including Title VII; the Americans with Disabilities Act; the Age Discrimination in Employment Act, as amended; the Older Workers Benefit Protection Act; the Employee Retirement Income Security Act; the Fair Labor Standards

Act; the Rehabilitation Act of 1973; Executive Order 11246; the federal Family and Medical Leave Act; state Family and Medical Leave Acts; Claims alleging retaliation under the Worker's Compensation Act; the Unemployment Compensation Law; the National Labor Relations Act, as amended; any and all state wage payment and collection laws; Pickering's policies, practices, collective bargaining agreements, contracts, benefits or understandings; any Claims arising out of any relationship, including employment relationship, between or among Kathleen Miller and the Released Parties predating the effective date of the Agreement; and all Claims for employment, reemployment, or reinstatement of employment to the Board; any and all grievances, or demands for mediation or arbitration, or Claims or demands under the Board's policies and procedures; and any and all Claims asserted, or which could have been asserted, in a state court Lawsuit referenced above, including any Claims against any current or former agents or employees of the Board.

The signatories to the Agreement hereby specifically waive, release and give up all Claims and rights, as described in the preceding paragraph, whether now known or unknown, which she have or may have, against the Board and the Released Parties, based on any fact, act, event, or omission, whether now known or unknown, occurring before the Effective Date of the Agreement. Releasor understands that she is waiving, releasing and giving up all Claims and rights that she knows about and all Claims and rights that she may not know about. The release does not

apply to Claims based on facts occurring after the Effective Date of the Agreement or claims against the Board or failure to perform any of her obligations under the Agreement.

8. Neutral Job Reference. In the event the Board is contacted by any person or entity seeking a professional, personal, or character reference related to Kathleen Miller and/or her employment with the Board, all parties agree that such inquiry shall be directed to the Human Resources Manager, who shall advise such person or entity that it is the policy of the Board solely to provide information verifying employment, dates of hire and separation, salary and title. Miller will not seek reemployment with the Board.

9. Mutual Non-Disparagement. Miller understands and agrees that she will not defame, disparage, demean, or in any other manner, make negative statements, whether written or oral (including, but not limited to, on social media and/or electronic blogs), nor do anything that derogates the Board, their services, compliance with the law, products, reputations, their officers, former and current employees, financial status, or operations, nor that damages the Board in any business relationships. The Board understands that they shall not defame, disparage or demean Miller, whether written or oral, nor do anything that derogates Miller. Notwithstanding the above, the Board is permitted to provide truthful statements to any governmental agency, if requested to do so.

10. Liens. It is further understood that as a condition of the settlement, all claims and/or liens, past, current and/or future arising out of the settlement or asserted against the proceeds of the settlement are to be satisfied by Kathleen Miller (herein "Releasor"), including but not limited to any Medicare or Medicaid claims and/or liens, Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including but not limited to claim based on subrogation or any other legal or equitable theory. Releasor therefore agrees, upon prompt presentation of any such claims and/or liens, to defend the Release Parties against any such claims and/or liens, and to indemnify and hold the Released Parties harmless against any judgment entered against the Released Parties based on such claims and/or liens, including the payment of any fines, charges and attorneys' fees incurred as a result of any such lien. Failure to satisfy any such lien shall be considered a breach of the Agreement, and Releasor agrees to pay all costs, interest and attorneys fees relative to any such lien.

11. Attorneys' Fees, Costs, and Expenses. Each party shall be responsible solely for its or her own attorneys' fees, costs, and expenses. Releasor specifically waives all claims to attorneys' fees, costs, and expenses from the Board, including all claims for reimbursement to the Board or her attorneys, agents, or family members, of any attorneys' fees,

costs, and expenses she has incurred or paid, or which were paid on her behalf.

12. Applicable Law and Severability. The Release shall be governed by and construed in accordance with the laws of New Jersey, except where federal law controls. Should any provision of the Release be declared or determined by any Court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of the Release.

13. Entire Release. The Release sets forth the entire Release between the parties and fully supersedes any and all prior Releases or understandings between the parties.

14. Kathleen Miller's Certification. Kathleen Miller agrees, certifies, acknowledges, and represents: (a) that she has been and is hereby advised in writing to consult with an attorney of her choice and at her expense, prior to signing the Release; (b) that she has had adequate time and opportunity to review and discuss, and has reviewed and discussed all of the terms and sections of the Release thoroughly with her attorney; (c) that her attorney has explained the entire Release to her; (d) that she does not waive any rights or claims that may arise after the date the Release becomes effective; (e) that she shall have and was given at least twenty-one (21) days to consider the terms and conditions of the Release

before signing it; (f) that her waiver of Claims and the General Release shall not become effective until the effective date of the Release.

If Kathleen Miller decides to sign the Release before the expiration of the 21-day period, Kathleen Miller specifically acknowledges that she has had sufficient time and opportunity to review and understand the terms of the Release and specifically waives and gives up any rights for additional time or opportunity to review it.

The check for payment of the amounts set forth in paragraph 4 shall be delivered to McOmber McOmber & Luber, P.C. in the foregoing manner: Lawyers Service.

KATHLEEN MILLER FURTHER CERTIFIES, ACKNOWLEDGES, AND REPRESENTS THAT SHE IS ABLE TO READ AND UNDERSTAND ENGLISH, THAT SHE UNDERSTANDS ALL OF THE PROVISIONS HEREIN, WITH THE ADVICE AND ASSISTANCE OF HER ATTORNEY, AND THAT SHE MAKES THE RELEASE KNOWINGLY AND VOLUNTARILY. KATHLEEN MILLER ACKNOWLEDGES THAT SHE HAS NO PHYSICAL OR MENTAL PROBLEM, CONDITION, OR IMPAIRMENT OF ANY KIND WHICH HAS INTERFERED WITH HER ABILITY TO READ AND UNDERSTAND THE MEANING OF THE RELEASE OR ITS TERMS. KATHLEEN MILLER FURTHER REPRESENTS THAT IN SIGNING THE RELEASE, SHE DOES NOT RELY ON ANY PROMISES OR REPRESENTATIONS MADE BY ANYONE OTHER THAN THOSE STATED SPECIFICALLY HEREIN.

15 Full Knowledge. Kathleen Miller further warrants, represents, and agrees that in signing the Release, she does so with full knowledge of any and all rights which she may have with respect to the Board and other Released Parties, or the Lawsuit.

16. Headings. The headings of the paragraphs in the Release are for convenience only and shall not control or affect the meaning or construction of, or limit the scope or intent of, any of the provisions of the Release.

17. Effective Date. The effective date of the Release shall be the date upon which the Board receives Kathleen Miller's signed and notarized Release, a W-9 form, and a child support search report.

18. Settlement Subject to Approval by Governing Body. Kathleen Miller understands that the agreement will not be binding unless and until it is formally approved by the Board of Education of the Township of Edison. Should it not be approved by the Board, its terms will be null and void and Kathleen Miller will have the right to continue to prosecute her civil claims against the Board.

IN WITNESS WHEREOF, and intending to be legally bound, Kathleen Miller has executed the Release as of the dates set forth below.

Kathleen Miller

(Signature)

Dated: 3/8/21

(Type or Print Name)

STATE OF NEW JERSEY, COUNTY OF [illegible]:

I CERTIFY that on March 8, 2021, Kathleen Miller personally came before me and acknowledged under oath, to my satisfaction, that the person (or if more than one, each person):

(a) is named in and personally signed the document; and

(b) signed, sealed and delivered the document as her or her act and deed.

(Notary Public) (Raised seal)

COURTNEY A. DERBY
NOTARY PUBLIC
STATE OF NEW JERSEY
MY COMMISSION EXPIRES NOV. 20, 2025

Board of Education of the Township of Edison

By_____
(Signature)

Jingwei "Jerry" Shi, President
Dated: 3/23/21
(Type or Print Name)
JINGWEI SHI

119-21

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

June 1, 2021

Jarrid H. Kantor, Esq.
Antonelli Kantor, P.C.
354 Eisenhower Pkwy
Suite 1000
Livingston, NJ 07039

Hillary D. Freeman, Esq.
Freeman Law Offices, LLC
103 Carnegie Center
Suite 300
Princeton, NJ 08540

Re: *Board of Education of the Borough of Kinnelon, Morris County, v. Karen D'Amico, Agency Docket No. 43-3/21*

Dear Counsel:

I have reviewed the petition for declaratory ruling in the above-captioned matter, together with the respondent's answer. Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq*.

Accordingly, petitioner's request for declaratory ruling is declined and this matter shall be transmitted to the Office of Administrative Law.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

c: State Law Library

VIA E-MAIL ONLY
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121-21

PURSUANT TO THE REFERRAL BY THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY

IN THE MATTER OF THE TENURE HEARING OF ANDREW LOTA	**: BEFORE THE COMMISSIONER OF : EDUCATION, STATE OF NEW JERSEY**
BY DOVER SCHOOL DISTRICT, MORRIS COUNTY	**: AGENCY DOCKET NO. 216-10/20**
	: OPINION AND AWARD

BEFORE: CAROL F. LASKIN, ESQUIRE, ARBITRATOR

APPEARANCES:

On behalf of Andrew Lota
Caruso Smith Picini
Nicholas Poberezhsky, Esquire
Benjamin Weathers, Esquire

On behalf of Dover School District
Adams Gutierrez & Lattiboudere, LLC
Adam S. Herman, Esquire

PROCEDURAL BACKGROUND

Pursuant to *N.J.S.A.* 18A:6-16, as amended by *P.L. 2012, c. 26* ("TEACHNJ"), tenure charges were brought by the Board of Education, Dover School District, Morris County ("Petitioner", "District" or "Dover") against Andrew Lota ("Respondent", "Lota"or "A.L.") on August 28, 2020, alleging conduct unbecoming and other just cause.

On or about September 14, 2020, Lota filed a written response. The next day, September 15, 2020, the District voted to certify tenure charges to the Commissioner of Education. Following receipt of Respondent's answer on October 8, 2020, the Office of Controversies and Disputes reviewed and deemed sufficient the charges, if true, warranted dismissal or reduction in

salary; thereupon referring the matter to me on October 13, 2020, for hearing and decision.

Hearings were conducted via Zoom on November 27, 2020, December 9, 2020, December 18, 2020, December 21, 2020, December 22, 2020, January 5, 2021, January 6, 2021, January 14, 2021, January 30, 2021, January 22, 2021, February 3, 2021 and February 11, 2021. On February 18, 2021, without a court reporter, the admissibility of Exhibits was argued and a briefing schedule determined. Final submissions were received by April 6, 2021, whereupon the record closed.[1]

THE TENURE CHARGES

Dover, asserting Lota is guilty of unbecoming conduct and other just cause, referred four (4) *Sworn Tenure Charges* as follows:

Charge Number One

a. At all times relevant, Mr. Lota has been employed by the Board as a teaching staff member.

b. During the 2019-20 school year, Mr. Lota was assigned to teach 8th grade mathematics.

c. During the 2019-20 school year, Mr. Lota engaged in a pattern of inappropriate conduct.

d. Between March 2020 and April 2020, as a result of the COVID-19 pandemic, the District ceased providing in-person instruction and provided remote instruction to its students.

e. Between March 2020 and April 2020, Mr. Lota provided remote instruction to his students.

f. Between March 2020 and April 2020, Mr. Lota's remote instruction included electronic communications with his students through email and other electronic means.

---

[1] Exhibits shall be referenced as D-District and R-Respondent. The undersigned and the parties were well served by an excellent court reporter for the twelve (12) days of Hearings recorded, pages of which were numbered sequentially from 1 to 1479. Thus, it is unnecessary to burden this Decision with specific dates of testimony. Consequently, the transcript shall be referenced as T followed by page/line.

g. In violation of District policy, District procedure and law, between March 2020 and April 2020, Mr. Lota engaged in a pattern of inappropriate electronic communications with A.N. one of his female 8th grade math students.

h. Between March 2020 and April 2020, Mr. Lota exchanged hundreds of emails with A.N.

i. Between March 2020 and April 2020, Mr. Lota exchanged significantly more emails with A.N. than any other student.

j. Mr. Lota's email communications with A.N. frequently occurred after the conclusion of the school day and/or on weekends.

k. Between March 2020 and April 2020, several of Mr. Lota's emails invited A.N. to individual Google electronic classrooms.

l. Between March 2020 and April 2020, several of Mr. Lota's emails invited A.N. to FaceTime him.

m. Some examples of Mr. Lota's numerous inappropriate emails with A.N. between March 2020 and April 2020 include:

1. On March 19, 2020, Mr. Lota emailed A.N. and told her that:
"You are so sweet . . ."

2. On March 25, 2020, Mr. Lota emailed A.N. stating:
"no worries love. . . whenever you can. . . "

3. On March 26, 2020, Mr. Lota emailed A.N. asking:
". . . are you angry with me?

4. On March 30, 2020, Mr. Lota emailed A.N. stating:
"Haven't talked to you much today" and included a sad emoji at the end of the sentence.

5. On March 31, 2020, in the evening between 7:37 p.m. and 8:42 p.m., Mr. Lota engaged A.N. in a series of emails which discussed certain things including his wife and a school assignment.

6. During the email conversation, Mr. Lota told A.N.:
"lol . . .I truly miss you!"

7. During the same email conversation, when A.N. advised that she would be sending Mr. Lota a picture of the assignment, he responded with

"whenever's convenient dear" along with a smile emoji.

8. Once Mr. Lota received the picture of the assignment, he responded by stating:
"Yes dear, thank you!"

9. On April 2, 2020, Mr. Lota emailed A.N. and stated:
"Hello beautiful!"

10. In the same April 2, 2020 email conversation, Mr. Lota stated to A.N. that he was:
"[s]tuck in exile . . ." and that he was "gonna get out after [his] virtual dept meeting and take [his] boys for a bike ride."

When A.N. asked Mr. Lota to pick her up, Mr. Lota responded by stating that "I'm in a meeting now with my co-workers and supervisor."

11. On April 13, 2020, Mr. Lota communicated with A.N. about a math problem from 9:16 p.m. through 10:21 p.m. During this email exchange, Mr. Lota stated to A.N.:
"lol . . . you kill me. dont worry anything you do or ask is ok" and ended the sentence with a smile emoji

12. On April 15, 2020, Mr. Lota continuously communicated with A.N. between 1:31 p.m. and 5:47 p.m. During the voluminous email exchange, Mr. Lota stated to A.N.:
"Anything for you dear" and concluded his statement with a smile emoji.

13. In the same voluminous email trail, Mr. Lota stated to A.N. that she was
". . . more grown up than [him]."

14. In the same voluminous email conversation, Mr. Lota stated to A.N. that
"lol . . . just saying that your very mature for your age" and concluded his statement with a smile emoji.

15. On April 18, 2020, which was a Saturday, Mr. Lota engaged in email communications with A.N. between 10:15 p.m. and 11:24 p.m. During the conversation, Mr. Lota stated to A.N.:
"lol u rock."

16. During the same Saturday evening email conversation, Mr. Lota stated to A.N:
" hi Love" with a smile emoji.

17. During the same Saturday evening email conversation, Mr. Lota invited A.N.

to a Google meeting.

18. During the same Saturday evening email conversation, Mr. Lota discussed putting his children to sleep. When A.N. told Mr. Lota that it is nice to put his kids to sleep, Mr. Lota stated: "omg thx" with a smile emoji.

19. During the same Saturday evening email conversation, Mr. Lota stated:

> "[smile emoji] love helping you . . . never a problem."

20. On April 19, 2020, which was a Sunday, Mr. Lota engaged in emails multiple communications with A.N. from 10:19 p.m. through 7:34 p.m.

21. During the Sunday email conversation, at 1:18 p.m., Mr. Lota asked A.N. what time she woke up.

22. During the same Sunday email conversation, Mr. Lota, at 4:34 p.m. stated to A.N. that:

> "lol . . . you're a flower" with a smile emoji.

23. During the same Sunday email conversation, Mr. Lota advised A.N. that he was going to send her books in the mail. Mr. Lota stated to A.N.:

> i. "ima gonna try to get these books in the mail to you tomorrow. I'm reading the 3rd one again, prob for the 10th time, now. If you really liked the 2 I introduced you to, You'll love the series."
>
> ii. dude . . . no rush. In fact, take your time and ENJOY them. If your taste in this kind of reading is like I hope, then please take your time with them. The best thing I can do is pass them on without worry of them being brought back."
>
> iii. When Mr. Lota reiterated that A.N. can hold onto the books for as long as necessary, A.N. stated: "ohhh yeahhh hahaha this has to end sooner or later so its all good," In response, Mr. Lota stated: "yes it is" and concluded the sentence with a smile emoji.

24. During the same Sunday email conversation, at 7:22 p.m., Mr. Lota asked A.N. to Facetime him.

25. During the same Sunday evening email conversation, at 7:34 p.m., Mr. Lota invited A.N. to a Google meeting.

26. On April 22, 2020, Mr. Lota emailed A.N. and stated the following:

> "Are you ok? How's the toe? Books are on the way. Are you getting my e-mails?"

27. In response to A.N.'s email, A.N. responded:

> "I haven't taken the nail out but I'm getting there, and thank god I'm so excited to read them, do you know when they will get here? And no I haven't been getting your emails idk maybe they were saved as drafts."

n. Mr. Lota's email communications with A.N. requested and/or tried to establish a personal relationship with a student beyond his professional responsibilities.

o. Mr. Lota's email communications with A.N. are those type which the Commissioner of Education or an arbitrator would find to be inappropriate in determining that Mr. Lota's is unfit to discharge the duties and functions of his teaching position.

p. Mr. Lota failed to exercise self-restraint and controlled behavior which is required and mandated for a teaching staff member entrusted with the care and custody of students.

q. Mr. Lota's inappropriate and unprofessional conduct placed A.N. at risk of physical and emotional harm.

r. Mr. Lota's inappropriate and unprofessional conduct violates District policy, District procedure and law.

s. Mr. Lota's actions are sufficiently flagrant and egregious to warrant termination.

t. Mr. Lota's actions demonstrate that he is not fit to serve as a teaching staff member.

Mr. Lota's willful misconduct as described above constitutes Conduct Unbecoming sufficient to warrant dismissal from employment and/or reduction in compensation.

Charge Number Two

Mr. Lota is guilty of Conduct Unbecoming by way of the following:

a. The Board repeats and reiterates the allegations set forth above.

b. Mr. Lota attempted to build trust with A.N. to gain access to and time alone with her.

c. Mr. Lota showed favoritism towards A.N.

d. Mr. Lota granted special privileges to A.N.

e. Mr. Lota catered to the interests of A.N.

f. Mr. Lota's behavior with A.N. constitutes grooming.

g. Mr. Lota failed to exercise self-restraint and controlled behavior which is required mandated for a teaching staff member entrusted with the care and custody of students.

h. Mr. Lota's inappropriate and unprofessional conduct placed students in risk of harm.

i. Mr. Lota's inappropriate and unprofessional conduct placed A.N. at risk of physical and emotional harm.

j. Mr. Lota's inappropriate and unprofessional conduct violates District policy, District procedure and law.

k. Mr. Lota's actions are sufficiently flagrant and egregious to warrant termination.

l. Mr. Lota's actions demonstrate that he is not fit to serve as a teaching staff member.

Mr. Lota's willful misconduct as described above constitutes Conduct Unbecoming sufficient to warrant dismissal from employment and/or reduction in compensation.

Charge Number Three

Mr. Lota is guilty of Conduct Unbecoming by way of the following:

a. The Board repeats and reiterates the allegations set forth above.

b. Between March 2020 and April 2020, Mr. Lota engaged in a pattern of inappropriate electronic communications with N.D. one of his female 8th grade math students.

c. Some examples of Mr. Lota's numerous inappropriate emails with N.D. between March 2020 and April 2020 include:

1. On March 25, 2020, Mr. Lota emailed N.D. stating:
   "Thanks love!"

2. On March 25, 2020, Mr. Lota emailed N.D. stating:
   "You're awesome."

3. On April 14, 2020, Mr. Lota emailed N.D. stating:
   ". . . no ones better than you love!"

4. On April 15, 2020, Mr. Lota emailed N.D. stating:
   "Thanks dear u are awesome!"

5. On April 16, 2020, Mr. Lota emailed N.D. stating:
   "Thanks . . . you rock Star you!"

6. On April 17, 2020, Mr. Lota emailed N.D. stating:
"Thanks love. . . You're still awesome!"

7. On April 23, 2020, Mr. Lota emailed N.D. stating:
"Thanks love" with a concluding smile emoji.

d. Mr. Lota failed to exercise self-restraint and controlled behavior which is required and mandated for a teaching staff member entrusted with the care and custody of students.

e. Mr. Lota's inappropriate and unprofessional conduct placed students in risk of harm.

f. Mr. Lota's inappropriate and unprofessional conduct placed N.D. at risk of physical and emotional harm.

g. Mr. Lota's inappropriate and unprofessional conduct violates District policy, District procedure and law.

h. Mr. Lota's actions are sufficiently flagrant and egregious to warrant termination.

i. Mr. Lota's actions demonstrate that he is not fit to serve as a teaching staff member.

Mr. Lota's willful misconduct as described above constitutes Conduct Unbecoming sufficient to warrant dismissal from employment and/or reduction in compensation.

Charge Number Four

Mr. Lota is guilty of Other Just Cause by way of the following:

a. The Board repeats and reiterates the allegations in all the charges set forth above.

b. All of the foregoing Charges, Counts and the facts alleged in the tenure charges are incorporated by reference as if fully set forth herein. The acts of misconduct described above, jointly and severally, demonstrate a series of ongoing infractions over an extended period of time, constituting a pattern of conduct unbecoming and/or other just cause warranting his dismissal and/or reduction in compensation.

DISTRICT POLICIES

At hearing and through its post hearing submission, Dover presented the following District policies as being specifically relevant to the instant tenure charges:

"District Policy 3283 - Electronic Communications between Teaching Staff Members and Students (created/edited July 2014)

The Board of Education recognizes electronic communications and the use of social media outlets create new options for extending and enhancing the educational program of the school district. Electronic communications and the use of social media can help students and teaching staff members communicate...

The Commissioner of Education and arbitrators, appointed by the Commissioner, have determined inappropriate conduct may determine a teaching staff member unfit to discharge the duties and functions of their position. Improper electronic communications by teaching staff members may be determined to be inappropriate conduct.

Inappropriate content of an electronic communication between a teaching staff member and a student includes, but is not limited to:

6. Communications requesting or trying to establish a personal relationship with a student beyond the teaching staff member's professional responsibilities;

8. Communications between the teaching staff member and a student that the Commissioner of Education or an arbitrator would determine to be inappropriate in determining the teaching staff member is unfit to discharge the duties and functions of their position."

"The following acceptable protocols for all electronic communications between a teaching staff member and a student shall be followed:

1. E-Mail Electronic Communications Between a Teaching Staff Member and a Student.

a. All emails between a teaching staff member and a student must be sent or received through the school district's email system. The content of all e-mails between a teaching staff member and a student shall be limited to the staff member's professional responsibilities regarding the student."... (D- 3)

District Policy 3281 - Inappropriate Staff Conduct (created/edited June 13, 2013)

The Board of Education recognizes its responsibility to protect the health, safety and welfare of all students within this school district. Furthermore, the Board recognizes there exists a professional responsibility for all school staff to protect a student's health, safety and welfare. The Board strongly believes that school staff members have the public's trust and confidence to protect the well-being of all students attending the school district.

In support of this Board's strong commitment to the public's trust and confidence of

school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all students. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.

The Board recognizes and appreciates the staff-student professional relationship that exists in a school district's educational environment. This Policy has been developed and adopted by this Board to provide guidance and direction to avoid actual and/or the appearance of inappropriate staff conduct and conduct unbecoming a school staff member toward students.

School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to students or about students and shall not engage in inappropriate language or expression in the presence of students. School staff shall not engage in inappropriate conduct toward or with students. School staff shall not engage or seek to be in the presence of a student beyond the staff member's professional responsibilities....

Inappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member.

A school staff member is always expected to maintain a professional relationship with students and to protect the health, safety and welfare of school students. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education." (D-4)

District Regulation 3281 - Inappropriate Staff Conduct (created October 2008 and edited February 2012) provides specific definitions and examples of inappropriate staff conduct, including,

"i. 'Inappropriate staff conduct' is any conduct prohibited by this policy and corresponding regulation, including any other conduct deemed by the Commissioner of Education, the State Board of Education, statute, administrative code, and/or judicial case law to be inappropriate conduct and/or conduct unbecoming a school staff member.

ii. 'Inappropriate comments' include, but are not limited to, comments about the staff member's personal life that are not relevant to the professional responsibility of the school staff member, comments of a sexual nature, sexually-oriented humor or language, inappropriate comments about a student's clothing or physical appearance, comments with sexual overtones, or comments regarding a student's dating partner.

iii. 'Inappropriate conduct' includes, but is not limited to, sexual misconduct, a request by a school staff member to a student for a social relationship outside the school staff/student relationship, sexually harassing conduct, inappropriate touching by the staff

member to a student or permitting a student to inappropriately touch a staff member, corporal punishment, requesting a student to expose private parts of their body other than for school medical purposes,...." (D-5)

ISSUE PRESENTED

Has the Dover School District, Morris County, met its burden of establishing by a preponderance of the credible evidence the tenure charges against Respondent, Andrew Lota?

If so, do the tenure charges warrant dismissal or a lesser discipline? (stipulated at T/5-19 to 6/8)

BASIC EVIDENTIARY FINDINGS

At hearing, the parties were zealously represented. Each was given a full opportunity to present testimony, written evidence, cross-examine witnesses and submit post hearing briefs.

Petitioner Dover proffered:

Dr. James McLaughlin - Superintendent
Christina Cirigliano - Assistant Superintendent
Jorden Dane Schiff, Ed.D[2]- School Liability Expert Group:
Detective Sergeant Oxmani Corona - Dover Police Department
Police Officer Joe Gotera - Dover Police Department
Mirian Y. Nieto-Gomez - Mother of A.N. (with assistance by Alex Tarasov, Spanish Interpreter)

And, on Rebuttal-
Aretha Dooley-Malloy - Consultant to Dover: January 20, 2020 to January 30, 2020 - Principal East Dover Elementary School and Dover Middle School

Respondent :

Andrew Lota, testified on his own behalf, in addition to:
Alison Merena - Andrew Lota's Wife
Kyle Madison - Dover Middle School Social Study Teacher

On November 2, 2020, Respondent filed a Motion to Suppress the testimony and expert report of Jorden Dane Schiff, Ed.D. On November 13, 2020, the District submitted its opposition. The parties orally argued the motion on a conference call whereupon the undersigned denied the motion, allowing Dr. Schiff to testify and submit his expert report.

Based upon a thorough review of the record, including all admitted exhibits, testimony, admissions, stipulations, arguments and observations of the demeanor of each witness, I ***find*** the following as basic evidentiary ***fact***:[3]

The Dover School District consists of five (5) schools, educating approximately thirty-four hundred (3400) students in Kindergarten through Twelfth grade. (T44/4 to 16). It has been categorized by the New Jersey Department of Education in District Factor Group "A," the lowest of eight (8) groupings in New Jersey measuring a community's relative socioeconomic status.

At all times relevant to the instant charges, the administration has been lead by Superintendent Dr. James McLaughlin and Assistant Superintendent Christina Cirgliano. The Dover Middle School, during the 2019-2020 school year, was lead by Interim Principal Aretha Dooley-Malloy, Vice Principal Heather Carlton and Vice Principal Michael McAuley.

Respondent, Andrew Lota, is a tenured eighth grade mathematics teacher who had been assigned to the Dover Middle School for the entirety of his twelve (12) year career with the District. He has no prior disciplinary history nor did he receive a summative evaluation rating less than effective or its equivalent. Lota organized the Dover Middle School's Chess Club. He also chaperoned school trips and assisted with track meets. (R-5, R-6, T931/24 to 935/14).

School Closure March 2020

After an initial meeting with school administrators, the administrative team determined to transition to remote learning. (T1380/14 to 1381/24, T48/1 to 16) On or about March 12, 2020, the District provided Emergency Closure Planning Guidance, D-9, to all teaching staff members informing of the transition to virtual learning, effective March 16, 2020. Therein, *inter alia*, a

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[3] Controverted evidence will be identified in *Position of the Parties* below.

weekly organization folder was addressed along with instructions on how to record and post video/audio files utilizing Google Classroom.

Once remote virtual learning commenced, middle school administrators and staff held virtual meetings daily. Thereafter, meetings were conducted less frequently.[4] (T1385/24 to 1388/6)

Google Suite

The District utilizes Google Suite as its technical platform. Google Suite includes email, Google Classroom, Google docs, Google sheets, Google slides and Google Meet. (T350/9 - 351/10) With the exception of Google Meet sessions, all other electronic communications on the District's servers were monitored and recorded. Confidentiality laws preclude the District from preserving video or audio recordings of Google Meet sessions. (T536/9 - 19)

Students cannot create a Google meeting link - only administration or teachers. To create a link, an authorized teacher, on his/her calendar, clicks a specific day and time which produces a link the teacher can send to the students through Google Classroom or through the teacher's district website or email. (T352/ to 353/1)

The instant charges are based upon Andrew Lota's utilization of the Google Suite technology, commencing at the initiation of virtual learning on March 16, 2020 until April 22, 2020, when a Gaggle Alert was issued concerning his emails that date with a fifteen (15) year old female, A.N., a high performing math student.

Gaggle Alert - April 22, 2020

Dover records and monitors all emails, utilizing the program "Gaggle", to identify

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[4] The parties differ on their recollection of specific content of these meetings, disclosed in *Position of the Parties* below.

communications indicating potential self-harm, inappropriate language and/or pornographic materials. (T61/5 to 13, D-35) Gaggle, as the early warning monitor program, tags key words sent throughout the school's on-line learning platform.

On April 22, 2020, Assistant Superintendent Cirgliano received a Gaggle Alert, D-10, of an email trail between Lota and A.N.- twenty-six (26) emails between 11:16 a.m. and 8:33 p.m. The alert was triggered by A.N.'s phrase, "It's okay, I think I will just die." The entirety of April 22, 2020, emails between Lota ("A.L") and A.N., appear, as follows:

11:16 AL to AN:	Are you ok? How's the toe? Books are on the way. Are getting my e-mails?
11:22 AN Response:	I haven't taken the nail out but I'm getting there, and thank god I'm so excited to read them, do you know when they will get here? And no I haven't been getting your emails idk maybe they were saved as drafts.
12:39 AL to AN:	They should be there Friday the latest:)
12:41 AN Response:	Thank you I will definitely read them and enjoy them, and I promise I will take care of
12:52 AL to AN:	The 1st one is eye of the world. It is very important that you read the prologues :) I have all but the 5th one, let me know when you need more and comment on them when you can:)
1:29 AN Response:	Okay I will read the prologue, are they confusing?
1:46 AL to AN:	Not al all, in faet when I read the prologue to the 1st book I knew this would be the best series ever written!
6:55 AN Response:	Really, can't wait to read them especially eye of the world that one sounds amazing. I hope that they're not to hard to understand.
7:21 AL to AN:	omg, if you liked the two other books you read from me, I think you will positively love these books. If you would like, from memory I could give you a small capture of the prologue?

7:22 AN Response: Yes, please I would love that

7:25 AL to AN: Ok, deep breath. Now remember, after the prologue, This book starts from someplace completely different, but eventually melds with the prologue to become completely awesome. It's not exact, obvious, because its way to you, but here you go..let me know what you think :) ""Lews Therin walked through the halls of his castle. The walls still shook from the horror that struck the floors around it. The walls had rents in them light from outside shone through. Every once in a while the ground itself shook, causing dust to permanently rise through the air. Tables toppled and food and drink on the floor from what had seemed a grand occasion littered the room. "Ilyana, Ilyaya my love, where are you? "He absent mindedly stopped over the dead body of a beautiful blond haired woman whose eyes stared in fixed horror from what she witnessed. Servants, children, friends, all dead filled the room. Lews Therein ignored these as if they weren't there. "Ilyana where are you? You can't hide from me!?" Behind him the air shimmered as if it were alive. The air itself seemed to rip in half, as it was torn fabric, to allow a tall figure to step through. He looked around the room, disgusted at what he saw. He saw Lews Therin and his face became an offended sneer...

7:30 AN Response: Wow that was cool, but I'm slightly confused so Lew saw himself?

7:36 AL to AN The prologue tells what happened ages ago with less Theron, the dragon to be born. There is more to the prologue, and much better written for the reader to be engaged, confused and able to wait to read on!

7:37 AN Response: Oh haha so it's meant for me to be confused okay good

7:40 AL to AN: Not necessarily confused, but needing to know more:)

7:42 AN Response: Yeahhh I get you like a hook, and okay hahah sounds good I told my mom that I'm expecting some books.

7:44 AL to AN: LOL awesome. There is really nothing inappropriate about them, they are considered fantasy fiction, pg at worst. Maybe she would like them :)

7:50 AN Response:	Maybe who would like them?
7:54 AL to AN:	lol, I jokingly meant your mom :) But if you talked to someone about them and they're interested, share :)
7:55 AN Response:	Omg Mr. Lota my toe hurts sooo muchhhh it's terrible
8:06 AL to AN:	I was hoping it was getting better. Soak the toe, pull that nail out. Better big pain short time than slightly less big pain long time.
8:08 AN Response:	Hahahah nr I think I made it worse for the past days, and it hurts a lot so I put a rubber bands on my toe to cancel most of the pain.
8:16 AL to AN	Have you thought about going to a doctor?
8:21 AN Response:	Yes I have, but my mom won't take me with everything going around she says that all I'm going to do is come back with corona.,
8:28 AL to AN	Maybe you have to have her pull the extra nail out without crying that will make her stop? I don't know, just trying to help. Feel bad :(
8:33 AN Response:	*It's okay I think I will just die.* (D-10)

Immediately Superintendent Cirgliano communicated with Dr. McLaughlin. They shared concerns; Lota was sending books, there was no mention of math throughout the day, Lota gave medical advice, and emails were exchanged after 8:00 p.m. Principal Dooley-Malloy was informed of the alert. Thereafter, Vice Principal Heather Carlton communicated by cell phone with Lota; whereupon, he confirmed mailing books to A.N. Carlton informed, an investigation would be conducted. (T942/2 to 13).

On Friday, April 24, 2020, Respondent with his Union President, John Coniglio, participated in a Zoom meeting with Dr. McLaughlin. Therein, Lota was notified of his

placement on administrative leave. Consequently, Lota's access to the District's Google Suite technology was revoked. (T1073/24)

Investigation

A. Dover Police Department

On April 24, 2020, Dr. McLaughlin also reported to the Dover Police Department his concern of a possible inappropriate relationship between a teacher and student." (R-4, D-34) A.N.'s mother was immediately informed about the school's report; an interview was scheduled for her and A.N. to determine whether the child had been "victimized by her teacher in any way." A recorded telephone interview was conducted. A.N. revealed three (3) instances where she felt "weird." (R-4, D-35)

A.N.'s mother consented to provide her daughter's cell phone for review by the Morris County Prosecutor's Office. Detective Sergeant Oxmani Corona, after reviewing the forensic results, closed the case as he "could not locate any evidence of a crime." (R-4, D-36)

B. The Institutional Abuse Investigation Unit

The District also notified the New Jersey Department of Children and Families, Institutional Abuse Investigation Unit, as required, to determine whether neglect or abuse occurred.

On December 22, 2020, the Institutional Abuse Investigation Unit reported its findings to Dr. McLaughlin, copied to Respondent's Counsel and the Interim Executive County Superintendent of Schools. After discussion at hearing, a portion of the Finding Report was read into the record by the undersigned.

> "Neglect/risk of harm is not established. IAIU has determined, in accordance with NJSA 9:6-8.21 that the child was not abused or neglected by teacher Andrew Lota. However,

some information indicates that the child was harmed or placed at risk of harm." (T1372/19 to 1375/5)

Respondent's Utilization of Google Suites With Students Between March 16 and April 22, 2020

Andrew Lota acknowledges the email exchanges between him and his students reflected within Dover's exhibits are accurate.[5] Consequently, Respondent concedes the accuracy of the emails listed within the Tenure Charges; Charge Number One, pertaining to student A.N. and Charge Number Three pertaining to student N.D., who was also an eighth grade female math student of Lota's and a friend of A.N., though were not assigned to the same math class. (T1056/1 to 1057/3)[6] N.D. and A.N. would sometimes come after school, with other math students not assigned to Lota, for extra help. (T977/15 to 978/2) Lota also confirmed his email trails with other students from the commencement of virtual learning until his Google Suite access was disabled. (D-37 through D-65)

Dover hired the school liability expert group, Dr. Jorden Schiff, to conduct an analysis and present an expert report. The report of October 16, 2020, D-32, was offered at hearing, resulting in extensive cross examination of Dr. Schiff. (T618/19 to 732/11) Appendix B of his report lists all documents reviewed, including the Tenure Charges, police files, school policies and procedures, school investigative records and Lota's personnel records. The school investigation records included emails of the middle school's other eighth grade math teacher, Thomas Frank, with his students for period March 3, 2020 to April 30, 2020. The spreadsheet of

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[5] Indeed, this was reiterated as the third sentence of the *Statement of Facts* within Respondent's brief, "The facts of this matter are relatively straightforward and largely undisputed. Respondent relies on the hearing transcripts and the records admitted in evidence as the complete *Statement of Facts*." (Respondent's brief at p.4)

[6] Thus, Respondent admits the accuracy of the email trails with A.N., Exhibits D-11 through D-21, email trails with N.D., Exhibits D-23 through D-29, and emails with other students, D-37 to D-65.

Google Meet was also scrutinized. D-22.

Upon review of all the materials listed in Appendix B, Dr. Schiff related the following facts:[7]

> Lota, "a. Communicated with A.N. more than any other student and exchanged a significant number of emails with A.N. compared to other students. Between Wednesday, March 18, 2020 and Wednesday, April 22, 2020, Mr. Lota exchanged 163 emails with A.N. and 490 emails with 28 other students. 25% of the total emails reviewed were exchanged between Mr. Lota and A.N. Mr. Lota emailed A.N. 57 times during the weekend, but only emailed with his other students six times on Saturdays and Sundays between March 18, 2020 and April 22, 2020....
>
> b. Mr. Lota had a habit of referring to his female students as "dear" and "love," whereas his colleague, Mr. Thomas Frank, in his emails with students, was strictly professional and stuck to topics regarding math assignments, submitting work, and assistance signing into the various platforms. Mr. Frank and his students typically exchanged a chain of a few emails (usually between two and six) to answer a specific question or address an issue, and the emails were mostly during school hours. Mr. Frank did respond to student questions/concerns in the evening hours on some occasions, but these conversations were strictly regarding math. Mr. Frank did not refer to female or male students as "dear" or "love."...
>
> c. No other teacher, whose information we received, engaged in Google Meet sessions with students during the weekend, except Mr. Lota who video conferenced with A.N., and only A.N., seven times on Saturday, April 18, 2020, and three times on Sunday, April 19, 2020." (D-32 at page 13)[8]

Respondent Mailing Books to A.N.

Prior to the Pandemic, Lota lent books to students at school. During virtual learning, Lota mailed two (2) books to A.N., part of a fourteen (14) book fantasy series. His wife, Alison Merena, assisted him in mailing the books, including driving Mr. Lota to the post office. She corroborated he previously lent books to students, both male and female. (T994/15 to 996/5;

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[7] Dr. Schiff's *opinion*, based upon these facts, is revealed in the *Position of the District*, below.

[8] The spreadsheet, D-22, disclosed the Goggle Meet sessions between Lota and A.N. on Saturday, April 18, 2020, totaled 128 minutes ending at 11:09 p.m.; the Google Meet sessions between Lota and A.N. on Sunday April 19, 2020 totaled 54 minutes, ending at 8:30 p.m..

T867/13 to 868/14)

Respondent Requesting A.N. Provide Photograph of Toe

A.N. complained of a painful toenail as reflected in the Gaggle alert, D-12, above. Lota suggested A.N. provide him a picture of her toe. (T998/8 to 1002/1) Alison Merena confirmed Lota showed her the picture. Ms. Marina is an Outpatient Occupational Physical Therapist with a Master's Degree in physical therapy. Ms. Marina testified she provided little feedback to her husband for, upon review of the toe, "it didn't appear to be insidious to me." (T866/16 to 867/7)

POSITION OF THE PARTIES

The parties presented comprehensive arguments, the essence of each is as follows:

Respondent, Andrew J. Lota

Lota maintains Petitioner, Board of Education, failed to meet its burden of proving the Tenure Charges against him by preponderance of relevant evidence. Counsel reasons,

> "Mr. Lota substantially complied with the Board's policies on electronic communications with students, which were relaxed amid the outbreak of the coronavirus pandemic and district wide transition to remote learning. There is no evidence that he "groomed" or attempted to establish a sexual relationship with a student. Nothing was presented at the hearing to demonstrate that Mr. Lota caused or attempted to cause harm to anyone." (Page 3)

Reviewing the policies Respondent is alleged to have violated, nothing therein limits the volume or duration of electronic communications a student may have with his/her teacher, the time or days permitted, one-on-one video conferencing, using terms of endearment with students, or lending books.

Respondent asserts *District Policy 3283*, D-3, *Electronic Communications Between Teaching Staff Members And Students*, enacted in 2014 is not applicable to remote instruction during a "once-in-a-century Pandemic." Lota avers this policy must be deemed unenforceable as

against electronic communications during full time remote learning. Counsel argues, "Stated differently, the policies are too vague to enforce except against patently inappropriate communications that need not require a consideration of the circumstances." (Brief at p.18)

Lota relies on his perception of Vice Principal Carlton's comments during Staff Goggle Meet sessions. He avers she declared Dover's electronic communication policies are relaxed during virtual learning. The testimony of Interim Principal Dooley-Malloy, expressly refuting this claim, should be disregarded, for she lied about her prior suspension by the School Ethics Commission.

Moreover, Respondent maintains the District failed to prove he "groomed" A.N. He never communicated with A.N. outside of Google Suites and indeed informed his wife about this student. Dr. Schiff's testimony and expert report must be accorded no weight, claims Lota, as he had no specialized training or experience in identifying sexual predators or behavior characteristic of grooming.

With respect to Tenure Charge Three, Respondent contends the Board failed to prove he committed conduct unbecoming with respect to any of his electronic communications with N.D. The entire factual predicate underlying Charge Three is that he referred to N.D. as "dear" and "love" and called her a "rock star." These facts, which are not in dispute, do not meet the criteria established for conduct unbecoming. Consequently, Respondent requests all Tenure Charges be dismissed and a make whole remedy be awarded.

Even if conduct unbecoming is determined, substantial mitigating factors including his exemplary background, willingness to submit to corrective action, and his lack of malicious intent, warrants discipline lesser than dismissal.

Dover Board of Education

The District maintains Respondent's email and video communications with A.N. within the early weeks of virtual learning clearly violated the professional boundaries between a teacher and student. There is no doubt Lota attempted to establish a personal relationship with A.N. His actions not only violated District Policies, handbooks and directives, they placed A.N. at risk of harm.

Dr. Schiff's expert opinion, within a reasonable degree of professional certainty, declared Lota acted in a manner unbecoming a teacher for the State of New Jersey. In his review, Dr. Schiff demonstrated how Lota's conduct "evolved" from an inappropriate mix of math and immature socializing type behaviors to entirely unprofessional and grooming behaviors. (D-32)

At hearing, Dr. Schiff opined,

"* Mr. Lota's inappropriate conduct violated District policies concerning staff conduct and the use of electronic communications;
* Mt. Lota's conduct met the definition of grooming.
* Mr. Lota's electronic communications resulted in the development of a prohibited inappropriate and sexually harassing relationship with a female student; and
* Mr. Lota's relationship and communications violated A.N.'s right to learn in a safe environment."[9] (District Brief at pp. 3-4)

Contrary to Respondent's representation, the Board's communication policies were not relaxed. Neither Vice Principal Carlton nor Interim Principal Dooley-Malloy made such a declaration. Further, on at least three (3) occasions staff was advised not to schedule a 1-on-1 Google Meet. Middle School Social Studies Teacher Kyle Madison confirmed; the only "relaxation" discussed by the Administrators dealt with the mental health of the students - for teachers to be compassionate with due dates, receiving assignments and providing extra help.

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[9] Dover, in its comprehensive Brief, did not present any argument relating to Charge Number Three, Lota's Electronic Communications with N.D.

Madison conducts only group Google Meets; he conceded calling a female student "beautiful" or referring to her as "love" was inappropriate.

The District maintains the proper penalty for Mr. Lota's flagrant behavior in Dover requires removal from his tenured position. Counsel concludes,

> "Mr. Lota as a teacher, was expected to serve as a model of appropriate behavior. Instead, Mr. Lota engaged in inappropriate conduct via email and Google Meets with an 8th grade female student. His communications over the course of a few weeks in March and April 2020 demonstrate that he sought to establish a personal relationship with A.N. by using initiating communications, using terms of endearment, engaging in social discussions and juvenile banter, granting A.N. special privileges not extended to any other student, communicating on the weekends, holding one-on-one, and sending A.N. gifts. The behavior by Mr. Lota towards A.N. is also indicative of grooming behaviors. Mr. Lota violated district policies, procedures and standards of conduct. As such, the District respectfully submits that Madam Arbitrator sustain the charges and dismiss Mr. Lota from his teaching position." (District Brief at p. 80)

ANALYSIS OF EVIDENTIARY FINDINGS

Has the Dover School District, Morris County, met its burden of establishing by a preponderance of the credible evidence, the tenure charges against Respondent, Andrew Lota?

It is axiomatic. New Jersey provides protection to tenured teaching staff members from dismissal or reduction in compensation except for "insufficiency, incapacity or conduct unbecoming such a teaching staff member or other just cause." *N.J.S.A. 18:28-5(b)* While "conduct unbecoming" is not defined by the statute, it has been considered an elastic standard, determined on a case-by-case basis, embracing a wide range of conduct.

At all times, Dover maintains the burden of establishing by a preponderance of the credible evidence Respondent engaged in conduct unbecoming as alleged in the Tenure Charges *supra*, D-1. The rationale for these protections in an evidentiary review is highlighted herein for a finding of unbecoming conduct will forever tarnish the employment history and reputation of

Andrew Lota. Upon consideration of this record, with emphasis upon resolution of the credibility of the witnesses, I ***find*** Dover has met its burden with respect to the Tenure Charges related to Lota's conduct with A.N.

Tenure Charges Related to Lota's Conduct with A.N.

The evidentiary findings above reveal the District has established, by the preponderance of the credible evidence, Andrew Lota engaged in the conduct outlined in Charge Number One and, with the exception of the term "grooming," in Charge Number Two.

Lota's electronic communications with A.N. violated *District Policy 3283*, for he clearly established "a personal relationship" with A.N. " beyond the teaching staff member's professional responsibilities." Respondent made "inappropriate comments" referenced in *District Policy 3281 - Inappropriate Staff Conduct*. He failed to maintain a professional relationship with A.N. He utilized Google Meet, "seeking to be in her presence." These Policies are not vague or incompatible with virtual learning.

This record supports Dr. Schiff's pronouncement after review of District documents; Lota's communications in both time and subject matter expanded during virtual learning when initially math was at the forefront to discussions of fantasy books, Lota's opinion of her maturity, expressions of endearment, and extensive Google Meet sessions.

Throughout the hearing, Respondent maintained his objective was to show compassion to an A+ level student with low self-esteem and anxiety "permitted" by the administration's "relaxation" of electronic communication policies. This record does not support Lota's testimony. I credit the testimony of the administrators, including Interim Middle School Principal Aretha Dooley-Malloy, Social Study teacher, Kyle Madison, also confirmed Petitioner

never modified its policies on appropriate staff conduct or electronic communications between teaching staff members and students.

While Middle School administrators, during virtual staff meetings with teaching staff, discussed showing compassion for the mental health of students and appreciation of their struggles with virtual learning, it is dishonorable to suggest the administration's concern granted permission for a middle-aged teacher to engage in private communications with a 15 - year old, alone in her room on a Saturday night.

Respondent often initiated e-mail contacts with A.N., D-11 to D-21. Respondent initiated every Google Meet invite. Lota was aware, due to statutory privacy concerns, his conversations with A.N. would not be recorded. Respondent's failure to communicate his articulated concern over A.N's pervasive low self-esteem or anxiety to either School Guidance or A.N.'s Mother is unsettling.

Grooming

Upon consideration of this record in its entirety, I ***find*** there is insufficient evidence to support Charge Number Two (f), "Mr. Lota's behavior with A.N. constitutes grooming." Counsel's argument is persuasive. Dr. Schiff's expertise is in the field of education administration. Reviewing Appendix A, attached to his expert report, D-32, failed to identify any training or educational qualifications that could classify him an expert on determining "grooming" behaviors. Review of the resources Dr. Schiff utilized listed in Appendix B of his report list documents from the United States Department of Education and the American Bar Association. Reading these documents, without further training, did not transform him into an expert whose opinion on "grooming" would be helpful to the undersigned, as the trier of fact.

Nevertheless, this record unquestionably supports finding Lota established a special personal relationship with A.N. far beyond a teaching staff member's professional responsibility, in violation of District Policies.

Tenure Charge Number Three, Related to Lota's Conduct With N.D.

Respondent acknowledged his electronic communications with N.D.. No other evidence was proffered supporting this Charge; Dover did not address the Charge in its post hearing submission. Upon review, I ***find*** the emails do not establish conduct unbecoming as alleged in Charge Number Three.

Lota neither initiated email exchanges with N.D. nor sent her a Google Meet invite, D-23 to D-29. The difference in scope of his communications with A.N. compared to N.D. highlights the evolution of his special relationship with A.N. from March 16, 2020 to April 22, 2020 - to the point of appearing preoccupied with maintaining communication with A.N. throughout Saturday and Sunday, April 18 and 19, 2020.

Accordingly, the record established Respondent engaged in the conduct unbecoming, with the exception of "grooming" as expressed in Charges Number One, Two and Four.

Do the tenure charges warrant dismissal or a lesser discipline?

Andrew Lota, prior to the 2019-2020 school year, served both the District and his students in performing the duties of a middle school math teacher for twelve (12) years. Seeking a lesser discipline than dismissal, Respondent's counsel requested this arbitrator consider mitigating factors such as his exemplary background, willingness to submit to corrective action

and lack of malicious intent.[10]

The record review, however, does not support mitigation. Throughout the hearing, Lota refused to concede his conduct violated any District Polices. On direct examination, Respondent articulated contrition, expressing his conduct would not be repeated. However, on cross-examination, Lota was argumentative; he denied his conduct was inappropriate, even announcing he would send the same emails again:

> "Q. We talked about this a few minutes ago with some of the e-mails that we went over. You made the decision to use those terms of endearment with AN; correct?
> A. Yes, sir.
> Q. And you would agree with me you could have used other terms, words, or phrases if you truly wanted to be supportive or encouraging to AN; correct?
> A. Yes, I could always -- anybody could always use other terms or words.
> Q. And again, those e-mails that we reviewed during the course of the case so far, you made the decision to send those e-mails to AN; right?
> A. Of course I did. And would again.
> Q. And you would again? Okay.[11] (T1310/6 to 23)
> ...

(T1311 to 1312)

> Q. Okay. And you testified that you called AN "beautiful" because she was cute; right?
> A. No.
> Q. No.? And during the course of your direct testimony you testified, at least according to my notes, that quote, unquote, "This will never happen again." Do you remember that testimony?
> A. I have no idea what you're talking about.
> Q. No?
> Okay. All right.
> You agree that your e-mails and your electronic communications you had with AN from an objective standpoint looked really bad; correct?

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[10] In addition to traditional mitigating factors,, the undersigned considered the commencement of the Pandemic as a mitigating factor. During March to late April, normal life ceased - replaced by a fog of anxiety for the unknown, concern for our health and the health of our loved ones. (Before it was understood Covid 19 was transmitted through the air - not likely from touching surfaces, fomites.)

[11] The words of endearment included beautiful, love and dear. Lota ,on cross, testified using terms of endearment "absolutely" has educational value. (T1347/11 to 1349/23)

I believe those were your words.

A. I don't believe those are my words.

Q. Okay.

A. From us. I probably said cynical or cynic's viewpoint they look bad." (T1312/21 to 1312/15)

...

Q. Mr. Lota, you're being argumentative, and I'm not looking to be argumentative back with you. I'm just asking you if you remember your testimony where you said the electronic communications made you look horrible?

A. I don't remember that, no.

Q. Okay. All right.
And you would agree with me that the electronic communications you had with AN, from an objective standpoint, looks like you were trying to establish a personal relationship with her; correct?

A. No.

Q. During your attorney's opening statements your attorney said some of your e-mails were not smart. Do you agree with that statement?

A. I would have said naive, but, yes.

Q. Yes what? You agree with your attorney's statement that some of your e-mails were, quote, unquote, "not smart"?

A. They were not smart to send from a point of view where people looking at it that think the worse would misconstrue them. That's what I agree with.

Q. Okay. So what you're saying is that you agree that they weren't smart because of how they may be viewed objectively by district –

A. Not objectively, cynically." (T1313/1 to 1314/7)

It is clear; Mr. Lota's conduct is a clear egregious violation of *District Policy 3281 - Inappropriate Staff Conduct* and *District Policy 3283 - Electronic Communications between Teaching Staff Members and Students*. Therein, the Board recognized school staff members hold the public's trust and confidence to protect the well being of all students to the highest level of professional responsibility.

A review of this record, in its entirety, did not disclose any attestation of Respondent's willingness to submit to corrective action. His conduct has broken the level of trust the District expects to rely upon for a teacher to perform his requisite duties. In light of Lota's failure to

recognize his conduct with A.N. was inappropriate, it remains a likelihood this behavior, upon reinstatement, could reoccur.

AWARD

The Charges are ***sustained***, in part, and ***denied***, in part. The Dover School District, Morris County, has established Andrew Lota engaged in actions expressed in Tenure Charges One, Two, and Four, *Conduct Unbecoming a Teaching Staff Member*.

There is insufficient evidence in this record to support discipline less than dismissal. Accordingly, Andrew Lota engaged in conduct unbecoming, constituting just cause for dismissal.

DATED: May 28, 2021

Carol F. Laskin
CAROL F. LASKIN, ESQUIRE

STATE OF NEW JERSEY :

COUNTY OF CAMDEN :

I CERTIFY that on May 28, 2021

I, CAROL F. LASKIN, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Decision and Award.

DATED: May 28, 2021

Lynda A Hilipot
NOTARY PUBLIC OF THE
STATE OF NEW JERSEY

Lynda A Hilipot
Notary Public
New Jersey
My Commission Expires 7-2-24
No. 50108025

122-21

122-21

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges Against Yesenia Camilo

WEST NEW YORK SCHOOL DISTRICT

Petitioner,

- and -

YESENIA CAMILO,

Ms. Camilo.

Agency Dkt No.
189-9/20

OPINION AND AWARD

Before
Joyce M. Klein
Arbitrator

Appearances:

For the Petitioner:
Jaclyn D'Arminio, Esq.
Florio Perrucci Steinhardt
Cappelli Tipton & Taylor, LLC

For Ms. Camilo:
James R. Zazzali, Jr., Esq.
Zazzali, Fagella, Nowak,
Kleinbaum & Friedman

Pursuant to *N.J.S.A.* 18A:6-16, as amended by *P.L. 2012*, c. 26 ("TEACHNJ"), the tenure charges brought by the West New York School District (the "Board" or "Petitioner") against Yesenia Camilo ("Camilo" or "Ms. Camilo") were referred to me by the Director of the Bureau of Controversies and Disputes, Department of Education, for a hearing and decision on September 24, 2020.

A pre-hearing conference was held via videoconference on November 5, 2020. Thereafter, several hearing dates were scheduled and subsequently cancelled due to Ms. Camilo and other members of her family being diagnosed with, and needing to recover from, COVID-19. This delay led to disputes over whether the hearing should be in person or via videoconference. On December

30, 2020, I ruled that Ms. Camilo's "procedural due process rights are not compromised by a virtual or remote hearing" and returned her to payroll on January 1, 2021 provided that she was prepared to proceed to a hearing via videoconference. On February 8, 2021, the parties met to commence the hearing, but only procedural matters were addressed. I conducted hearings via videoconference on March 19 and 25, 2021.

At the hearings, the parties argued orally, examined and cross-examined witnesses, and introduced documentary evidence into the record. Testimony was received from Principal Patrick Gagliardi; Assistant Superintendent of Administrative Services Scott Wohlrab; Assistant Principal Renee Theobald-Rodriguez (Rodriguez); Director of Special Education Services Allan Roth; Special Education District Supervisor Yoleisy Yanez and Respondent Yesenia Camilo.

Post-hearing briefs were received by May 7, 2021, whereupon the record was closed.

RELEVANT BOARD OF EDUCATION POLICIES

Relevant portions of the Board's Policies are reproduced below:

3150 - DISCIPLINE

The Board of Education directs all teaching staff members to observe statutes of the State of New Jersey, rules of the State Board of Education, policies of this Board, and duly promulgated administrative rules and regulations governing staff conduct. Violations of those statutes, rules, policies and regulations will be subject to discipline.

The Superintendent shall deal with disciplinary matters on a case by case basis. Discipline measures will include verbal and written warnings as appropriate and will provide, wherever possible, for progressive penalties for repeated violations. Penalties may include suspension, withholding one or more increments, and dismissal.

In the event disciplinary action is contemplated, notice will be given to the teaching staff member in ordinary and concise language of the specific acts and omissions upon which the disciplinary action is based; the text of the statute, policy, or rule that the member is alleged to have violated; a date when the member may be heard and the administrator who will hear the matter; and the penalty that may be imposed.

District Policy 3161 – EXAMINATION FOR CAUSE

The Board of Education may, in accordance with law, require the psychiatric or physical examination of any teaching staff member who shows evidence of deviation from normal physical or mental health.

The Superintendent shall recommend to the Board the examination of any teaching staff member whose physical or mental conditions so departs from normal health as to adversely affect the performance of the member's duties. Any such recommendation must be accompanied by competent evidence. If the Board determines that deviation from normal health has been demonstrated, it may require that the member submit to a physical or mental examination.

A requirement for physical or mental examination shall be made known to the employee by written notice setting forth the nature of the examination required, the reasons for the requirement, and a statement offering the member the opportunity to appear before the Board to explain or refute those reasons provided any such hearing is requested in writing within five working days of the receipt of the notice.

The Director of Human Resources, with reasonable cause may require a staff member to go for a fitness for duty physical examination by a Board approved physician to determine the staff member's ability to perform his/her duties.

This examination shall be at the expense of the school district and the results shall be confidential and only provided to the Director of Human Resources and/or designee.

* * *

. . . The cost of the examination will be borne by the Board if the Board designates a physician or institution from the names submitted from the teaching staff member.

* * *

If the results of the examination show mental abnormality or communicable disease, the teaching staff member shall be placed on sick leave and compensated in accordance with his/her sick leave entitlement, if any, until proof of recovery, satisfactory to the Board, is furnished. No leave of absence granted under this policy shall

exceed the term of the contract of a nontenured teaching staff member or a period of two years in the case of a tenured teaching staff member.

A teaching staff member who refuses to submit to the examination required by the Board and has exhausted the hearing procedures established by law and this policy shall be subject to discipline, which may include the certification of tenure charges to the Commissioner of Education.

District Policy 3270 – PROFESSIONAL RESPONSIBILITIES

The Board of Education will establish and enforce rules for the assignment of specific duties to teaching staff members and for the conduct of teaching staff members during the work day.

The Board directs the Superintendent to require the preparation of lesson plans by each teacher that implement the goals and objectives of the educational program. . ..

The Superintendent shall apply uniformly throughout the district, except as may otherwise be provided in this policy, the following additional rules for teaching staff member conduct:

* * *

2. Teaching staff members are expected to attend every faculty meeting unless expressly excused by the Building Principal:

* * *

District Policy 3280 – LIABILITY FOR PUPIL WELFARE

Teaching staff members are responsible for supervision of pupils and must discharge that responsibility with the highest levels of care and prudent conduct. All teaching staff members of this district shall be governed by the following rules in order to protect the well-being of pupils and to avoid any assignment of liability to this Board of Education or to a staff member personally in the event a pupil injured.

The Superintendent shall prepare such regulations as may be required to enforce the following rules:

1. Each teaching staff member must maintain a standard of care for supervision, control, and protection of pupils commensurate with the member's assigned duties and responsibilities;

District Policy 3281 – INAPPROPRIATE STAFF CONDUCT

The Board of Education recognizes its responsibility to protect the health, safety and welfare of all pupils within this school district. Furthermore, the Boar recognizes there exists a professional responsibility for all school staff to protect a pupil's health, safety and welfare. The Board strongly believes that school staff members have the public's trust and confidence to protect the well-being of all pupils attending the school district.

In support of this Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.

* * *

CHARGES

The West New York Board of Education brought charges against Yesenia Camilo on September 2, 2020 alleging that she engaged in conduct unbecoming a teaching staff member, incapacity, insubordination and other just cause. Those charges state:

CHARGE I

CONDUCT UNBECOMING A TEACHING STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING MS. CAMILO'S INAPPROPRIATE CONDUCT AND FAILURE TO COMPLY WITH BOARD POLICIES

Count 1

On September 4, 2019, Ms. Camilo arrived for a professional development day at 9:20AM, this was twenty (20) minutes after the start of the program. Also on this date, Ms. Camilo was observed smoking on school property after the second session of the professional development program began. Finally, when questioned about smoking during the program, Ms. Camilo said, "cono," threw her cigarette on the ground and walked inside the school building.

Count 2

On September 5, 2019, Ms. Camilo failed to attend a faculty meeting. An administrator called her classroom, after which she attended this meeting.

Count 3

On September 10, 2019, Ms. Camilo announced during CPT that she was leaving, walked out of the school building without permission or signing out, and later told administrators that she left to meet her father outside. After being questioned, Ms. Camilo demanded that her team members tell her who "ratted her out."

Count 4

On September 11, 2019, during a meeting about her actions on the previous day, Ms. Camilo stated to administration that she was late for the meeting because she got lost coming down the stairs and because she thought it was her preparation period.

With regard to her actions in leaving the CPT meeting on September 10, 2019, Ms. Camilo stated that she did not want to walk to the main office to sign out and that she did not say "boo" to her team when she returned to CPT.

Count 5

On September 12, 2019, Ms. Camilo called Assistant Principal Renee Theobald-Rodriguez's ("Ms. Theobald-Rodriguez") cellphone to request a personal day at 7:58AM. Ms. Camilo should have called at least one hour prior and the request should have been entered in the Board's attendance application, Frontline.

Count 6

On September 13, 2019, Yoleisy Yanez ("Ms. Yanez") greeted Ms. Camilo, who asked who would be evaluating her. When Ms. Yanez replied that she would be doing the evaluation, Ms. Camilo replied, "I knew you were here to get me in trouble."

Count 7

On September 16, 2019, Principal Patrick Gagliardi ("Principal Gagliardi") had to look for Ms. Camilo as she did not report to CPT. When he found her, she rambled about trying to reach another teacher and getting confused about her lunch period.

Count 8

On October 3, 2019, Ms. Camilo was found outside Ms. Theobald-Rodriguez's office ranting about a "huge animal" in the corner. The "animal" was a small cricket. Ms. Camilo's behavior was erratic and disturbing.

Count 9

On or about October 4, 2019, Ms. Camilo told a parent during an Individualized Education Program ("IERP") meeting that she uses food to bribe the student to complete tasks, in contravention of the IEP.

Count 10

On or about October 18, 2019, it was discovered that Ms. Camilo removed $10.00 from an envelope containing student money collected for a class field trip. On the envelope, Ms. Camilo left a note stating, "From the kids money, I took $10 for food – 10-04-19. YCamilo."

CHARGE II

CONDUCT UNBECOMING, NEGLECT AND INCAPACITY REGARDING MS. CAMILO'S INAPPROPRIATE CLASSROOM CONDUCT

Count 1

On September 11, 2019, during a walkthrough of her classroom, Ms. Camilo was observed standing in a daze with a cleaning spray and rag. She was heard mumbling and standing still. She then uttered something to the paraprofessional in her classroom, and Mr. Diaz started the day's lesson.

Count 2

On September 16, 2019, Ms. Camilo left her classroom two (2) minutes prior to the final bell, leaving her paraprofessional to dismiss her class. Upon questioning, Ms. Camilo stated that she stayed until the end of the day and dismissed her class. Upon being informed that security recordings proved that she walked out early, Ms. Camilo stated that she heard the bell and that's why she left the room. When Principal Gagliardi explained that the bell did not ring until two (2) minutes after Ms. Camilo left the room, she initially stated that the hallway was full of people, so she thought the day was over. Upon being informed that security cameras recorded her as the only person in the hallway at the time, Ms. Camilo

replied, "Write me up. What do you want me to say? What do you want me to do?"

Count 3

On September 17, 2019, Ms. Yanez entered Ms. Camilo's classroom after second period had begun and observed that there was no instruction taking place. Ms. Camilo was seated at her desk, appearing ill and told Ms. Yanez to give her a zero. Soon after making this statement, Ms. Camilo got up from her desk and began teaching her class.

Count 4

On October 4, 2019, Ms. Yanez visited Ms. Camilo's classroom to remind her that another teacher planned a lesson to model in her classroom the following Monday. The students in Ms. Camilo's classroom were all on Chromebooks. Some students were listening to music, some were looking at a website with images of the character "Momo." Ms. Camilo was on her cellphone, oblivious to what was occurring in her classroom. Upon speaking with the students, Ms. Yanez determined that most, if not all, of the students were not involved in any instructional activity. After observing for a period of approximately five (5) minutes, Ms. Yanez approached Ms. Camilo, who screamed and threw a pencil, as she had no idea that Ms. Yanez was in her classroom.

Count 5

From the beginning of the 2019-2020 school year until her removal from the classroom, in or about October 16, 2019, Ms. Camilo failed to set up a gradebook in PowerSchool, despite a policy requiring teachers to enter student assignments and grades within seven (7) days of their assignment. Further, Ms. Camilo's gradebook was empty and she failed to enter comments for any students by the deadline for progress reports. Upon questioning, Ms. Camilo stated that she was overwhelmed. Ms. Camilo did not ask for help. Additionally, Ms. Camilo stated that she kept all grades recorded in a paper gradebook and was corresponding with parents. Despite this claim, Ms. Camilo failed to provide any gradebook or correspondence with parents.

CHARGE III

INSUBORDINATION AND CONDUCT UNBECOMING FOR FAILURE TO FOLLOW DIRECTIVES

The foregoing background information, and the facts alleged therein, are incorporated by reference as if fully set forth herein. Yesenia Camilo has engaged

in unbecoming conduct including misconduct, dishonesty, insubordination and other just cause by her acts and omissions relative to his employment by the Board. These acts and omissions, as specifically set forth below, constitute just cause for immediate dismissal due to conduct unbecoming and insubordination.

Count 1

On October 16, 2019, the Board approved a resolution directing Ms. Camilo to submit herself to a Fitness for Duty Examination. On the same date, Ms. Camilo was informed via memorandum from Allan Roth, Esq. of the requirement that she submit to a Fitness for Duty examination. Despite the Board making every effort to assist Ms. Camilo, including arranging for her transportation, Ms. Camilo failed to attend at least two (2) scheduled meetings with the Board assigned psychologist.

To date, Ms. Camilo has failed to submit to same, nor has she initiated an appeal of the directive.

CHARGE IV

CONDUCT UNBECOMING A STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING MS. CAMILO'S CONDUCT

The foregoing background information, common to all charges, and the facts alleged therein, are incorporated by reference as if fully set forth herein.

Each of the foregoing charges and counts individually warrant dismissal. Viewed in their totality within the context of the Ms. Camilo's behavior, it is evident that she engaged in a petter of unbecoming conduct, neglect of duty, incapacity and insubordination or other just cause, warranting dismissal. The allegations, jointly and severally, demonstrate her unfitness to continue to serve in a position of trust, warranting her immediate dismissal.

BACKGROUND

Ms. Camilo has been employed as a teacher in the West New York School District since June 18, 2003. Ms. Camilo holds and maintains certificates as a teacher of English as a Second Language, Teacher of the Deaf or Hard of Hearing, Teacher of the Handicapped and Elementary School Teacher. Ms. Camilo enjoyed a record as a teacher in good standing for the first 16 years of her career where she served as a special education teacher at PS-2, an elementary school in the Early Childhood Program in the West New York Public School District ("District"). There, Ms. Camilo worked with young children aged

2 1/2 – 4 years old. Ms. Camilo had a clean record and received generally good evaluations.

In May of 2019, Ms. Camilo learned that she was transferred to a position at the West New York Middle School ("Middle School"). Ms. Camilo was concerned about the transfer and suspected that it was related to local politics. That she was being transferred to a position so different from her previous grade and age level, Pre-K resource teacher to Seventh/Eight Grade Special Education) and to a larger school, concerned Ms. Camilo. She testified that, before she started at the Middle School, she reached out to Principal Patrick Gagliardi for information and/or assistance but received no reply. Mr. Gagliardi stated that the Middle School has no orientation for teachers who transfer from within the District. Mr. Gagliardi was not aware of the age of the students Ms. Camilo taught at her prior school. Mr. Gagliardi testified that Ms. Camilo told him "they should never have transferred me here."

On the first day of school, which was a professional development day for teachers, Mr. Gagliardi was in the cafeteria corralling teachers to attend the professional development, when he saw Ms. Camilo, outside of the school building by the front doors. According to Mr. Gagliardi, she was about 20 minutes late and was smoking on school grounds where smoking is not permitted. No other staff member who was late to professional development was counseled.

Mr. Gagliardi explained that if staff members wish to smoke, they must either cross the street, away from the main entrance, or go to a designated area in the back end of the garage. He also indicated that there are signs that indicate that there is no smoking on the premises that are posted on the entrances to the school building and near where Ms. Camilo was smoking. Ms. Camilo's response to Mr. Gagliardi's finding her smoking outside of the school was to say "conyo" or "damn," and throw her cigarette on the ground.

Ms. Camilo acknowledged smoking, but testified that she did not believe she was on school property, that she was a good distance from the entrance of the school, and that she was with a group of school employees, who were smoking as well. Ms. Camilo also stated that she did not yell or curse at Mr. Gagliardi. She cursed to express her surprise after Mr. Gagliardi yelled at her in front of the other staff members. Mr. Gagliardi testified initially that he could not recall whether Ms. Camilo was alone or in a group, but later testified that others were late. According to Mr. Gagliardi, he told only Ms. Camilo to put out her cigarette. Mr. Gagliardi agreed with Ms. Camilo's testimony her cursing was not directed at him and he understood her expression to mean "damn." A 'no-smoking on school premises policy' was announced to staff in the past, but Mr. Gagliardi acknowledged that it was Ms. Camilo's first day, and that the 'no smoking' signs do not delineate where school property starts or ends.

The next day, on September 5, 2019, Mr. Gagliardi noted that Ms. Camilo was late to the first faculty meeting. Mr. Gagliardi viewed the faculty meeting as important because it covered many of the school's protocols and the administrators' expectations. Assistant Principal Renee Theobald Rodriguez (Rodriguez) explained faculty members were notified of the meeting via email. She testified that the only way Ms. Camilo "would have not been made aware [was] if she did not read her email or check the schedule that had been posted in the main office." Ms. Camilo was in her classroom and was called to attend the meeting nearly 20 minutes into the program.

Ms. Camilo acknowledged that she was late to the September 5, 2019 faculty meeting. She explained that she lost track of time setting up her new classroom and that she had expected, based upon her previous school, a PA announcement, for a faculty meeting. Ms. Camilo went to the faculty meeting immediately upon receiving a call from Ms. Rodriguez. Ms. Rodriguez testified that Ms. Camilo apologized for being late; stated that she did not realize she was late and "did come down rather quickly." Mr. Gagliardi confirmed that Ms. Camilo was late, but did attend the meeting.

Five days later, on September 10, 2019, Ms. Camilo was in the middle of her common planning time ("CPT") and told her team that she was hungry and left. According to Mr. Gagliardi, the only time a teacher is permitted to leave a building without permission is during their duty-free lunch, otherwise they are required to sign out in the logbook, even if they step out momentarily. Mr. Gagliardi explained that in the event of an emergency the administration needs to know who is the building.

Neither Mr. Gagliardi nor Ms. Rodriguez saw Ms. Camilo leave the building. Another faculty member, who was in the CPT, told Ms. Rodriguez that Ms. Camilo left to get something to eat. The faculty member reported to Ms. Rodriguez that when Ms. Camilo returned to the CPT she asked "who ratted me out."

Ms. Camilo testified that she had arrived early to that CPT and then left, telling another teacher that she was hungry and had to "go grab a bag" from her father. Ms. Camilo met her father at the entrance to the building and took a bag with supplies and her lunch from him. Ms. Camilo realized later that it took longer than she expected and was not a good idea. Ms. Camilo testified that she did not believe that she would have to sign out under the circumstances.

Mr. Gagliardi and Ms. Rodriguez met with Ms. Camilo on September 11 to discuss her leaving the CPT early on September 10. Ms. Rodriguez reminded Ms. Camilo that if a staff member needs to leave the building, they need to seek permission and sign out. Ms. Rodriguez recalled Ms. Camilo stating that "she had to get something from her father who was right outside the school" and that Ms.

Camilo explained that she had to meet her father to pick up a broom to clean her classroom.

Mr. Gagliardi testified that Ms. Camilo told him that she had left the meeting to meet her father, and that she did not go to the main office to sign out. At hearing, Mr. Gagliardi testified that Ms. Camilo did not sign out because she did not want to talk to people in the office. When Mr. Gagliardi issued a counseling notice on September 18, 2019, he described the incident as follows:

> 9/10/19 During CPT you announced to the team that you were hungry and that you were leaving. You then walked out of the building without permission and without signing out in the staff log book. It was also reported that upon your return to CPT you asked the team "who ratted you out?"
>
> 9/11/19 Met with you regarding the 9/10/19 walking out issue. You had multiple excuses for why you walked out of the building without permission, including that you got lost coming down the stairs, that you thought it was your prep, that you didn't want to walk that far to the main office to sign the book. When I inquired as to what you said to the team when you returned to CPT, you said that you "didn't say boo to anyone".

On September 11, 2019, Mr. Gagliardi was performing a walk through and went into Ms. Camilo's classroom, he found her standing in an apparent daze, holding cleaning supplies. Mr. Gagliardi "tried to get her attention and she didn't even recognize that [he] was there." Her students, he testified, "were doing absolutely nothing." Mr. Gagliardi noted that Ms. Camilo did not react to his presence in the room but Mr. Diaz, the paraprofessional began handing out worksheets and beginning the day's lesson approximately five to seven minutes into the start of class time. Ms. Camilo testified that she was about to clean a student's desk and she was expecting Mr. Gagliardi to speak first.

The next day, on September 12, 2019, at 7:58 a.m., Ms. Camilo called Ms. Rodriguez on her personal cellphone asking to use a personal day. This request was after the 7:00 a.m. deadline for reporting absences and the requested absence was not reported via Frontline, the Board's attendance application. The procedure for reporting absences was reviewed at the initial faculty meeting and is outlined in the Board Policy. Ms. Camilo explained that she was unable to request the absence properly because she had internet connectivity issues and could not access Frontline. She testified that she could not get through on the backup phone number.

On September 13, 2019, Special Education District Supervisor Yoleisy Yanez testified that she stopped in to greet Ms. Camilo in her classroom. Ms.

Yanez said it was a routine visit not a formal walkthrough, and that she was visiting all of the Middle School special education teachers that day. Ms. Yanez recalled that Ms. Camilo inquired who her evaluators would be. When Ms. Yanez told her she was one of her evaluators, Ms. Camilo stated that she knew Ms. Yanez would get her in trouble and that she had been informed of this by "some people in higher positions." Ms. Yanez testified that Ms. Camilo continued by attempting to discuss her medical issues. Ms. Yanez ended that discussion because there were students in the classroom.

Three days later, on September 16, 2019, Ms. Camilo was late to her CPT. Mr. Gagliardi explained that missing CPT was concerning, especially for special education disciplines. Fifteen minutes into the period, Mr. Gagliardi found her wandering the halls, rambling about trying to reach another teacher and being confused about her lunch period. Mr. Gagliardi noted that this incident increased his concern regarding Ms. Camilo's state of mind. Mr. Gagliardi summarized this incident in his September 18, 2019 counseling memo as follows:

> 9/16/19 Late for CPT. All CPTs on 9/16/19 were scheduled as high priority since the Middle School 504 Coordinator was leading a training for all teams. You were not in attendance at the CPT. In fact, 15 minutes after the CPT began, I went to look for you. I found you walking in the hallway. When I inquired as to your whereabouts, you stated that you were trying to call Ms. Winters and then asked me if she was on vacation. You also mentioned that you lost track of time after the lunch period.

Later that same day, Ms. Camilo left her classroom two minutes before the final bell, leaving her paraprofessional to dismiss her class. Mr. Gagliardi explained that this violated Board Policy. He acknowledged that there are incidents where a paraprofessional may be left in control of a classroom, but a certified teacher was not to leave her classroom without the proper authority and ensuring adequate coverage. Mr. Gagliardi explained further, "she doesn't have the authority to leave the classroom with those kids attended only by a paraprofessional. It's not a certified staff member." Assistant Superintendent of Administrative Services Scott Wohlrab confirmed that paraprofessionals are left in charge of classes when a teacher needs to use the restroom. According to Mr. Gagliardi, someone reported that Ms. Camilo left early, and he viewed the security footage to verify it.

According to Mr. Gagliardi, the next day Ms. Camilo first claimed she had stayed until the end of the day to dismiss her class. When informed that security footage showed otherwise, she indicated that thought she had heard the bell, and that the hallway had been full of people. When again advised that the hallway had been empty, save for her, Ms. Camilo's only response was "Write me up. What do you want me to say? What do you want me to do?" At hearing, Ms. Camilo clarified

that the sounds of students preparing to leave made her think she heard the bell and that she needed to use the restroom.

On September 17, 2019, Ms. Yanez again visited Ms. Camilo's classroom, this time for a formal walk-through. Ms. Yanez entered the classroom about ten minutes after the start of class and found Ms. Camilo seated in front of her classroom, looking "either sick or upset." No instruction was taking place. Ms. Yanez asked if Ms. Camilo was feeling all right and she responded, "Who sent you? Why did they send you here?" After explaining she was conducting walkthroughs, Ms. Yanez prompted Ms. Camilo to begin her lesson and she replied, "give me a zero." After further prompting Ms. Camilo begin to instruct her students. This interaction was concerning enough for Ms. Yanez to write to Mr. Cardenas in the Board's Human Resources office at the time, regarding her interactions with Ms. Camilo documenting both the September 13th and the September 17th events.

That letter described this incident as follows:

> Around 10 minutes after the second period started, I entered the classroom (Room 322). The students were quietly seated. I did not observe any type of instruction taking place. The teacher was seated at her desk as well, appearing to be very upset or ill. I asked her if she was feeling sick. She responded by questioning the reason why I was there. She also asked, "Why did they send you"? My response was that I was conducting walkthroughs, to which Camilo also added, "You can give me a zero".
>
> I reiterated to the teacher that I was conducting other walkthroughs and that at that point, I needed to observe her working with the class. She finally decided to get up from her seat and to introduce me to her students. She stated: "This my friend Mrs. Yanez...." Then, Mrs. Camilo asked her paraprofessional to hand out copies of the Reading Fluency packet, which consisted of a song, "Seasons of Love", printed on paper. The paraprofessional shared a copy with me.
>
> The first class activity consisted of having the students take turns to read on verse form the song. The following activity was a whole class choral reading. The teacher asked the paraprofessional to time them. All the students and the teacher read the song in unison. The teacher expressed how happy she was feeling because her students were doing much better with their reading fluency. She explained that they had done the same activity the day before, as an opportunity for them to be exposed to the same words again.

On October 3, 2019, Ms. Rodriguez was at her desk when she noticed Ms. Camilo in the hallway waving her arms in apparent distress. When she went to determine the cause, she found Ms. Camilo screaming about a "huge animal." Thinking that a squirrel or raccoon may have entered the school building, Ms. Rodriguez rushed to investigate. What she found was a cricket, which she promptly stepped on. Ms. Rodriguez characterized Ms. Camilo's behavior as "bizarre" and that she found it necessary to calm her because "she seemed fearful that she saw a huge animal." Ms. Rodriguez testified that she discussed the incident with Mr. Gagliardi and reached out to Human Resources.

According to Ms. Camilo, she was not waving her hands, but alerting Ms. Rodriguez that there was a large bug or cockroach in the hallway that might need attention before the students see it and react. Ms. Camilo explained that she was telling Ms. Diaz where the bug was in Spanish. Ms. Camilo said she had her purse in her hands and did not wave her arms. Ms. Camilo testified that she may have referred to the bug as "big cucaracha," but not as a "huge animal."

On October 4, 2019, Ms. Yanez made another unannounced visit to Ms. Camilo's classroom unannounced. When she entered, the students in Ms. Camilo's classroom were all on Chromebooks and were not engaged in instruction. One student was viewing a website with images of the character "Momo." Ms. Yanez testified "Momo" is "highly inappropriate" for school and is associated with suicidal tendencies. Ms. Yanez instructed the student to close the website. During this time, Ms. Camilo was speaking with someone on her cellphone and appeared unaware of what was occurring in her classroom. After observing for a period of approximately five (5) minutes, Ms. Yanez approached Ms. Camilo, who screamed in surprise, opened her arms, and threw a pencil. Ms. Yanez recorded her observations in another letter as follows:

> On Friday October 4, 2019, after a meeting with the CST and the teachers from House 4, I visited Mrs. Camilo's classroom. I wanted to remind her that Mr. Jimenez had planned a lesson to model in her class for Monday, and that I was going to be a part of it. It was 9th period, around 2:30 pm.
>
> The students were all in their Chromebooks, some listening to music. A couple of students were on a website with pictures of the character "Momo". One of them had the face of the character drawn on a piece of paper. I asked him to logout because the content was completely inappropriate for school. While all this was happening, Mrs. Camilo was on the phone, apparently unaware of what was going on.
>
> I continued speaking with the students on individual basis, finding out that many of them were not involved in any type of instructional

> activity. Around five minutes later, I approached Mrs. Camilo and her reaction was to scream. As she opened her arms due to the surprise, the pencil she had in one of her hands flew across the room. She appeared terrified when she saw me, stating that she had not seen me entering the room.

Also on October 4, 2019, Ms. Camilo took money from a collection envelope containing students' contributions towards an upcoming field trip and left an IOU. According to Mr. Gagliardi, there are no circumstances where a teacher can use student funds and it was a violation of the school's policy and protocol. Ms. Camilo stated her intent to return the funds, and did so. Ms. Camilo explained that she used the funds to purchase snacks for her students as an achievement incentive. She also explained that some of her special education students took medications that suppress their appetite, so she gave them food for snack when they were hungry. Ms. Camilo explained that there was no budget for snacks for middle grades so she used her own money to purchase food for her students. Ms. Camilo paid the $10.00 back.

On October 8, 2019, Mr. Gagliardi became aware that Ms. Camilo had failed to set up or update her PowerSchool. According to Mr. Gagliardi, she should have set-up PowerSchool when she received her roster of students and updated it regularly to reflect the current progress of her students. Ms. Camilo's gradebooks were empty.

When Mr. Gagliardi met with Ms. Camilo, she stated she was unfamiliar with PowerSchool but had kept all her grades recorded in a paper gradebook. Ms. Camilo never provided a gradebook. Instead, she provided stacks of assignments completed by her students. An examination of these assignments showed that all of them were marked with an "A" even though many were substantially incomplete. Ms. Rodriguez described the work as "juvenile", even when taking into consideration the students' classification as learning disabled.

Mr. Gagliardi issued a letter of reprimand to Ms. Camilo that same day. That letter provides in part"

> In conversation with you regarding these concerns, you expressed being unfamiliar with the "system". You stated you haven't used PowerSchool in over nine years. You said, "That's why I told them not to transfer me here." You stated that there was too much paperwork & that you are overwhelmed in this current position. You also stated that, although unfamiliar and overwhelmed, you have not asked one of your three supervisors nor one of your three administrators for assistance with these matters.

> Furthermore, you also stated that you have grades for all of your students and that you keep them recorded in a paper gradebook. You stated that although parents are unable to view their children's grades online, you have been in correspondence with the parents through email and written messages and are aware of their children's grades.
>
> When asked to produce your written gradebook and the electronic and/or written correspondence with parents, you were unable to produce anything. On the contrary, you shared piles of worksheets to "prove" your students were working. Once your supervisor and administrators reviewed the worksheets, it was apparent that "grades" were falsified in an attempt to satisfy the administration and that there has not been any feedback to students or parents as to their assignments, performance, grades, progress or lack thereof.
>
> I find it very disturbing and in direct violation of policies, procedures & directives that you do not have any student records documented for the school year. Moreover your attempt to deceive the administration in an apparent coverup of your own negligence is unprofessional.
>
> If you continue to violate policies, procedures or directives, you may be subject to disciplinary action up to and including termination.

Mr. Gagliardi acknowledged that no parent of any of Ms. Camilo's students complained about the lack of PowerSchool information or progress reports. Mr. Gagliardi also acknowledged that the Middle School never received any complaints from students' parents regarding Ms. Camilo in any other fashion.

Ms. Camilo confirmed that that she had not set up a PowerSchool account by October 8, 2019 and acknowledges that she should have done so. Ms. Camilo explained that she had not used PowerSchool since 2013, and had not, in fact, been responsible for entering grades because she had been teaching Pre-K since 2013.

Ms. Camilo testified that she believed that she was teaching her students and that they were learning. Ms. Camilo stated that she realized that she did not have the paper gradebook because it was at home. So, to represent her work and the students' progress, Ms. Camilo produced the student packets/worksheets. Ms. Camilo acknowledged that she added grades and/or comments to the paperwork while she was upstairs because she had three new students added into the class and wanted to demonstrate her work and the work of her students in lieu of the paper grade book. Ms. Camilo explained that she used an unorthodox method of reducing stressors and incentivizing her students with a grade "A" starting point.

A version of the grades also was displayed on the whiteboard in her classroom. Ms. Camilo explained that the "A" has to be maintained, and is not automatic. Ms. Camilo testified that she did not intend to falsify any documents, or to deceive Mr. Gagliardi or Ms. Rodriguez, and that her production of those notes and paperwork was to give them reassurance that she was working hard and her special education students were reading and making progress.

Ms. Camilo explained that she had just completed parent/teacher conferences the week before and communicated and shared student progress with the parents at that time. According to Ms. Camilo, many parents thanked her and expressed their happiness that their children were more eager to do their homework and showing a greater interest in reading. Ms. Camilo did not request training or assistance with PowerSchool.

After finding Ms. Camilo's empty grade book, Mr. Gagliardi discussed Ms. Camilo's erratic behavior with Allan Roth, the Administrative Assistant to the Director of Special Services, including the incident where she was found staring off into space, and the incident on October 4th where she expressed evident fear of a large animal that turned out to be a cricket. Mr. Roth brought the matter to the attention of the Superintendent who recommended to the Board that it order an "Examination for Cause" or a Fitness For Duty examination. Mr. Roth drafted notice to Ms. Camilo that the Board would consider ordering an Examination for Cause and inviting her to appear. Ms. Camilo was not present. Mr. Roth had also provided notice to the Association.

At the October 16, 2019 meeting, the Board issued a resolution directing Ms. Camilo to submit to an Examination for Cause. Mr. Roth testified that he then drafted a memorandum to Ms. Camilo advising her of the determination and arranging a date scheduling the examination for some time between October 16, 2019 and October 28, 2019. Mr. Roth testified that the original letter had been written over and he was unsure of the event date. Mr. Roth noted that the letter was sent via regular and certified mail, and that it was not returned to him. Ms. Camilo testified that she did not receive the letter but when she saw it, after Tenure Charges were filed, her address was incorrect.

Mr. Roth acknowledged that he cannot prove that she received the letter and that Ms. Camilo's attorney told him she did not receive the letter. Mr. Roth acknowledged that attorneys for Ms. Camilo told him that his first notice of a Fitness for Duty examination was not received by Ms. Camilo. He arranged for a second appointment on October 28, 2019. Mr. Roth testified that he was advised by both the doctor selected to perform the exam, as well as Ms. Camilo's then attorney, Mr. Krumholz, that Ms. Camilo attempted to attend the second appointment, but was late. Thereafter, Mr. Roth tried to arrange two more exams for Ms. Camilo. The first in mid-December, and the second on or about January 3rd. Mr. Roth testified that the first exam did not go forward due to a

miscommunication with Ms. Camilo's attorney's office. The second did not go forward because of a miscommunication with the doctor's office. Mr. Roth recognized that Ms. Camilo appeared for the January 3, 2019 appointment, but was unable to be seen at that time. Ms. Camilo waited and begged the doctor to complete the examination but that was not possible.

Mr. Roth scheduled a final fitness for duty examination for Ms. Camilo on January 23, 2020. Mr. Roth testified he sent a letter to Ms. Camilo, at her proper address, and copied both her attorney and the examining doctor. When he was notified by the doctor that Ms. Camilo had not attended this examination, Mr. Roth immediately contacted Ms. Camilo's attorney, who did not dispute that she had not appeared or advise that his client had appeared at the examination for cause. According to Mr. Roth, Ms. Camilo's attorney did not provide an excuse for her failing to attend the January 23, 2020 appointment. At hearing, Ms. Camilo claimed that she did not receive notice of that appointment. At this point, the Board did not offer additional dates for the Examination for Cause.

Ms. Camilo asserts that the focus on her was politically motivated. She explained that in the last round of elections she was working for a ticket opposite Mr. Gagliardi and Ms. Yanez. She asserts that this was the reason for her transfer to the Middle School, that she was being sent there to be "taken out," describing Mr. Gagliardi as a "hitman." Ms. Camilo acknowledges that she did not interact with Mr. Gagliardi during the campaign. Ms. Camilo testified that she believed Ms. Yanez was aware of her campaign work, but their few inactions were nonconfrontational.

Ms. Camilo testified that she voiced those concerns to her previous supervisor Joanne Winters, but Ms. Winters offered no assistance. Ms. Camilo also voiced her transfer concerns to Ms. Rodriguez. Ms. Rodriguez confirmed that Ms. Camilo was "very concerned" about her transfer, but she felt it was only about Mr. Gagliardi being a "rule follower," and stated that she offered her support to Ms. Camilo. Ms. Rodriguez acknowledged that she and Mr. Gagliardi had known Ms. Camilo for years. Ms. Camilo testified that she spoke to Ms. Rodriguez in detail of her concerns, including those regarding Mr. Gagliardi and Ms. Yanez, and that the transfer was potentially an effort to "get rid of (her)."

Ms. Camilo testified that she was "overwhelmed" in those first five weeks in the Middle School and she had told Ms. Rodriguez and Mr. Gagliardi. She also testified that she asked for help and support but received no answer to these requests. At hearing, Ms. Camilo acknowledged her own responsibility for those first weeks and believes she could have handled the situation better.

Mr. Gagliardi testified that he did not believe that Ms. Camilo "should lose her job for the behaviors (he) witnessed." He testified to his understanding that

Ms. Camilo's "(tenure) charges were brought about for incidents beyond what (he) documented here."

DISCUSSION

N.J.S.A. 18A:6-10 provides that no tenured employees of the public school system "shall be dismissed or reduced in compensation ... except for inefficiency, incapacity, unbecoming conduct, or other just cause." The District bears the burden to establish that it met this standard.

The New Jersey Supreme Court has defined "unbecoming conduct" as conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." In re Young, 202 N.J. 50, 66 (2010) (quoting Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citation omitted). The New Jersey Supreme Court further defined "unbecoming conduct" as that which violates "the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Bound Brook Bd. Of Ed. v. Ciripompa, Dkt. No. A-57-15, __ N.J. __ (February 21, 2017) (quoting Karins v. City of Atlantic City).

The Board asserts that Ms. Camilo engaged in insubordination, conduct unbecoming a staff member and/or other just cause regarding her inappropriate conduct and failure to comply with Board Policy. The Board points out that when Ms. Camilo became a teacher in the District, she agreed to "faithfully do and perform duties under [her] employment contract, and to observe and enforce the rules prescribed by the state of New Jersey, the Board and the Superintendent of Schools." The Board asserts that from her first day at the Middle School, she violated this agreement by repeatedly failing to uphold and conform to Board Policy and to the conduct generally expected of a teacher.

The Board emphasizes that Ms. Camilo was late for the scheduled professional development and was smoking on school property in violation of the Board's policies and State law (N.J.S.A. 26:3D-58(b)). The Board acknowledges that this conduct, accompanied by a curse, was insufficient, on its own, to justify discipline. The Board notes that this incident was only the first of many during the first month of school. The Board argues that the combination of events over the course of the first month show conduct unbecoming a teacher.

The Board would reject Ms. Camilo's claim that her violations were minor and she should have been given a chance to improve, asserting that retaining Ms. Camilo in a teaching position would lead to more disturbing behaviors and would cause greater harm to her students.

The Board asserts that Ms. Camilo repeatedly failed to follow appropriate protocols. The Board notes that she was late for important school meetings, including the first professional development day, the first faculty meeting and her CPT meetings. The Board also raises concerns about her behavior when questioned about her lateness. The Board points out that Ms. Camilo either rambled, claimed she got lost, or provided other excuses.

The Board points out that Ms. Camilo also failed to use the proper methods to report her absence by calling Ms. Rodriguez, rather than using Frontline, or calling the backup number. The Board also cites Ms. Camilo's action in taking money from funds marked for a student field trip and asserts that there can be no justification for this action. The Board points to Ms. Camilo's efforts to minimize these lapses because she was unfamiliar with the building and the technology and she intended to and did return the money. The Board emphasizes that, these excuses show that Ms. Camilo took no responsibility for her actions and focused on her belief that the Board would provide training despite her failure to ask for such training. The Board contends that when problems were brought to her attention, she still did not seek assistance or training, but expected that Mr. Gagliardi and Ms. Rodriguez would provide training and any other help with acclimating to the Middle School.

The Board would characterize Ms. Camilo as combative, citing her conduct in leaving the CPT and the leaving the building without signing out or permission. When asked about her conduct leaving the CPT meeting and the building, the Board points out that Ms. Camilo responded by asking her CPT "who ratted me out". The Board points out that this type of communication pits colleague against colleague which contradicts the purpose of CPT, which is to foster cooperation and collaboration amongst members of the same team. The Board notes that Ms. Camilo also tried to discuss her medical issues with Ms. Yanez in the presence of her students which, it maintains, is a violation of Board Policy 3281, Inappropriate Staff Conduct, which provides that "School Staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language or expression in the presence of pupils."

The Board emphasizes that in a brief period, Ms. Camilo's behavior became erratic and she appeared to be confused, disoriented, in a daze, or generally nonresponsive, even when addressed directly. The Board points to the incident on October 3, 2019 when Ms. Rodriguez saw her in apparent hysterics claiming to have seen a "huge animal", which was a small cricket. The Board notes that Ms. Rodriguez felt the need to calm her, noting that she appeared convinced that she had seen something of significant size.

The Board asserts that each of these incidents, by themselves, could be viewed as temporary lapses in judgment, and had these incidents happened over the length of a career, they might be viewed differently, but these incidents

occurred in a brief period of time. According to the Board, taken together, this conduct shows a teacher failing to meet an implicit standard of good behavior, and unable or unwilling to self-correct.

The Board asserts that Ms. Camilo is guilty of conduct unbecoming, neglect and incapacity regarding her inappropriate classroom conduct. During Ms. Camilo's month at the Middle School, the Board contends that she displayed an inability to conduct herself appropriately with her students. The Board asserts that Ms. Camilo's conduct in front of her students violates Board Policy 3281, Inappropriate Staff Conduct, and limited students' opportunity to be educated appropriately during the first month of the school year. The Board points to the September 13, 2019 incident where Ms. Yanez visited Ms. Camilo's classroom and, in front of her students, she accused Ms. Yanez of trying to get her in trouble and also tried to discuss her medical issues with Ms. Yanez, in the presence of her students.

The Board also cites Mr. Gagliardi's visit to Ms. Camilo's classroom on September 16, 2019, when he found her in a daze with no instruction being performed in her classroom. Further, the Board points to Ms. Yanez' September 17, 2019 walk through where Ms. Camilo was in apparent distress and was not teaching approximately ten minutes into the class period. The Board notes that Ms. Yanez had to prompt Ms. Camilo to start teaching after she suggested that Ms. Yanez "give her a zero" in front of her students. The Board asserts that later that same day, Ms. Camilo left her classroom two minutes before the bell in violation of school protocol. The Board contends that Ms. Camilo's reaction when asked about the incident was to claim that she had not left before the bell, that she had heard the bell or students in the hallway. When presented with evidence to the contrary, the Board emphasizes that Ms. Camilo had no excuse or rational explanation.

The Board points out that when Ms. Yanez visited Ms. Camilo's classroom on October 4, students were on their Chromebooks listening to music and viewing non-instructional content, including inappropriate material while Ms. Camilo was on a phone call and not paying attention to her classroom. The Board notes that Ms. Yanez was in the classroom for approximately five minutes before Ms. Camilo noticed her, screamed, and threw a pencil in apparent surprise.

The Board contends that Ms. Camilo's behavior, particularly in leaving her students improperly attended, are concerning, inappropriate and in direct contravention to Board Policy 3280, Liability for Pupil Welfare which provides that "teaching staff members are responsible for supervision of pupils and must discharge that responsibility with the highest levels of care and prudent conduct."

The Board argues that Ms. Camilo's actions show neglect for her students' safety and their education. The Board asserts that this was compounded by the

discovery that Ms. Camilo did not have an appropriate gradebook and she had not made any entries in PowerSchool, which is designed to keep parents updated on their child's progress. The Board argues that Ms. Camilo should have been aware that she was expected to keep PowerSchool updated, but one month into the school year, she had not set up her PowerSchool gradebook or entered any grades or comments.

Addressing Ms. Camilo's claim that she did not know how to use PowerSchool and had kept a paper gradebook instead, the Board notes that she has not produced a paper gradebook, and instead provided mostly incomplete packets of work where each student received an "A". Acknowledging Ms. Camilo's claim that she used the initial "A" grades to motivate her students and that their true grades would not reflect all "A"s, the Board notes that there is no evidence that she was tracking her student's progress in a way that could be appropriately reported to their parents. The Board cites Mr. Gagliardi's testimony that the result of Ms. Camilo's inability to produce evidence of her instruction that "those kids... really lost a month of school under her tutelage." Based upon the lack of entries in PowerSchool and the Administration's failure to observe any actual instruction being performed by Ms. Camilo in her classroom, Mr. Gagliardi concluded that no instruction was taking place.

The Board charges that Ms. Camilo is guilty of insubordination and conduct unbecoming a staff member and/or other just cause regarding her failure to follow directives.

In addition to the "egregiousness" of Ms. Camilo's conduct, the Board's original concern was her mental health. The Board emphasizes that many of the incidents detailed in the charges caused administrators and supervisors to question Ms. Camilo's fitness for duty. The Board acknowledges that it is odd that a teacher with a 17 year record of good service would suddenly and flagrantly violate so many Board policies and act in a bizarre and confrontational manner so often in such a brief period. So, the Board determined to send Ms. Camilo for a fitness for duty exam, and asserts that her failure to fully cooperate rises to the level of insubordination, or a willful refusal to attend the examination, and conduct unbecoming of a staff member. The Board cites Mr. Roth's testimony that that it scheduled, or attempted to schedule, an examination for cause a total of five times and the examination never occurred. Specifically, the Board cites Mr. Roth's testimony that Ms. Camilo failed to appear to the first exam (scheduled between October 16 and October 28); was late to the second, so that exam could not take place (October 28, 2019); failed to appear at the third (December 16, 2019) due to an alleged error by her attorney; appeared for the fourth (January 3, 2019) but due to an admitted error by the Board was not seen, and finally, completely failed to appear for the fifth scheduling (January 23, 2020). The Board points out that after the fifth attempt, it did not try to schedule another exam and Ms. Camilo did not

ask that one be scheduled for her. The Board notes that Ms. Camilo did not challenge the direction to submit to an Examination for Cause.

Addressing Ms. Camilo's claim that she was not properly notified of the Board's action, that she never received proper notice of the hearing, the result of the hearing, or the scheduling of the early examinations, the Board notes that she failed to appeal on these grounds or seek to preserve these allegations. The Board also notes Ms. Camilo's acknowledgement that she was in contact with Anita Kober, her Union President, and Tom DeSocio, her NJEA Representative, both of whom were fully aware of both Ms. Camilo's rights and the Board's actions during this period. The Board cites Mr. Roth's testimony that he was in communication with Ms. Camilo's Association representatives throughout the process. Addressing Ms. Camilo's claim she was unaware of the October 28, 2019 examination date, the Board cites Mr. Roth's testimony that she had attended that exam, but too late to be examined. The Board points out that Ms. Camilo failed to appear at the January 23, 2020 appointment despite reminders to her attorney. The Board asserts that by January of 2020, Ms. Camilo was aware of and attempted to attend at least two Examinations for Cause and she was aware or should have been aware that her job was on the line. Because Ms. Camilo did not attend the last examination that was scheduled for her, the Board concludes that she "completely failed to cooperate" and thus engaged in insubordination and must be dismissed from her employment.

Finally, the Board asserts that Ms. Camilo engaged in conduct unbecoming a staff member and/or other just cause regarding the totality of her conduct. The Board contends that each charge independently supports Ms. Camilo's dismissal, but also asserts that the charges, when viewed in totality support its tenure charges. The Board emphasizes that in the course of one month, Ms. Camilo was involved in 13 incidents where her behavior violated Board Policy and/or administration rules; was inappropriate in front of students or bizarre and concerning.

The Board emphasizes that the determination regarding whether a teacher has engaged in conduct warranting dismissal from a tenured position requires consideration of the nature of the act, the totality of the circumstances and the impact on the employee's career. (See I/M/O Tenure Hearing of Molokwu, OAL Dkt. No. EDU 9650-04 (December 12, 2005), citing in re Fulcomer, 93 N.J. Super. 404, 421 (App. Div.1967)). The Board cites cases where one incident is sufficient to establish conduct unbecoming and support removal and other cases where a series of incidents supports such removal. Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd o.b. 131 N.J.L. 326 (E&A, 1944); See also, I/M/O the Tenure Hearing of Stephen Fox, OAL Dkt. No. EDU 7955-04 (February 10, 2005). The Board relies on Laba v. Newark Bd. of Educ., 23 N.J. 364, 384 (1975), where the Court established that the touchstone of unbecoming conduct is the teaching staff member's fitness to discharge the duties and functions of his

or her office or position. A finding of unbecoming conduct does not require a violation of any specific rule or regulation, but rather may be based primarily on an implicit standard of good behavior. In re Emmons, 62 N.J. Super. 136, 140 (App. Div. 1960).

Addressing Ms. Camilo's claim that this these charges are political retaliation on the part of Mr. Gagliardi and Ms. Yanez, the Board points out that this claim does not explain how any possible scrutiny led her to fail to follow Board Policy, fail to learn the procedures of her new assignment, and act in a manner labeled bizarre and erratic by her superiors, Further, the Board asserts that Ms. Camilo's claim of political retaliation does not explain her failure to cooperate in the Board's efforts to determine her fitness for duty. For these reasons, the Board contends that each of the charges individually warrant dismissal and when they are considered in their totality, Ms. Camilo's termination is supported.

Ms. Camilo asserts that the Board's failure to prove the charges against her by a preponderance of the evidence warrants dismissal of the charges.

In this instance, Ms. Camilo explains that the Board has not proven by a preponderance of the evidence that she engaged in unbecoming conduct. Ms. Camilo maintains that this dispute must be considered with the background that she was transferred from a position and grade level she had excelled at for many years to another position with her certification that required preparation and patience. Ms. Camilo asserts that any failures on her part were performance or efficiency based and not conduct unbecoming. Ms. Camilo acknowledges that she struggled and was overwhelmed in her new position and new school. She claims that rather than provide support, she was scrutinized and targeted. Ms. Camilo asserts that any of her conduct that varied from her previous work history or professional norms was in reaction to the pressure of the new situation. Ms. Camilo asserts that the record reflects only *de minimus* conduct or technical violations of policy and the Board has failed to meet its burden of proof.

Beginning with the First Count, Ms. Camilo asserts that the Board has failed to establish that she was on school property when smoking. Ms. Camilo also points out it was her first day working at the Middle School and she would not have known the boundaries of school property at that time. Ms. Camilo notes that she was the only one written up with a counseling despite the presence of other staff who were smoking.

Addressing the Second Count, Ms. Camilo acknowledged being late a couple of times, she never failed to attend a meeting. Both Ms. Camilo's and Ms. Rodriguez's testimony establish that there was no intent to miss the meeting or be late. Ms. Camilo contends that the Board failed to support its allegation that she left the building, or that she did more than step or reach out of the door for food and supplies. Ms. Camilo notes that the Board presented no direct evidence or

video supporting the Third Count. Ms. Camilo also cites the Board's acknowledgement that no pupil is under a staff member's supervision when in a CPT, so there is no support for the allegation that there was neglect or risk of harm to students.

Ms. Camilo does not dispute that she asked her colleagues in CPT who told on her, but emphasizes that there is no evidence that she left school grounds and she would not need to sign out unless she did so.

Ms. Camilo emphasizes that despite the extensive testimony that she left the building, no witness or video actually saw her leave the building. Ms. Camilo cites Ms. Rodriguez' testimony of Ms. Camilo's contemporaneous statement; that she met her father who was just outside the building.

Addressing the Fourth Count, Ms. Camilo points out that it does not include an allegation of a violation of policy but simply restates what occurred in a meeting with Mr. Gagliardi and Ms. Rodriguez.

Likewise, Ms. Camilo contends that the Fifth Count of Charge I recounts her last minute need to use an absence for a migraine. When her internet was not working and she could not reach anyone on the hotline, she called in her absence. Ms. Camilo asserts that calling Ms. Rodriguez's cellphone was reasonable based upon their working history together and Ms. Rodriguez's policy of handing out her number and requesting staff to call.

Addressing the Charges (Sixth Count of Charge I and Counts Three and Four of Charge II) based upon Ms. Yanez's interactions with Ms. Camilo, a conflict of interest based upon their political backgrounds is raised in defense. Because Ms. Yanez and Ms. Camilo have opposing political loyalties, Ms. Camilo claims that there is a conflict posed by Ms. Yanez's role as Ms. Camilo's primary evaluator and a witness in these Tenure Charges. Ms. Camilo asserts that Ms. Yanez's testimony lacks credibility and should, at a minimum, limit the weight given to her testimony. Ms. Camilo contends that it is unlikely that Ms. Yanez could have conducted her walk through on October 4 in a "very small room" for over ten minutes without being noticed by Ms. Camilo. Ms. Camilo suggests that Ms. Yanez's detailed accounts in all of her emails and complaints and in her direct testimony do not mention Mr. Diaz further undermines her credibility. Ms. Camilo points out that when Ms. Yanez was asked about Mr. Diaz on cross-examination, she seemed startled, rendering her claims not believable.

Ms. Camilo maintains Ms. Yanez's multiple, unannounced visits, ostensibly to "gain (her) trust" seemed to be meant more to undermine her. Ms. Camilo points out that Ms. Yanez, who regularly talked to Mr. Gagliardi before conducting walk throughs, could not remember if she had discussed Ms. Camilo with him before

she made the unannounced September 17 walk through right after Mr. Gagliardi's counseling of Ms. Camilo for the previous day's issue.

Addressing the Seventh Count of Charge I, Ms. Camilo points out that the allegation does not include a violation of any policy and cannot be considered a conduct unbecoming charge. Instead, the count describes Ms. Camilo's demeanor in an attempt to serve or support the eventual effort to have Ms. Camilo sent out for a Fitness for Duty examination.

Ms. Camilo asserts that Count Eight of Charge I is a story about a bug that has been embellished in order to paint Ms. Camilo as erratic. The conduct described is not conduct unbecoming a teacher, but an exaggerated incident with a but, according to Ms. Camilo.

Turning to Count Nine of Charge I, Ms. Camilo argues that the Board failed to present or admit any documentary or testimonial evidence supporting any allegation contained in this Count.

Addressing Count Ten of Charge I, Ms. Camilo admitted to and concedes that she violated the policy. Ms. Camilo explained that the money was not used for personal gain, she had no intent to retain the $10, and made sure that it was returned, despite the effort that was required to have it returned by her father.

Ms. Camilo maintains that Count One of Charge II seems intended to support the Board's efforts to justify a Fitness for Duty examination. Emphasizing that there is no violation of policy, Ms. Camilo asserts that Mr. Gagliardi also gave conflicting or changing testimony and she explained that she was cleaning up after her special education students and had an awkward moment with Mr. Gagliardi, but did not engage in conduct unbecoming or any other inappropriate classroom conduct.

Turning to Count Two of Charge II, Ms. Camilo acknowledges that this could represent a technical violation of Policy. Ms. Camilo points out that she thought she heard a bell and attempted to explain that, as well as that she had to use the bathroom for those two minutes. The students were not left alone, "unattended," or in any danger of harm. Mr. Diaz was in control and it was not in violation of policy. Otherwise, any trip to the bathroom by a staff member during teaching, could be a potential tenure charge. Ms. Camilo points out that Mr. Diaz was left in control of those same students the next day by Mr. Gagliardi, even though he testified that there was some kind of danger in doing so.

Ms. Camilo points out that this is the first time Mr. Gagliardi employed videotape against an employee and he varied his viewing or access procedure for this one time, not including his disciplinarian. Mr. Gagliardi failed to show Ms.

Camilo the videotape and, for the second time, was unable to recall who reported Ms. Camilo leaving two minutes early.

Ms. Camilo recognized and acknowledged that she left two minutes early and her frustrated responses to Mr. Gagliardi reflect her realization that her response or explanation did not matter.

Turning to the Fifth Count of Charge II, Ms. Camilo admitted at hearing that she failed to enter progress reports into PowerSchool and acknowledged that she should have relearned or gained access to the program sooner. Ms. Camilo explained the mitigating circumstances, including the difference between her responsibilities the previous eight years teaching pre-k and her new requirements at the Middle School. Ms. Camilo asserts that her failures were pedagogical and related to efficiency and performance.

Ms. Camilo points out that she wanted to demonstrate both her and her student's progress when she produced the student packets and was not intending to deceive. Ms. Camilo notes that the fact that her "A" motivation system was written on the whiteboard as well, supports her explanation and suggests that she did not falsify documents.

Ms. Camilo asserts that the Board failed to sustain its burden in the First Count of Charge III by making error after error in its "effort" to have Ms. Camilo tested for fitness for duty. Mr. Roth thwarted Ms. Camilo's Fitness for Duty exam by sending the initial letter to the wrong address and miscommunicating with the doctor's office.

Ms. Camilo emphasizes that she made all reasonable efforts to be tested under the direction and requirements of the Board. While Mr. Roth's testimony confirmed many of his mistakes, Ms. Camilo's willingness to submit to a Fitness for Duty exam, Ms. Camilo notes that it was not her responsibility to pursue the Fitness for Duty exam on her own and the Board did not require her to do so.

Turning to the Fourth Charge alleges that Ms. Camilo's conduct, separately and collectively, warrants dismissal, under the totality of the circumstances, Ms. Camilo asserts that these general allegations are not supported by the record. Ms. Camilo argues that review of the totality of the circumstances shows that her conduct does not warrant dismissal.

Ms. Camilo emphasizes that the charges focus on five weeks and the Board, if it had pedagogical concerns, could have made efforts to support and correct her performance, or it could have established a basis for efficiency charges. Ms. Camilo asserts that if the Board was truly concerned about her mental health or well-being, there were multiple options and resources there as well that could have been provided.

Ms. Camilo argues that dismissal is unwarranted and too severe a penalty under the circumstances. Even if a small portion of Ms. Camilo's conduct was inappropriate, the sanction of dismissal is disproportionate, especially considering Ms. Camilo's transfer to a new school and position. Ms. Camilo notes that the September 18, 2019 Instructional Counseling Notice given to Ms. Camilo states that it was "Non-Disciplinary" and includes many of the incidents that comprise the Tenure Charges. Ms. Camilo emphasizes the Charges are almost entirely based upon what the Board, or its administrators, deemed "Non-Disciplinary." Ms. Camilo asserts that converting non-disciplinary items into tenure charges is disproportionate and appears to be double jeopardy.

Ms. Camilo cites Mr. Gagliardi's testimony that Ms. Camilo should not lose her job for the conduct he witnessed. Mr. Gagliardi acknowledged that the Board based its decision on additional conduct. Ms. Camilo points out that the only additional conduct was the allegation that she refused to submit to a Fitness for Duty Examination.

Ms. Camilo asserts that if a penalty is warranted, then the doctrine of progressive discipline applies. Contending that the Board has failed to prove the tenure charges against Ms. Camilo, she argues that no penalty or sanction should apply. Alternatively, if discipline is warranted, Ms. Camilo asserts it should be progressive and take into account the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record.

Ms. Camilo contends that the tenure charges against her should be dismissed and she should be reinstated to a teaching position, together with all back pay, benefits, and emoluments, retroactive to the date the tenure charges were filed.

CHARGE I

CONDUCT UNBECOMING A TEACHING STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING MS. CAMILO'S INAPPROPRIATE CONDUCT AND FAILURE TO COMPLY WITH BOARD POLICIES

Count 1

On September 4, 2019, Ms. Camilo arrived for a professional development day at 9:20 AM, this was twenty (20) minutes after the start of the program. Also on this date, Ms. Camilo was observed smoking on school property after the second session of the professional development program began. Finally, when questioned about smoking during the program, Ms. Camilo said, "cono," threw her cigarette on the ground and walked inside the school building.

As the Board, acknowledges, this charge, by itself, would not warrant tenure charges. It is not disputed that Ms. Camilo was smoking, and she may have been smoking on school grounds, but because it was her first day at the Middle School, she was unaware of the limits of the school grounds and where smoking was permissible. Additionally, Ms. Camilo was with other staff members who were also late for professional development and may have been smoking as well. Mr. Gagliardi plainly stated that he was "corralling" the staff to attend the professional development, so apparently many teachers were also late. With respect to Ms. Camilo stating "cono" or "conyo", which Mr. Gagliardi interpreted as "damn", both Ms. Camilo and Mr. Gagliardi agree that she was not cursing at Mr. Gagliardi, but merely expressing her disgruntlement with the situation. Additionally, Ms. Camilo received "non-disciplinary" counseling for this incident. Under all of these circumstances, and given the *de minimus* nature of the allegations, Count 1 of Charge I does not support tenure charges.

Count 2

> On September 5, 2019, Ms. Camilo failed to attend a faculty meeting. An administrator called her classroom, after which she attended this meeting.

Both Ms. Rodriguez and Ms. Camilo testified that Ms. Camilo was late to the faculty meeting, but came immediately when she was called to let her know she was late. Lateness to a faculty meeting does not support tenure charges.

Count 3

> On September 10, 2019, Ms. Camilo announced during CPT that she was leaving, walked out of the school building without permission or signing out, and later told administrators that she left to meet her father outside. After being questioned, Ms. Camilo demanded that her team members tell her who "ratted her out."

Count 4

> On September 11, 2019, during a meeting about her actions on the previous day, Ms. Camilo stated to administration that she was late for the meeting because she got lost coming down the stairs and because she thought it was her preparation period.
>
> With regard to her actions in leaving the CPT meeting on September 10, 2019, Ms. Camilo stated that she did not want to walk to the main office to sign out and that she did not say "boo" to her team when she returned to CPT.

It is undisputed that Ms. Camilo announced that she was hungry and was going to get a bag or something to eat and left the CPT. According to Ms. Camilo, she went to the main entrance to the school where she met her father who brought her a bag with her lunch and some cleaning supplies. Ms. Rodriguez recalled that Ms. Camilo told her she met her father to get a broom outside of the building. Ms. Camilo acknowledges that she should not have left the CPT and that getting her lunch and cleaning supplies from her father took longer than she expected.

Mr. Gagliardi, Ms. Rodriguez and Mr. Wohlrab all testified that teachers were required to sign out if they left the building except during duty free lunch. Mr. Wohlrab explained that a teacher is required to sign out if they are leaving to grab lunch. If this is what occurred, Ms. Camilo should have signed out before leaving the school. But neither Mr. Gagliardi, Ms. Rodriguez or Mr. Wohlrab saw Ms. Camilo leave the school and no one checked the security video to see whether she did so. Ms. Camilo testified that she went to the doorway or right outside of the door to meet her father and get the cleaning supplies and her lunch.

There is insufficient evidence that Ms. Camilo left the school grounds. I note that Mr. Gagliardi did not seek to counsel or discipline Ms. Camilo or any other teacher who was outside of the building when he was corralling the staff to attend professional development.

Addressing the allegation that Ms. Camilo told Mr. Gagliardi that she did not want to walk to the main office and she didn't say "boo" upon returning to CPT, there is some question regarding what Ms. Camilo told Mr. Gagliardi. The substance of that conversation may have concerned Mr. Gagliardi because it was unusual, but it was not evidence of conduct unbecoming a teacher. In any event, given that there is insufficient evidence that Ms. Camilo did more than step outside of the building to meet her father to receive a bag, the allegations in Charges 3 and 4, even if true, do not support tenure charges.

Count 5

> On September 12, 2019, Ms. Camilo called Assistant Principal Renee Theobald-Rodriguez's ("Ms. Rodriguez") cellphone to request a personal day at 7:58AM. Ms. Camilo should have called at least one hour prior and the request should have been entered in the Board's attendance application, Frontline.

It is undisputed that Ms. Camilo did not follow the proper procedure to request a personal day. Ms. Camilo was unable to access Frontline due to internet connectivity issues and could not reach a person on the back up line for her last minute absence. Failure to use the proper procedure to request a last minute

personal day on one occasion, while substantiated, is not a policy violation that warrants tenure charges, with or without other more serious charges.

Count 6

> On September 13, 2019, Yoleisy Yanez ("Ms. Yanez") greeted Ms. Camilo, who asked who would be evaluating her. When Ms. Yanez replied that she would be doing the evaluation, Ms. Camilo replied, "I knew you were here to get me in trouble."

It is not disputed that this conversation occurred. Ms. Camilo's conduct in making that statement may have been ill advised, but the statement is not one that should lead to termination. Charge 6 does not support tenure charges.

Count 7

> On September 16, 2019, Principal Patrick Gagliardi ("Principal Gagliardi") had to look for Ms. Camilo as she did not report to CPT. When he found her, she rambled about trying to reach another teacher and getting confused about her lunch period.

Similarly, this count supports the Board's concern for Ms. Camilo's mental health and supports its determination to send her for a Fitness for Duty examination, but does not support tenure charges.

Count 8

> On October 3, 2019, Ms. Camilo was found outside Ms. Theobald-Rodriguez's office ranting about a "huge animal" in the corner. The "animal" was a small cricket. Ms. Camilo's behavior was erratic and disturbing.

There is some disagreement regarding whether Ms. Camilo's conduct when she saw the cricket was inappropriate. Ms. Rodriguez described Ms. Camilo's behavior as "bizarre" and testified that she was waving her arms, in distress and "fearful". Ms. Camilo, noting that Ms. Rodriguez does not speak Spanish, acknowledged that she may have described the bug as a "big cucaracha", but denies calling it a huge animal. Regardless of exactly what happened, the record supports a conclusion that Ms. Camilo over-reacted to the presence of a cricket or cockroach. As with Counts 6 and 7, this charge does not allege conduct that would warrant tenure charges, but does support a determination to send Ms. Camilo for a Fitness for Duty examination.

Count 9

> On or about October 4, 2019, Ms. Camilo told a parent during an Individualized Education Program ("IERP") meeting that she uses food to bribe the student to complete tasks, in contravention of the IEP.

The record does not include any evidence supporting Charge I, Count 9 and it is dismissed.

Count 10

> On or about October 18, 2019, it was discovered that Ms. Camilo removed $10.00 from an envelope containing student money collected for a class field trip. On the envelope, Ms. Camilo left a note stating, "From the kids money, I took $10 for food – 10-04-19. Y. Camilo"

Ms. Camilo did take $10.00 from student funds to purchase snacks for her class; documented that she did so and returned the money. This conduct was inappropriate. As Mr. Gagliardi testified, using student funds is a violation of the school's policy and protocol. Ms. Camilo should not have borrowed any student funds. But, she documented the loan and paid it back. No dishonesty or theft was involved, and this incident is not sufficiently serious to warrant tenure charges.

CHARGE II

CONDUCT UNBECOMING, NEGLECT AND INCAPACITY REGARDING MS. CAMILO'S INAPPROPRIATE CLASSROOM CONDUCT

Count 1

> On September 11, 2019, during a walkthrough of her classroom, Ms. Camilo was observed standing in a daze with a cleaning spray and rag. She was heard mumbling and standing still. She then uttered something to the paraprofessional in her classroom, and Mr. Diaz started the day's lesson.

Charge II, Count 1, reflects the walkthrough conducted by Mr. Gagliardi where he observed Ms. Camilo standing in a daze and mumbling with a cleaning rag. Ms. Camilo pointed out that she had been about to clean a student's desk and was waiting to be spoken to by Mr. Gagliardi. Whether or not Ms. Camilo's recollection is accurate, she does not explain why instruction was not taking place and why she appeared to be in a daze. As with several previous charges, the

allegations in Count 1 support the Board's determination to send Ms. Camilo for a Fitness for Duty exam, but do not support tenure charges.

Count 2

> On September 16, 2019, Ms. Camilo left her classroom two (2) minutes prior to the final bell, leaving her paraprofessional to dismiss her class. Upon questioning, Ms. Camilo stated that she stayed until the end of the day and dismissed her class. Upon being informed that security recordings proved that she walked out early, Ms. Camilo stated that she heard the bell and that's why she left the room. When Principal Gagliardi explained that the bell did not ring until two (2) minutes after Ms. Camilo left the room, she initially stated that the hallway was full of people, so she thought the day was over. Upon being informed that security cameras recorded her as the only person in the hallway at the time, Ms. Camilo replied, "Write me up. What do you want me to say? What do you want me to do?"

Ms. Camilo did leave her classroom two minutes before the bell rang in violation of Board Policy. Mr. Diaz, Ms. Camilo's paraprofessional remained in the classroom. After this was reported to Mr. Gagliardi, he personally reviewed the security cameras to verify that she had left the classroom early. Ms. Camilo initially denied leaving early, but when told of the footage from the security cameras, she replied in exasperation, "Write me up. What do you want me to say? What do you want me to do?"

The Board makes much of Ms. Camilo leaving her classroom without a certificated member of the staff in control of the classroom. Although administrators testified forcefully about the policy violation of leaving a classroom without a certificated staff member, the next day Mr. Gagliardi authorized Mr. Diaz, the paraprofessional, to remain in control of Ms. Camilo's classroom when he called her to his office to discuss her leaving early the previous day. Under these circumstances, Ms. Camilo's misconduct in leaving her class early, while inappropriate, does not warrant tenure charges.

Of greater concern is Ms. Camilo's initial denial that she left early. While teachers do sometimes need to leave the classroom without prior arrangement, such as, in this circumstance, to use the restroom, Ms. Camilo's denial that she had done so is troubling. However, Mr. Gagliardi determined that both Ms. Camilo's conduct in leaving early as well as her initial denial that she did so, along with other conduct warranted a non-disciplinary counseling. Under these circumstances, the counseling issued by Mr. Gagliardi is sufficient to address the count and tenure charges for these allegations are not supported.

Count 3

> On September 17, 2019, Ms. Yanez entered Ms. Camilo's classroom after second period had begun and observed that there was no instruction taking place. Ms. Camilo was seated at her desk, appearing ill and told Ms. Yanez to give her a zero. Soon after making this statement, Ms. Camilo got up from her desk and began teaching her class.

Count 4

> On October 4, 2019, Ms. Yanez visited Ms. Camilo's classroom to remind her that another teacher planned a lesson to model in her classroom the following Monday. The students in Ms. Camilo's classroom were all on Chromebooks. Some students were listening to music, some were looking at a website with images of the character "Momo." Ms. Camilo was on her cellphone, oblivious to what was occurring in her classroom. Upon speaking with the students, Ms. Yanez determined that most, if not all, of the students were not involved in any instructional activity. After observing for a period of approximately five (5) minutes, Ms. Yanez approached Ms. Camilo, who screamed and threw a pencil, as she had no idea that Ms. Yanez was in her classroom.

Addressing Counts 3 and 4 together, in both of these instances, Ms. Yanez was concerned and documented the incidents to Human Resources. Ms. Camilo asserts that Ms. Yanez, together with Mr. Gagliardi worked for an opposing local political ticket and their political differences led to a conflict of interest and an effort to undermine her. Ms. Camilo alleges that the frequency with which Ms. Yanez visited her classroom was part of an effort to undermine her because of their political differences. Ms. Camilo testified that she and Ms. Yanez met on the campaign trail, but did not have heated interactions.

Countering Ms. Camilo's allegations about her political differences with Mr. Gagliardi and Ms. Yanez is that Ms. Camilo has challenged the details of her interactions with Ms. Yanez, but has not challenged, the substance their meetings. For example, Ms. Camilo acknowledged that when Ms. Yanez came into her classroom on September 17, 2019, she had just returned from being counseled about leaving her class early by Mr. Gagliardi and had her head down on her desk so that her students would not see that she was crying. Further Ms. Camilo acknowledged her surprise when Ms. Yanez came into her classroom on October 4, but challenges Ms. Yanez's testimony that she could have been there as long as 10 minutes without Ms. Camilo being aware of her presence.

Under these circumstances, there is insufficient evidence that Ms. Yanez sought to undermine Ms. Camilo. Rather, the record establishes that Ms. Yanez's contemporaneous write ups of her observations of Ms. Camilo are, for the most part, accurate. Ms. Yanez's frequent visits to Ms. Camilo's classroom are, as asserted by Ms. Camilo, more frequent than is usual. The first visit, was a beginning of the year visit made to all Middle School special education classes. The September 17 visit was a formal observation. Only the October 4 visit, to issue a reminder, seems out of the ordinary. Under the circumstances of Ms. Camilo's previous concerning conduct, I cannot find this visit to be motivated by anything other than concern for Ms. Camilo's mental health and the education of her students.

It is concerning that on both September 17 and October 4, 2019, when Ms. Yanez visited Ms. Camilo's classroom, Ms. Camilo was distracted and it did not appear that instruction was occurring. Ms. Camilo's primary responsibilities are to her students and to insure their instruction and growth. This incident is an example of a situation where that was not occurring.

Count 5

> From the beginning of the 2019-2020 school year until her removal from the classroom, in or about October 16, 2019, Ms. Camilo failed to set up a gradebook in PowerSchool, despite a policy requiring teachers to enter student assignments and grades within seven (7) days of their assignment. Further, Ms. Camilo's gradebook was empty and she failed to enter comments for any students by the deadline for progress reports. Upon questioning, Ms. Camilo stated that she was overwhelmed. Ms. Camilo did not ask for help. Additionally, Ms. Camilo stated that she kept all grades recorded in a paper gradebook and was corresponding with parents. Despite this claim, Ms. Camilo failed to provide any gradebook or correspondence with parents.

On October 8, 2019, when Mr. Gagliardi began reviewing PowerSchool entries, he became aware that Ms. Camilo had failed to set up or update her PowerSchool. PowerSchool should have been set up at the beginning of the school year when Ms. Camilo received her roster of students and it should have been updated regularly. Ms. Camilo acknowledged that she had not set up PowerSchool because she was not familiar with it. However, she indicated to Mr. Gagliardi, and again at hearing, that she kept her grades in a paper gradebook. No gradebook has been provided to support this allegation.

Instead, Ms. Camilo provided stacks of assignments, many of which were incomplete or wrong, but all of which were graded with an "A". Ms. Camilo provided an explanation for her unorthodox grading method, that all students

began the school year with an A to motivate them. While it is possible that this method of grading could be used, by the fifth week of school, there should be some record of grades other than an "A", particularly for work that is wrong or incomplete. Nor did Ms. Camilo, who acknowledged being overwhelmed by her reassignment to the Middle School, seek assistance with PowerSchool or otherwise take responsibility for making sure that grades and comments were entered into PowerSchool.

Mr. Gagliardi issued a letter of reprimand citing both Ms. Camilo's failure to set up and enter grades and comments into PowerSchool and her "attempt to deceive the administration" by claiming to have a gradebook that was not produced. Ms. Camilo asserted that she did not have the paper gradebook because it was at home, but her failure to produce that gradebook to date suggest that no such gradebook exists. Ms. Camilo's responsibilities as a teacher include tracking and documenting her students' progress. Ms. Camilo's failure to document the progress and grades of her students constitutes neglect of her students and of a basic function of teaching. Ms. Camilo's failure to set up PowerSchool and to comment on and document her student's progress and grades constitutes conduct unbecoming a teacher. While this misconduct supports the Tenure Charges, Ms. Camilo has already received discipline for it.

CHARGE III

INSUBORDINATION AND CONDUCT UNBECOMING FOR FAILURE TO FOLLOW DIRECTIVES

The foregoing background information, and the facts alleged therein, are incorporated by reference as if fully set forth herein. Yesenia Camilo has engaged in unbecoming conduct including misconduct, dishonesty, insubordination and other just cause by her acts and omissions relative to his employment by the Board. These acts and omissions, as specifically set forth below, constitute just cause for immediate dismissal due to conduct unbecoming and insubordination.

Count 1

On October 16, 2019, the Board approved a resolution directing Respondent to submit herself to a Fitness For Duty examination. On the same date, respondent was informed via memorandum from Allan Roth, Esq. of the requirement that she submit to a Fitness For Duty examination. Despite the Board making every effort to assist Respondent, including arranging for her transportation, Respondent failed to attend at least two (2) scheduled meetings with the Board assigned psychologist.

To date, Respondent has failed to submit to same, nor has she initiated an appeal of the directive.

Ms. Camilo was directed to attend an initial Fitness For Duty examination by a letter, that was sent to the wrong address. Ms. Camilo has testified that she did not receive the letter. According to Mr. Roth, the letter was not returned to the Board, but he acknowledged that the Board has no proof that Ms. Camilo received the letter. The letter was sent via certified mail, but no acknowledgement of receipt was proffered. Under all of these circumstances, I find that Ms. Camilo did not receive notice of the first appointment for her Fitness for Duty exam.

A second Fitness For Duty exam was scheduled for October 28, 2019. It is undisputed that Ms. Camilo was late for the appointment, and the doctor did not have sufficient time to complete the exam. Ms. Camilo has explained that she was stuck in traffic and called the doctor's office to let them know she would be late.

A third Fitness for Duty exam was scheduled in mid-December. Mr. Roth testified that this appointment did not go forward due to a miscommunication with Ms. Camilo's attorney's office. There is no evidence that Ms. Camilo was involved in this miscommunication.

A fourth Fitness for Duty exam was scheduled for about January 3, 2020. This appointment did not go forward because of a miscommunication with the doctor's office. Ms. Camilo appeared for the January 3, 2019 appointment, but was unable to be seen at that time. Despite Ms. Camilo's efforts to be seen, the examination was not completed. There is no evidence that Ms. Camilo played any role in the miscommunication with the doctor's office.

A final Fitness for Duty exam was scheduled for January 23, 2020. According to Mr. Roth, he sent a letter to Ms. Camilo, at her proper address, and copied both her attorney and the examining doctor. When he was notified by the doctor that Ms. Camilo had not attended this examination, Mr. Roth contacted Ms. Camilo's attorney, who did not dispute that she had not appeared or provide an explanation for her failing to attend the January 23, 2020 appointment. At hearing, Ms. Camilo claimed that she did not receive notice of the last appointment.

At this point, the Board did not schedule an additional appointment for Ms. Camilo and instead determined to file these Tenure Charges. These charges allege that Ms. Camilo failed to attend "at least two (2) scheduled meetings with the Board assigned psychologist", though the record shows that Ms. Camilo can be faulted only for failing to attend the last scheduled appointment on January 23, 2020. In each of the other instances where the examination did not take place, if Ms. Camilo was aware of the appointment, she made every effort to attend. While the Board may have grown impatient with its inability to get Ms. Camilo evaluated for a determination of whether she was fit to return to work, the Board determined

to file tenure charges after Ms. Camilo failed to attend a single appointment for a Fitness for Duty exam where fault can be attributed to her. Given that notice of the appointment was sent to Ms. Camilo's then attorney as well as to her, I am not persuaded that she did not receive notice of the January 23, 2020 appointment. The missed Fitness for Duty exam is a failure to follow a directive issued by the Board that warrants discipline. To the extent that Ms. Camilo missed a single appointment for a Fitness for Duty exam, the Charge III is substantiated.

CHARGE IV

CONDUCT UNBECOMING A STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING MS. CAMILO'S CONDUCT

> The foregoing background information, common to all charges, and the facts alleged therein, are incorporated by reference as if fully set forth herein.
>
> Each of the foregoing charges and counts individually warrant dismissal. Viewed in their totality within the context of the Ms. Camilo's behavior, it is evident that she engaged in a pattern of unbecoming conduct, neglect of duty, incapacity and insubordination or other just cause, warranting dismissal. The allegations, jointly and severally, demonstrate her unfitness to continue to serve in a position of trust, warranting her immediate dismissal.

When these tenure charges are viewed in their entirety, many of the charges, including those reflected in the September 18, 2019 counseling letter, do not describe conduct sufficiently serious to support tenure charges that would result in Ms. Camilo's termination. A few instances of tardiness to meetings; smoking on school grounds when no students are present; leaving a meeting to meet her father at the entrance to the building; phoning Ms. Rodriguez directly to seek a last minute personal day; leaving the classroom two minutes before the end of the school day are examples of conduct that warranted counseling and should be corrected, but not instances that justify termination. Nonetheless, these examples, all of which occurred in only a few weeks, when viewed in light of Ms. Camilo's seventeen year career with a good record, serve as justification for the Board's determination to send Ms. Camilo for a Fitness For Duty examination.

Likewise, the erratic behavior documented by Mr. Gagliardi and Ms. Yanez, including standing in the classroom with cleaning supplies, apparently in a daze, sitting at her desk appearing to be upset or ill, talking on the phone and failing to notice Ms. Yanez for several minutes, also support the Board's determination to send Ms. Camilo for a Fitness For Duty examination.

In addition to Ms. Camilo's unusual and erratic behavior, Ms. Camilo engaged in conduct that was potentially neglectful of students' education, including her failure to set up and make entries into PowerSchool, the school's electronic gradebook, and those instances where Mr. Gagliardi and Ms. Yanez entered Ms. Camilo's classroom and found her in a daze, upset or ill, and on the phone not attending to students. In each of these instances, Ms. Camilo's students were not receiving instruction and/or her attention. These are not instances that warrant termination, but they do warrant both correction and assurance that Ms. Camilo is fit to continue in her role as a teacher. Ms. Camilo has received a letter of reprimand for failure to set up and make entries in PowerSchool, but has not received counseling or other discipline for the instances described by Ms. Yanez.

Rather, the Board, upon consideration of Ms. Camilo's conduct from the beginning of the school year through October 16, 2016, properly determined that she should be evaluated by a psychiatrist in a Fitness For Duty examination. For a variety of reasons detailed herein, including an incorrect address, traffic, and multiple miscommunications, the first four attempts to have Ms. Camilo evaluated did not occur, but Ms. Camilo is not at fault for the delays. A fifth and final appointment was scheduled for January 23, 2020 and Ms. Camilo's excuse for her absence was that she did not receive notice of the appointment. As previously discussed, that excuse was not persuasive given that her address was correct and her then attorney had notice of the appointment. At this point, the Board did not seek to reschedule the appointment and ultimately filed tenure charges.

When Ms. Camilo' s misconduct is evaluated in its entirety, she received a non-disciplinary counseling for a variety of minor infractions and/or erratic behavior in the first weeks of the school year. It is not appropriate to review the charges addressed by the counseling and weigh them in the evaluation of tenure charges. Mr. Gagliardi has already addressed them with Ms. Camilo. Likewise, Ms. Camilo received a letter of reprimand for her failure to set up and use PowerSchool, so this misconduct, though more serious than that addressed by the counseling, also has been addressed by Mr. Gagliardi. Given the prior non-disciplinary counseling and letter of reprimand issued to Ms. Camilo, both of which are encompassed in Charge IV, this Charge is dismissed.

Ms. Camilo's unusual and erratic behavior as documented by Ms. Yanez has not been the subject of discipline and is properly justification for the requirement that she have a Fitness For Duty exam. However, Ms. Yanez also documented two separate instances where several minutes passed where students were not engaged in instruction or completion of an assignment or a test while Ms. Camilo was at her desk with her head down or on the phone. During that period, Ms. Yanez noted students listening to music and viewing inappropriate material on their Chromebooks. Where, as here, Ms. Camilo's conduct materially affects her students, discipline is appropriate. In this instance, Ms. Camilo twice

neglected her students for a period of several minutes, and in doing so, allowed one or more students to view inappropriate material.

Additionally, Ms. Camilo engaged in misconduct when she failed to follow the directive to attend the January 23, 2020 Fitness For Duty exam. Failure to follow a directive is a form of insubordination and warrants discipline.

When all of the facts and circumstances of this case are considered, Ms. Camilo's misconduct in Charge II, Counts 3 and 4 by neglecting her students and allowing one or more students to view inappropriate material and her misconduct in Charge III, Count 1, to the extent that she failed to attend the January 23, 2021 Fitness For Duty examination warrant discipline, but are not sufficient to warrant termination. This is particularly so given the Board's concern about Ms. Camilo's mental health and well-being. The questions surrounding Ms. Camilo's mental health must be balanced with the Board's need to insure that its teachers assume responsibility for their classes and follow its directives. Withholding Ms. Camilo's increment for the 2021-2022 school year should serve as progressive discipline and to correct Ms. Camilo's conduct and insure that she takes full responsibility for providing instruction and following the Board's policies, and for asking for assistance as needed.

To date, Ms. Camilo has not attended a Fitness For Duty examination as required by the Board on October 16, 2019. Successful completion of a Fitness For Duty examination is required before Ms. Camilo is returned to the classroom. If Ms. Camilo is unable to successfully complete a Fitness For Duty examination, it is expected that the Board will continue to follow the provisions of its Policy 3161–Examination for Cause.

Accordingly, Respondent Yesenia Camilo shall be reinstated pending successful completion of a Fitness For Duty examination. Respondent Yesenia Camilo's increment for the 2021-2022 school year shall be withheld.

AWARD

Charge II, Counts 3 and 4 are sustained. Charge III, Count 1 is sustained to the extent that Ms. Camilo failed to attend the January 23, 2020 Fitness For Duty examination. The remaining charges filed by the West New York School District are denied.

Respondent Yesenia Camilo shall be reinstated pending successful completion of a Fitness For Duty examination. Respondent Yesenia Camilo's increment for the 2021-2022 school year shall be withheld.

Dated: June 3, 2021
Ocean Grove, New Jersey

Joyce M. Klein

State of New Jersey }
County of Monmouth }ss:

On this 3rd day of June, 2021, before me personally came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

Gretchen L Boone
Notary Public
New Jersey
My Commission Expires 8-24-2022
No. 50066778

123-21

123-21

OAL Dkt. No. EDU 07335-19
Agency Dkt. No. 90-4/19

New Jersey Commissioner of Education

Final Decision

S.A. and D.S., on behalf of minor child, B.S.,

Petitioners,

v.

Board of Education of the Borough of Metuchen, Middlesex County,

Respondent.

The record of this matter, the proposed Stipulation of Settlement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 11, 2021
Date of Mailing: June 11, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07335-19
AGENCY DKT. NO. 90-4/19

S.A. AND D.S. ON BEHALF OF B.S.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,

Respondent.

Richard J. Kaplow, Esq., for petitioners (Law Office of Richard J. Kaplow, attorneys)

Jessika Kleen, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: March 19, 2021 Decided: April 27, 2021

BEFORE **DAVID M. FRITCH,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 30, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On March 19, 2021, the parties filed a fully executed Settlement Agreement and the Board Resolution approving the settlement. The Agreement and Resolution are attached and fully incorporated herein.

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

April 27, 2021
DATE

DAVID M. FRITCH, ALJ

Date Received at Agency: April 27, 2021

Date Mailed to Parties: 4/29/2021

/dw

Jessika Kleen, Esq.
MACHADO LAW GROUP
1 Cleveland Place
Springfield, New Jersey 07081
Attorneys for Respondent, Metuchen Board of Education

D.S. and S.A. o/b/o B.S.,	
Petitioners,	DEPARTMENT OF EDUCATION OFFICE OF ADMINISTRATIVE LAW
	Agency Reference No. 90-4/19 OAL Dkt. No. EDS 07335-2019
v.	
Metuchen Board of Education,	
Respondent.	

STIPULATION OF SETTLEMENT

WHEREAS, D.S. and S.A. o/b/o B.S. (Petitioners), reside in Metuchen, New Jersey; and

WHEREAS, the Metuchen Board of Education ("District") is the local educational authority with the responsibility of providing a free public education to B.S. for so long as he remains a resident of the District; and

WHEREAS, Petitioners filed an appeal of a decision made under the Anti-Bullying Rights Act (ABRA), N.J.S.A. 18A:37-13, et seq, hereinabove captioned;

WHEREAS, the Parties are now desirous of resolving the issues raised between them and have reached an amicable resolution thereby avoiding the time and expense associated with further litigation; and

WHEREAS, the Parties hereby agree as follows:

1. The District will pay four thousand dollars ($4,000.00) to Petitioners as reimbursement for fees and costs associated with this litigation, in accordance with the District's existing invoicing and payment policies and procedures.
2. The District shall permanently remove the record of the affirmative HIB finding from B.S.' official student record.
3. The terms of this Agreement represent the compromise of disputed claims between the Parties in this matter. The Parties agree that this Agreement sets forth a complete and full resolution of this matter and that it fully resolves all the claims that were raised or that could have been raised in this matter.
4. Petitioners acknowledge that execution of this Agreement shall be understood as a waiver, and the terms and scope of this waiver or release are limited to claims that were brought or could have been brought in this matter through the execution of this Agreement.
5. It is understood and agreed that there is no "prevailing party" and no entitlement for attorneys' fees or costs for either party. Notwithstanding the foregoing sentence, nothing herein shall abrogate the District's obligations as set forth in this Agreement.

6. The Board and Petitioners acknowledge that they have been represented by and have had the opportunity to consult with their chosen counsel and/or representative throughout the negotiations of this Settlement Agreement, that they have reviewed this Settlement Agreement with their counsel, that they fully understand its requirements and limitations and terms, and that they are entering into this Agreement voluntarily and with full understanding of its meaning. The Parties further expressly state that they are fully satisfied with the representation provided by their counsel and/or representative.

7. This Agreement contains the entire agreement between the Parties hereto.

8. It is expressly understood and agreed that this Agreement shall be subject to the laws of the State of New Jersey.

9. This Settlement Agreement may be signed in counter parts and shall be deemed fully executed and effective when all parties have executed at least one of the counterparts, even though no single counterpart bears all such signatures. A signature shall be considered valid, binding and enforceable if transmitted by facsimile.

10. This agreement is confidential, and its terms and conditions may not be shared with third parties, except for legal counsel, for enforcement purposes, for tax purposes or by court order.

o/b/o B.S.,

Dated: 2/04/21

ON BEHALF OF METUCHEN BOARD OF EDUCATION

Dated: 2/9/21

Dated:

B. FINANCE

Motion/Second/Comments/Roll Call

1. **Treasurer of School Monies and Board Secretary's Reports**
   Move to approve the Treasurer of School Monies' Report, and Board Secretary's Report as of December 31, 2020.

2. **Payment of Bills**

a) Board Secretary's Certification
Pursuant to N.J.A.C. 6:20-2A.10(d), the Board Secretary has certified that as of February 23, 2021 no budgetary line item accounts have obligations and payments which exceed the amount appropriated by the Board of Education.

_____ _____
Michael A. Harvier, Board Secretary Date

b) Approve the Following Items Submitted by the Board Secretary
Payment of bills and claims, as shown on the attached list(s) that have been certified by the Board of Education and filed in the Business Office.

3. **Budget Transfers**
   Move to approve budget transfers effective December 31, 2020.

4. **Student Agreement**
   Move to approve the settlement agreement of Student #2021119.

5. **Speech and Language Evaluations**
   Move to approve Marlana Hamfeldt Loden to conduct Speech and Language evaluations, as needed, at a rate of $415 per evaluation.

6. **Educational Evaluations**
   Move to approve Tomasso Educational Services to conduct Educational Evaluations, as needed, at a rate of $550 per evaluation and $75/hour for meeting.

7. **Educational Evaluations**
   Move to approve Brunswick Reading and Speech Center to conduct Educational Evaluations, as needed, at a rate of $450 per evaluation.

124-21

OAL Dkt. Nos. EDU 00253-21 and EDU 8537-20 (Consolidated)

Agency Dkt. Nos. 240-11/20 and 178-8/20

New Jersey Commissioner of Education

Final Decision

S.B., on behalf of minor child, D.B.,

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 11, 2021
Date of Mailing: June 11, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NOs. EDU 00253-21
and EDU 8537-20
AGENCY DOCKET NOs. 240-11/20
and 178-8/20

S.B. ON BEHALF OF D.B.,
Petitioners,
v.
JERSEY CITY BOARD OF EDUCATION,
Respondent.

Brian Rans, Esq., for petitioners (Northeast New Jersey Legal Services)

Kyle Ulscht, Esq. appearing on behalf of respondent (Machado Law Group, attorneys)

Record Closed: April 26, 2021 Decided: April 27, 2021

BEFORE **NANCI G. STOKES**, ALJ:

On September 9, 2020, and on January 13, 2021, the Department of Education, Office of Controversies and Disputes, transmitted these matters to the Office of Administrative Law (OAL), for resolution as a contested case under N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. By Order dated January 22, 2021, I consolidated

these cases. I conducted prehearing telephone conferences and scheduled hearing dates. Before the April 27, 2021, hearing, the parties settled the cases. A copy of the Settlement Agreement and Jersey City Board of Education approval from its April 22, 2021, meeting is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement meets the requirements of N.J.A.C. 1:1-19.1 and that I should approve the stipulations set forth. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

April 27, 2021

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: 4-27-21

Date Mailed to Parties: 4-27-21

ljb

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Attorneys for Respondent
Jersey City Board of Education

S.B. o/b/o D.B.,	:	OAL Dkt. No.: EDU 08537-2020
	:	Agency Dkt. No.: 178-8/20
Petitioner,	:	
	:	
v.	:	OAL Dkt. No.: EDU 00253-2021
	:	Agency Dkt. No.: 240-11/20
Jersey City Board of Education,	:	
	:	SETTLEMENT AGREEMENT
Respondent.	:	
	:	

THIS SETTLEMENT AGREEMENT (the "Agreement") made by and between the Jersey City Board of Education, with its principal office located in Jersey City, New Jersey (hereinafter referred to as the "Board" or "District") and S.B. (hereinafter referred to as "Parent") on behalf of student D.B., a minor (hereinafter referred to as "D.B.").

NOW THEREFORE, in consideration of the mutual premises and promises the parties hereto agree as follows:

1. Any student record that references the alleged incident which occurred in March of 2020 and was reported to the District in or around June of 2020 (hereinafter "HIB incident") and/or any discipline imposed by the District against D.B. as a result of the HIB incident, shall be rescinded and removed from D.B.'s student record.
2. D.B. shall not be permitted to reapply for admission to McNair High School while enrolled in the District.
3. The parent, on behalf of D.B., hereby agrees to withdraw, with prejudice, both of the above captioned petitions of appeal and further agree not to pursue any further proceeding or complaint before the Jersey City Board of Education, other agency, or court, including Federal or Superior Court, as it relates to the HIB incident, or the discipline which the District imposed in relation to same.
4. In the event the District discloses the HIB incident or any discipline that D.B. incurred as a result of the HIB incident to third parties, such as institutions of higher learning or training, the District shall issue a correction to the third party as soon as practicable.
5. As further consideration for the Agreement, the parties agree that, following the full execution of this Agreement, they will keep all terms of this Agreement completely confidential.

Notwithstanding anything to the contrary contained herein, it is expressly understood and agreed that, following the full execution of this Agreement, neither the parent nor her attorney will take any action to publicize the terms or nature of this Agreement except that disclosure is permitted: (1) as necessary with regard to any proceeding for the enforcement of this Agreement; (2) to the student's immediate family, treating physicians/therapists and attorneys, who shall agree not to disclose the fact of or any of the terms of this Agreement as if they were a party to this Agreement; (3) as may be required by any court or agency of competent jurisdiction; and (4) as may be required by law. To the extent that D.B. is asked about this matter, D.B. may indicate that the matter is "resolved," but will make no other disclosure regarding this matter. Violation of this confidentiality clause by Parent and/or D.B. shall result in the termination of all of the District's obligations under this Settlement Agreement, and will result in the inclusion of the reference to the HIB and suspension within D.B.'s student records.

6. This Agreement shall not constitute, be interpreted, construed or used as evidence of any admission of fact, law, responsibility, wrongdoing or liability on the part of the District or the petitioners and shall not be referred to in any subsequent proceeding by any party other than to enforce the terms of the Agreement. If this Agreement is not fully executed and approved by all parties hereto, this Agreement shall become null and void and shall neither constitute an admission of any party nor be referred to by any party in any subsequent legal proceeding for any purpose whatsoever.
7. The parent acknowledges that she has reviewed the Agreement in detail and that she fully understands its requirements and limitations.
8. The Petitioner hereby states that she is signing this Agreement voluntarily of her own free will and not under duress or coercion of any kind.
9. This Agreement shall be construed fairly according to the plain language of its terms and not for or against any party hereto. If, during the term of this Agreement, it is found that a specific clause(s) of the Agreement is/are illegal under Federal or State Law, then the remainder of the Agreement is not affected by such a ruling shall remain in full force and effect.
10. All parties are bound by this Agreement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns, are also bound. This Agreement is made for the benefit of all the parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors and assigns.
11. This Agreement constitutes the full and complete agreement of the parties hereto with respect to its subject matter, that it supersedes any prior or contemporaneous representations, whether oral or written, and that it may not be modified or amended except by a written instrument signed by all parties hereto.
12. In consideration for the above, the parent herewith releases the Board of Education, its officers, employees, and agents from any and all claims, rights, liability, including but not limited to any claims or costs for attorney's fees, civil liability, or any other equitable or legal relief at all relevant times, whether known or unknown as of the date of this Agreement, as it relates to the above-captioned consolidated matters, or the events surrounding same.
13. This Agreement is specifically subject to the approval of the Respondent Jersey City Board of Education at its voting meeting of April 22, 2021.

14. The parties acknowledge that they have been represented by and have had the opportunity to consult with their legal counsel and/or advocate throughout the negotiations of this Agreement, that they reviewed this Agreement with their counsel and that they fully understand its requirements and limitations. The parties further expressly state that they are fully satisfied with the representation provided by their legal counsel and/or advocate.

IN WITNESS WHEREOF, the parties have executed this Settlement on the dates set forth below:

FOR THE BOARD:

By: _____

Print Name: Regina Robins

Dated: 4/26/21

FOR THE PARENT:

By: _____

Print Name: Safiraz Botros

Dated: 4/22/2021

Agenda Item Details

Meeting	Apr 22, 2021 - Regular Meeting, 6:00 p.m.
Category	12. Legal
Subject	12.03 Approval of Settlement and Release (D.B.)
Access	Public
Type	Action (Consent)

Public Content

BE IT RESOLVED, the Jersey City Board of Education upon the recommendation of the Superintendent, and the School Business Administrator, hereby accepts the terms and conditions of the Settlement Agreement and Release related to S.B.O/B/O D.B. (Settlement Agreement and Release on File in the Business Office).

Originator: Robert J. Pruchnik, General Counsel

Executive Content

125-21

125-21R

New Jersey Commissioner of Education

Decision

C.B., on behalf of minor child, C.B.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

Synopsis

Pro se petitioner challenged the determination of the respondent Board that she and her minor child, C.B., were not domiciled in Elizabeth for the 2019-20 and 2020-21 school years. C.B. had been in an out of district placement for special services at the Developmental Learning Center in New Providence since 2018, and the Board requested tuition reimbursement based upon the cost of C.B.'s out of district placement. In a March 8, 2021 Commissioner's decision remanding the matter to the OAL, the Commissioner disagreed with the ALJ's calculation of tuition owed to the Board and found instead that the Board's ability to recover tuition is limited pursuant to *N.J.S.A.* 18A:38-1(b), which does not specify that the assessed tuition be equal to the actual costs incurred by the district for educating the student at issue. Rather, *N.J.S.A.* 18A:38-1(b) uses the measure of annual per pupil cost, which is based on the district's overall costs and enrollment, and is not specific to any individual student. As the Commissioner was unable to discern the per pupil cost from the record, the matter was remanded to the OAL for the sole purpose of recalculation of tuition pursuant to *N.J.S.A.* 18A:38-1(b).

On remand, the ALJ found, *inter alia*, that: C.B. was ineligible to attend school in the district for the entire 2019-20 school year and for 112 days of the 2020-21 school year; based on budget worksheets submitted by the Board which contained per diem rates for out of district students categorized by grade and in accordance with the child's classification; the per diem rate for a student with autism was $122.85 for the 2019-20 school year and $171.57 for the 2020-21 school year. Accordingly, the ALJ concluded that the respondent Board is entitled to tuition reimbursement in the total amount of $41,328.84 ($22,113 for the 2019-20 school year and $19,215.84 for 112 days of the 2020-21 school year).

Upon review, the Commissioner disagreed with the ALJ's calculation of tuition and reiterated that, pursuant to *N.J.S.A.* 18A:38-1(b), tuition is calculated based on the total annual per pupil cost to the local district; special education costs are not included in that figure, which is based on a district's overall costs and enrollment, and is not specific to an individual student; here, the district's annual per pupil cost was $11,773 for a kindergarten student during the 2019-20 school year and $14,993 for a first grade student in the 2020-21 school year. The Commissioner concluded that the Board is owed $11,773 for the 2019-20 school year and $9,328.48 for 112 days of the 2020-21 school year. Accordingly, the Initial Decision was modified as to the total amount of tuition owed for the period of C.B's ineligible attendance, and petitioner was directed to reimburse the Board in the amount of $21,101.48. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

125-21R

OAL Dkt. No. EDU 02722-21
(EDU 17292-19 ON REMAND)
Agency Dkt. No. 301-11/19

New Jersey Commissioner of Education

Decision on Remand

C.B., on behalf of minor child, C.B.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, mindful of the Commissioner's March 8, 2021 decision remanding this residency matter for determination of the annual tuition cost and calculation of tuition. The parties did not file exceptions.

In her March 8, 2021 decision, the Commissioner found that petitioner was not domiciled in Elizabeth for the 2019-20 and 2020-21 school years,[1] and the minor child was, therefore, not entitled to a free public education in the district during that time. With respect to the assessment of tuition, the Commissioner found that the Board's ability to recover tuition from petitioner is limited to "1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance." *N.J.S.A.* 18A:38-1(b). The Commissioner further explained that the measure of annual per pupil cost is based on the

[1] Following the Commissioner's decision, the minor child was disenrolled from the district on March 19, 2021. Subsequent to the disenrollment, petitioner provided documentation that she is now domiciled in Elizabeth and her child is permitted to attend school in the district.

district's overall costs and enrollment, is not specific to any individual student, and does not include the assessment of special education and related costs.[2] As such, the Commissioner remanded this matter for determination of the annual tuition cost and a calculation of tuition that is consistent with *N.J.S.A.* 18A:38-1(b).

On remand, the Administrative Law Judge (ALJ) found that the minor child was ineligible to attend school in the district for the entire 2019-20 school year and for 112 days of the 2020-21 school year (up until his disenrollment on March 19, 2021). The ALJ noted that the Board submitted budget worksheets, which contained the per diem rates for out-of-district students categorized by grade and in accordance with the child's classification; the per diem rate for a student with autism was $122.85 for the 2019-20 school year and $171.57 for the 2020-21 school year. Accordingly, the ALJ found that the Board was entitled to tuition reimbursement in the amount of $41,328.84 ($22,113 for the 2019-20 school year and $19,215.84 for 112 days of the 2020-21 school year).

Upon review, the Commissioner disagrees with the ALJ's calculation of tuition. The Commissioner reiterates that tuition is calculated based on the "total annual per pupil cost to the local district." *N.J.S.A.* 18A:38-1(b). Special education costs are not included in that figure, as it is based on a district's overall costs and enrollment, and is not specific to an individual student. *N.J.-B., on behalf of minor child, I.T. v. Board of Education of the Township of Union, Union County*, Commissioner's Decision No. 112-20, decided April 24, 2020. In this matter, the annual per pupil cost was $11,773 for a kindergarten student during the 2019-20 school year and $14,993 for a first-grade student in the 2020-21 school year. As such, the Board is entitled to

[2] The minor child attended an out of district placement at the Developmental Learning Center in New Providence for special services.

tuition in the amount $21,101.48. Specifically, the Board is owed $11,773 for the 2019-20 school year and $9,328.48 for the 2020-21 school year ($83.29 per day for 112 days).

Accordingly, the Initial Decision of the OAL is modified as stated herein. Petitioner is directed to reimburse the Board in the amount of $21,101.48 for tuition costs incurred during the time period that C.B. was ineligible to attend school in Elizabeth. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 14, 2021
Date of Mailing: June 15, 2021

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT NO. EDU 02722-21
AGENCY REF. NO. 301-11/19
ON REMAND
OAL DKT NO. EDU 17292-19
AGENCY REF NO. 301-11/19

C.B. o/b/o MINOR CHILD, C.B.,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondents.

C.B., on behalf of minor child C.B., petitioner pro se

Christina M. DiPaola, Esq., for respondent (LaCorte, Bundy, Varady & Kinsella, attorneys)

Record Closed: APRIL 23, 2021 Decided: April 28, 2021

BEFORE **ERNEST M. BONGIOVANNI**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, C.B., on behalf of minor child C.B. (petitioner) lost an appeal of a residency determination by the Board of Education of the City of Elizabeth (BOE/respondent) that petitioners did not reside in Elizabeth and consequent demand for tuition reimbursement for the time frame where the minor child was enrolled in the

BOE's public school beginning the school year of 2019-2020, until the child was disenrolled. (Initial Decision, December 8, 2020). The minor child received special education services for autism as a kindergarten and first grade student. Petitioner was assessed $96.972.24 for costs as of the date of the hearing, November 9, 2020. The Initial Decision determination that petitioner was not domiciled in Elizabeth while enrolled in Elizabeth public schools was affirmed, however the matter was remanded because of the calculation of tuition, which was calculated at the actual cost paid by the City for the cost of education of the minor child, which equated to a per diem rate of $391.22.

The matter was returned to determine the "annual per pupil cost, which is based on the district's overall costs and enrollment and is not specific to any individual student." The sole purpose of this remand is to determine the "the annual per pupil cost from the record of the proceedings." Such annual tuition costs and calculation of tuition must be consistent with N.J.S.A 18A:38-1 (b). Commissioner's Decision, dated March 8, 2021, (page 3).

Accordingly, a hearing was held on April 23, 2021. Testimony was taken and Exhibits were received into evidence, and the record closed.

FACTUAL DISCUSSION

Testimony

Victor Tropeano

Victor Tropeano (Tropeano) is employed by respondent as a residency inspector within the legal department of the BOE. He is familiar with the petitioner's case since he began investigating her residency in November 2019, and has kept up with petitioner's whereabouts since his residency investigation began. He was aware that the minor child was disenrolled as a student of its schools on March 19, 2021. He testified further that shortly thereafter the disenrollment, the petitioner finally provided sufficient documentation that she is now domiciled in Elizabeth, and her child now permitted to

attend free of charge. Tropeano also testified that he is familiar with the exhibits prepared by the respondent which show the per pupil costs for students of the school district for the time frames when C.B. was enrolled in the schools but ineligible for public education as not being domiciled there, specifically from the beginning and throughout the school year of 2019-2020, and the beginning of the school year 2020-2021 until March 19, 2021. He testified also of his familiarity with the school calendar for those two years and presented the BOE's school calendars for those two years.

Based on the Exhibits and his evidence, none of which was refuted by the petitioner, the school calendar for 2019-2020 was 180 days commencing September 5, 2019 and ending June 15, 2020. (R-3). Further, and also not refuted by petitioner, the school calendar for 2020-2021 commenced on September 11, 2020 and the number of school days for that year that had elapsed from that day until the minor child was disenrolled was 112 (R-4).

Further, Tropeano testified to tuition rates charged to out of district students based on the Elizabeth Budget Worksheets for school years 2019-2020 (R-1) and 2020-2021 (R-2). Based on that evidence, the rates are charged in accordance with what grade the pupils attend and in accordance with the child's classification. There are several levels of classification for special needs education students. For children with autism the per diem rate for school year 2019-2020 was $122.85; for school year 2020-2021, the per diem rate is $171.57.

Therefore, the BOE charges petitioner with the entire cost of school year 2019-2020 $22,113 (180 days times $122.85) and for school year 2020-2021, from commencement of the school year until disenrollment March 19, 2021, $19, 215.84 (112 days times $171.57) for a combined cost of $41,328.84.

The Petitioner, C.B.

C.B. offered no contrary competent testimony nor documentary evidence to refute or negate in any way the evidence of the BOE. She agreed that the school year for 2019-2020 was 180 days and that her child attended the Elizabeth public schools

the entire year. She also agreed the 2020-2021 school year commenced September 11, 2020, that her child attended the Elizabeth public schools the entire year and was disenrolled by notification by the BOE on March 19, 2021, and that the number of days of the school year to that date was 112. She also agreed that the school rates were as published by the Budget Worksheets submitted by the Board and had no contrary evidence to same. She also admitted that during this time her son received special services education for autism as a kindergarten and first grade student.

C.B.'s entire contention was that she be charged nothing because she was always domiciled in Elizabeth and that the school's determination that she had not established domicile there before her son began attending Elizabeth schools in 2019, which she previously appealed, and which was denied by the undersigned, and which determination the Commissioner affirmed, was simply incorrect. Aside from her own testimony that she maintained she was always domiciled in Elizabeth, she wanted to offer the testimony of a neighbor, and many documents, who and which would prove that since approximately 2016, she has been domiciled at a certain address in Elizabeth and therefore, notwithstanding the Initial and Final Decisions, her child was entitled to a free education by Elizabeth during the school years involved in the prior proceeding. She essentially wanted to a rehearing on the prior determination. Such an effort to undue the prior determination on those issues was not permissible as the issue of whether petitioner had established residency issue was not before the undersigned on this remand. Therefore, all of petitioner's testimony on these points were ruled irrelevant and the petitioner did not enter any competent testimony or documents to advance her case. In fact, she provided admissions that she knew she was going to be charged for the educational costs of special services for her autistic child at the rates charged by Elizabeth, that the child did attend the school for kindergarten and first grade for the entire school year of 2019-2020 and again for the school year of 2020-2021 until he was disenrolled March 19, 2021. She had no contrary evidence regarding the school calendar or the school per diem rates. Petitioner had no other competent testimony to offer and otherwise agreed with or could not refute the evidence of respondent.

FINDINGS OF FACT

Based on the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in the matter in contention of this remand.:

1. The annual tuition cost was based on the BOE's worksheet budgets for school years 2019-2020 and 2020-2021 which contains the per diem rates for out of district students categorized by grade and by general and levels of special education.

2. Petitioner was charged for the time Ordered by the Initial Decision dated December 8, 2020, from the beginning of the 2019-2020 school year until the date he was disenrolled on March 19, 2021, for a total of 292 days.

3. For the 180 day school year of 2019-2020, the per diem rate charged to out of district students receiving special education services for autism was $122.85 which equals $22,113 charged to petitioner for the entire school year For the 2020-2021 school year, the per diem rate charged to out of district students receiving special education services for autism was $171.57, and the period being from beginning of that school year until disenrollment on March 19, 2021, a total of 112 days, which equals $19, 215.84.

4. Accordingly, petitioner is charged with tuition for the period of attendance in the Elizabeth public schools from the beginning of the school year 2019-2020 until March 19, 2021 in the 2020-2021 school year with the sum of $41,328.84.

LEGAL ANALYSIS

The Initial Decision of December 8, 2020 and the affirmed Final Decision of the NJ Commissioner of Education determined that, as petitioner had not established residency prior to entering her child as a student, and continued to attend there for nearly two years despite demands to prove her domiciliary or remove the child, tuition for a non-qualified student (not domiciled in Elizabeth) had to be paid by petitioner to the

school from the beginning of school year 2019-2020, for the entire year, and for school year 2020-2021, until such time as the child was disenrolled or established a domicile in Elizabeth. At the April 23, 2021 hearing on the narrow issue requiring the remand, it was uncontested that the child received special education services, specifically for autism, during the nearly two years of ineligible enrollment. The sole purpose of this remand was to clarify the amount owed to allow the Commissioner to "discern the annual per pupil cost from the record."

The Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

> If in the judgment of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

N.J.S.A. 18A: 38-1(b) likewise requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

As correctly stated by respondent in its pre-hearing memorandum of April 20, 2021, the applicable statute N.J.S.A. 18A-38-1 (b) does not specify the assessed tuition be equal to the actual costs incurred by the District for education the particular student in issue. Instead, tuition assessment is measured by the average cost per pupil based on the District's overall costs and enrollment.

The actual cost per student which determines the tuition rate or rates for a given year is the local cost per student in average daily enrollment based on the student's grade. Tuition reimbursement is calculated on a student's ineligible enrollment based on the student's grade and program category consistent with N.J.A.C. 6A: 23-3.1. To arrive at the actual per pupil cost means to determine the average daily enrollment, based upon audited expenditures that year, for the purpose for which the tuition rate is

being determined, and consistent with the grade program categories in N.J.S.A. 18A:7F-13 and 18A:7F-19, meaning regular education classes, preschool and kindergarten, grades one through five, grades six through eight, grades nine through twelve, and special class programs defined in N.J.A.C. 6A:14-4.7.

Here the respondent provided uncontested evidence that during the child's ineligible period, he was enrolled in special class programs, specifically for autism and that the per diem rates, $122.85 for the entire 180 day school year 2019-2020, and per diem rate of $171.57 for the 2020-2021 school year up to the date of disenrollment were derived from the average daily enrollment based on audited expenditures those two years, consistent with the grade and special class programs for those students. Accordingly, based upon the facts adduced at the April 23, 2021 hearing on remand and the legal principles cited above, I **CONCLUDE** that respondent is entitled to payment for tuition from petitioner for the aforesaid period of ineligible attendance, in the amount of $41,328.84.

ORDER

Based on the foregoing, it is hereby **ORDERED** that petitioner, C.B. is required to and shall be made to pay made to require to pay respondent $41,328.84 for tuition reimbursement for the period that her for the period in the Elizabeth school years 2019-2020 and 2020-21 in which her minor child attended special education classes while not domiciled in Elizabeth.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 28, 2021

DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: April 28, 2021

Date Mailed to Parties: April 28, 2021

EB/id

APPENDIX

LIST OF WITNESSES

For Petitioner:

C.B.

For Respondent:

Vito Tropeano

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

None

For Respondent:

R-1 2019-2020 Budget Worksheet, Tuition Rates for Out of District Students attending Elizabeth Public Schools

R-2 2019-2020 Budget Worksheet, Tuition Rates for Out of District Students attending Elizabeth Public Schools

R-3 Elizabeth Public Schools 2019-2020 School Calendar

R-4 Elizabeth Public Schools 2020-2021 School Calendar

126-21

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

June 15, 2021

VIA EMAIL

Jecrois Jean-Baptiste, Director
DOC Office of Educational Services
Whittlesey Road, P.O. Box 863
Trenton, New Jersey 08625

Jason Jones, Esq.
Weissman & Mintz LLC
One Executive Drive, Suite 200
Somerset, New Jersey 08873

Re: *In the Matter of the Tenure Hearing of Regina Gauss, Department of Corrections, Garden State Youth Correctional Facility, Agency Dkt. No. 65-4/21.*

Dear Parties:

I have reviewed the materials filed in connection with the Motion to Dismiss the tenure charges filed against Regina Gauss by the Department. Upon review, I find that the tenure charges do not comport with *N.J.A.C.* 6A:3-5.4. Specifically, *N.J.A.C.* 6A:3-5.4(c) requires proof of service of the tenure charges on the employee and the employee's representative, if known.[1] Moreover, "[s]uch service shall be at the same time and in the same manner as the filing of charges with the Commissioner." The tenure charges did not included proof of service on Ms. Gauss or her representative.

Accordingly, the Motion to Dismiss is hereby GRANTED, and the tenure charges are dismissed without prejudice.

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

126-21L

c: State Law Library

[1] It should also be noted that *N.J.A.C.* 6A:3-5.4 requires the Department of Corrections to provide the Commissioner with the name of the Deputy Attorney General who will be representing the agency.

127-21

127-21

New Jersey Commissioner of Education

Decision

C.B., on behalf of minor child, A.J.B.,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

Synopsis

Pro se petitioner filed a petition challenging the online processes required by the respondent Board to enroll petitioner's child at Newark's Central High School for the 2020–2021 school year. Petitioner claimed, *inter alia*, that she was being bullied, intimidated, manipulated and forced to register A.J.B. online with her personal information such as immunization records, photo ID, proof of residence and birth certificate. In her filing, no relief was requested aside from a statement that "this matter needs attention," and in response to the Board's interrogatory regarding the relief being sought, petitioner responded that she was "seeking a[n] investigation." The Board filed a motion for summary decision, contending, *inter alia*, that the matter is moot, as A.J.B. is enrolled and attending Central High School; further, the online registration protocol for the 2020-2021 school year had been approved by the Department of Education for use during the Covid-19 pandemic; and petitioner failed to state a claim for which relief can be granted.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the claims set forth in the petition are either moot, insufficient to assert a justiciable claim for relief or outside of the OAL's jurisdiction. The ALJ concluded that the dismissal of the petition of appeal is warranted. Accordingly, the Board's motion to dismiss was granted and the petition was dismissed with prejudice.

Upon review, the Commissioner concurred with the ALJ that petitioner's claims regarding the enrollment of her child are moot, and that any other issues raised by petitioner fail to state a claim for relief that can be granted by the Commissioner. Accordingly, respondent's motion for summary decision was granted, and the petition of appeal was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

127-21

OAL Dkt. No. EDU 10179-20
Agency Dkt. No. 213-10/20

New Jersey Commissioner of Education

Final Decision

C.B., on behalf of minor child, A.J.B.,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge that petitioner's claims regarding the enrollment of her child are moot, and that any other issues raised by petitioner fail to state a claim for relief than can be granted by the Commissioner.

Accordingly, respondent's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 15, 2021
Date of Mailing: June 15, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 10179-20
AGENCY DKT. NO. 213-10/20

C.B. ON BEHALF OF MINOR CHILD A.J.B.,
Petitioner,
v.
CITY OF NEWARK BOARD OF EDUCATION, ESSEX COUNTY,
Respondent.

C.B., petitioner, pro se

Bernard Mercado, Senior Associate Counsel, for respondent (Brenda C. Liss, General Counsel)

Record Closed: April 22, 2021 Decided: May 3, 2021

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE

Petitioner C.B. on behalf of A.J.B. commenced this action relating to her son's enrollment at Central High School in Newark. The Board of Education of the City of

Newark (the Board) contends that dismissal of the matter is appropriate since the issues raised by the petition have been rendered moot and the relief sought by petitioner is beyond the jurisdiction of this forum.

PROCEDURAL HISTORY

On or about October 6, 2020, petitioner filed a Petition of Appeal with the Commissioner of Education (the Commissioner). On or about October 21, 2020, the Board filed an Answer to Petition of Appeal, and the Department of Education transmitted the matter to the Office of Administrative Law for determination as a contested case. On November 23, 2020, I held a prehearing conference and thereafter issued a prehearing order scheduling the hearing for April 16, 2020. Prior to the hearing, the Board filed a motion for summary decision and the hearing was adjourned at the Board's request. In support of its motion, the Board filed a brief and a certification of counsel (Mercado Cert.). Petitioner filed a response opposing the motion and the Board filed a reply brief. The record was closed upon receipt of the last submission.

FACTUAL DISCUSSION

Based upon a review of the documentation submitted, I **FIND** the following undisputed **FACTS**:

Petitioner is the parent of student A.J.B. (See Petition of Appeal).[1] On or about September 8, 2020, petitioner enrolled A.J.B. at Central High School in Newark for the 2020–2021 school year. (See Petition of Appeal; Mercado Cert. at Exhibit A.)

Or about October 6, 2020, petitioner filed the instant Petition of Appeal relating to the Board's enrollment process. Petitioner claims, among other things, that she was being bullied, intimidated, manipulated and forced to register A.J.B. on-line with her personal information such as immunization records, photo ID, proof of residence and birth certificate; she advised a Board representative that she "felt very uncomfortable providing

[1] The Petition of Appeal does not include numbered paragraphs.

[her] private information online" because the information "is not safe [and] secure"; and Board representatives were "very disrespectful." (See Petition of Appeal.) In her Petition of Appeal, petitioner requests relief in the form of "[t]his matter needs attention." In response to the Board's interrogatory regarding the relief being sought, petitioner responded that she was "seeking a[n] investigation." (Mercado Cert. at Exhibit C, Answer to Interrogatory 9.)

LEGAL DISCUSSION AND CONCLUSIONS

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary-judgment rule embodied in the New Jersey Court Rules. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in deciding the motion:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2.
>
> [Citations omitted.]

In evaluating the merits of the motion, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Judson, 17 N.J. at 75. However, "[w]hen a motion for summary decision is made and supported, an

adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). The New Jersey Supreme Court has cautioned that, "if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla, . . . '[f]anciful, frivolous, gauzy or merely suspicious' . . ., he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact." Judson, 17 N.J. at 75 (citation omitted). Stated differently, "[b]are conclusions . . . without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." U.S. Pipe & Foundry Co. v. Am. Arbitration Ass'n, 67 N.J. Super. 384, 399-400 (App.Div.1961). Likewise, unsupported and self-serving statements, standing alone, are insufficient to create a genuine issue of material fact. Heyert v. Taddese, 431 N.J. Super. 388, 413-414 (App. Div. 2013). And the "non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill, 142 N.J. at 529. Disputed issues of fact that are immaterial or of an insubstantial nature will not suffice. Ibid. Rather, "[c]ompetent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments,'" Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014), certif. denied, 220 N.J. 269 (2015) (citation omitted), and the party opposing the motion "'must do more than simply show that there is some metaphysical doubt as to the material facts.'" Alfano v. Schaud, 429 N.J. Super. 469, 474 (App. Div. 2013), certif. denied, 214 N.J. 119 (2013) (citation omitted).

Against this backdrop, the Board contends that petitioner's claims relating to its enrollment process are moot since it is undisputed that A.J.B. is currently enrolled in Central High School. The Board further maintains that petitioner's claims regarding her uncomfortable feelings toward the Board's enrollment process and being taken advantage of or disrespected during that process fail to state a claim for which relief can be granted and that the relief sought by petitioner (i.e., the matter "needs attention" and an investigation) also do not fall within the jurisdiction of this forum to award.

Based upon the foregoing facts and the applicable law, I **CONCLUDE** that the matter is ripe for summary decision. Succinctly stated, there is no genuine issue as to any material fact, and the claims set forth in the Petition are either moot, insufficient to assert a justiciable claim for relief or outside my jurisdiction.

It is firmly established that "questions that have become moot or academic prior to judicial scrutiny generally have been held to be an improper subject for judicial review." Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); see Oxfeld v. New Jersey State Board of Education, 68 N.J. 301, 303 (1975). An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic or when a decision is sought on a matter which, when rendered, will have no practical effect on the existing controversy. Betancourt v. Trinitas Hosp., 415 N.J. Super. 301, 311 (App. Div. 2010). "[F]or reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest." Anderson, 143 N.J. Super. at 437.

In short, petitioner's claim regarding the enrollment process that she underwent on behalf of her son in September 2020 is moot. It is undisputed that A.J.B. was enrolled in Central High School and, therefore, no ongoing controversy relating to enrollment exists. See Robinson v. State-Operated School Dist. of Paterson, EDU 09407-09, Initial Decision, (December 14, 2010), adopted, Comm'r (January 25, 2011) http://njlaw.rutgers.edu/collections/oal/, aff'd., 2011 N.J. Super. Unpub. LEXIS 2832 (App. Div. November 17, 2011) (dismissing as moot a student's petition challenging a suspension when no reference to the disciplinary incident existed in the student's records and the student had already graduated). In addition, our courts have recognized that where a petitioner is no longer subject to the force of school procedures or regulations, a challenge to those procedures or regulations becomes academic and moot. See Oxfeld, 68 N.J. at 303. It is not the role of the Commissioner to function in the abstract or to enter advisory rulings. See N.J. Civil Serv. Ass'n v. State of New Jersey, 88 N.J. 605, 611 (1982); Crescent Park Tenants Assoc. v Realty Eq. Corp. of New York, 58 N.J. 98,107 (1971). This matter also does not present any issue of great public importance compelling a definitive resolution despite its mootness. Oxfeld, 68 N.J. at 303.

Further, for this matter to be justiciable before this forum, petitioner must have suffered a distinct injury or harm that can be remedied by the Commissioner. See e.g., New Jersey Turnpike Auth. v. Parsons, 3 N.J. 235, 240 (1949). Petitioner's claims relating to her feelings of discomfort toward the Board's enrollment process and being taken advantage or disrespected during that process do not state a cognizable claim for which relief can be granted by this forum. This forum also lacks the jurisdiction to order an investigation or somehow give the matter some type of broad attention as requested by petitioner.

Based upon the foregoing, I **CONCLUDE** that dismissal of the Petition of Appeal is warranted.

ORDER

It is **ORDERED** that respondent's motion for summary decision be and hereby is **GRANTED** and petitioner's Petition of Appeal be and hereby is **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-**

0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 3, 2021
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: May 3, 2021

Date Mailed to Parties: MAY 4, 2021

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128-21

128-21

Agency Dkt. No. 30-2/21

New Jersey Commissioner of Education

Decision

Board of Education of the Township of Washington, Gloucester County,

Petitioner,

v.

J.M. and R.H.,

Respondents.

In this matter, the Washington Township Board of Education (Board) seeks payment of tuition from respondents because their minor child attended school in Washington Township (District) when he was ineligible to do so. Respondents did not file an answer to the petition within twenty days, as required by *N.J.A.C.* 6A:3-1.5(a). A second and final notice was sent to respondents, indicating that if an answer was not filed within ten days, the Commissioner would decide the matter on a summary basis, pursuant to *N.J.A.C.* 6A:3-1.5(e). Respondents did not file an answer.

Accordingly, the Commissioner finds that each count in the petition is deemed admitted and that it is appropriate to decide the matter on a summary basis. The District's residency investigation revealed that respondents' minor child did not reside in the District from September 15, 2018 through the end of the 2019-2020 school year. The District issued a notice of ineligibility, which respondents did not appeal. The Commissioner concludes that the minor

child was, therefore, not entitled to a free public education in the District's schools during that time period.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in the District. Pursuant to *N.J.A.C.* 6A:22-6.1, when parents do not appeal a notice of ineligibility, a district may assess tuition for up to one year of ineligible attendance. Therefore, the Board is entitled to tuition reimbursement in the amount of $16,941 for the 2019-2020 school year, during which time respondents' minor child was ineligible to attend school in the District.

Accordingly, respondents are directed to reimburse the Board in the amount of $16,941 for the 2019-2020 school year, for tuition costs incurred during the time period in which their minor child was ineligible to attend school in Washington Township.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 22, 2021
Date of Mailing: June 22, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

129-21

129-21SEC

SEC Dkt Nos. C14-15 and C08-16 (Consolidated)
OAL Dkt. Nos. EEC 15030-15 and EEC 15136-16 (Consolidated)
Agency Dkt. No. 2-3/20A

New Jersey Commissioner of Education

Final Decision

Barbara Holstein,

Complainant,

v.

Tacia Raftopoulos-Johnson, Montague Board of Education, Sussex County,

Respondent.

In the Matter of Tacia Raftopoulos-Johnson, Montague Board of Education, Sussex County.

This matter involves an appeal of the School Ethics Commission's (Commission) February 26, 2020 decision that appellant Tacia Raftopoulos-Johnson, a member of the Montague Board of Education (Board), violated the School Ethics Act (Act) in connection with her attendance at a meeting of the Port Jervis Board of Education to speak about the sending-receiving relationship between the two districts (PJBOE Meeting), and her vote in support of a resolution obligating the Board to pay for students, including her own child, to attend school in Port Jervis after the sending-receiving relationship had been terminated (Resolution). The Commission recommended a penalty of censure for the violation. Having carefully reviewed the

Commission's decision and the record in its entirety, the Commissioner finds that the Commission's decision is supported by sufficient, credible evidence, and that appellant failed to establish that the decision is arbitrary, capricious, or contrary to law. *N.J.A.C.* 6A:4-1.1(a). The Commissioner also finds that a penalty of censure is appropriate.

Two complaints were filed with the Commission in this matter. The first complaint, C14-15, concerned the PJBOE Meeting, as well as an email sent by appellant to her child's guidance counselor and blind copied to parents in the district. The complaint alleged that appellant violated *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(b), *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(f), and *N.J.S.A.* 18A:12-24.1(j). Following a motion to dismiss by appellant, the Commission dismissed some allegations and transmitted the remainder of the matter to the Office of Administrative Law (OAL). The matter was held in abeyance when a second complaint (C08-16) was filed concerning the Resolution, and alleging that appellant violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), *N.J.S.A.* 18A:12-24(f), N.*J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), and *N.J.S.A.* 18A:12-24.1(f). Following a motion to dismiss by appellant, the Commission dismissed the allegations that appellant violated *N.J.S.A.* 18A:12-24(a) and transmitted the remainder of matter to the OAL, where the complaints were consolidated.

Following hearings, the Administrative Law Judge (ALJ) concluded that appellant did not personally and unethically try to benefit herself and thus that the charges had not been sustained. In its February 26, 2020 decision, the Commission found that appellant violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f) in connection with her attendance at the PJBOE Meeting, and *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12(c), *N.J.S.A.* 18A:12-24(f), *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), and *N.J.S.A.* 18A:12-

24.1(f) in connection with her vote on the Resolution.[1] The Commission recommended a penalty of censure, and noted that it would have recommended a penalty of removal, but appellant was no longer serving on the Board.

On appeal, appellant argues that all of her actions were in furtherance of protecting the children of Montague, who had a right to continue their secondary education in Port Jervis, even after the severance of the sending-receiving agreement, pursuant to *N.J.S.A.* 18A:38-21.1. According to appellant, any directives to the contrary from the Department of Education (DOE) were inconsistent with the law, and appellant was placed in the difficult position of ignoring her obligations to the students of her district or ignoring the DOE's directives. Additionally, appellant notes that all decisions were made by the board as a whole. Appellant contends that all board members who have children who attend school or who pay taxes in their district have some sort of financial relationship with the district, and that this relationship does not automatically create a conflict of interest. According to appellant, *N.J.S.A.* 18A:12-24(h) is a defense to her actions, because she did not receive any greater gain than the other 35 parents whose children were also permitted, pursuant to the Resolution, to continue to attend school in Port Jervis at Montague's expense.[2]

Appellant also alleges that fraud was committed by someone, because the Commission has stated that complaint C08-16 was filed on March 15, 2016, despite the fact that that it was not signed and notarized until March 16, 2016. Appellant contends that there were other procedural irregularities, including that the Commission failed to provide her with a copy

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[1] The Commission adopted the ALJ's conclusion that appellant's actions related to the email she sent to her child's guidance counselor did not violate the Act. The Commission also adopted the ALJ's conclusion that appellant's actions related to the PJBOE Meeting did not violate *N.J.S.A.* 18A:12-24.1(b) or *N.J.S.A.* 18A:12-24.1(d).

[2] Appellant also reviews the individual provisions of the Act at issue in this matter, arguing that she did not violate any of them based on *N.J.S.A.* 18A:38-21.1 and *N.J.S.A.* 18A:12-24(h).

of the complaint. For these reasons, appellant urges the Commissioner to dismiss complaint C08-16, investigate the matter, or refer it to appropriate authorities.

In reply, the Commission argues that appellant improperly engaged in self-help, in defiance of DOE decisions and directives, rather than using the proper legal channels to challenge the DOE's directive that Montague parents who continued to send their children to Port Jervis would be responsive for tuition payments. According to the Commission, appellant improperly secured a benefit for her family when she used her position on the Board to enable her child to continue to attend school in Port Jervis at the Board's expense, rather than her own. The Commissioner also contends that appellant exceeded her authority by making representations at the PJBOE Meeting about the relationship between the districts. The Commission argues that each of its findings that appellant violated the Act was supported by sufficient, credible evidence and was not arbitrary, capricious, or unreasonable. Furthermore, the Commission maintains that its penalty was reasonable, because appellant bore special responsibility for the Board's actions as its president, and she played a significant role in leading the Board to defy the DOE's decisions and directives.

Regarding appellant's claims of fraud, the Commission argues that those claims are without merit. The Commission notes that the initial complaint was timely filed, and even if it had not been, the Commission has discretion to extend the limitations period. The Commission contends that it did not fraudulently alter any dates, and that the record demonstrates that date stamps were changed so that the dates on hard copy filings comported with the dates on faxed copies that were received earlier by the Commission, as the Commission considers the date of the first copy received to be the date of filing. The Commission argues that

its actions were in compliance with its procedures for the filing of complaints, and that appellant's accusations to the contrary do not support a finding of fraud or criminal activity.

Upon a thorough review of the record, the Commissioner concludes that the Commission's decision was not arbitrary, capricious, or unreasonable. The majority of appellant's arguments in this matter are based on *N.J.S.A.* 18A:38-21.1(a)(3), which provides that when a sending-receiving relationship is terminated, secondary school students shall be permitted to continue their education in the receiving district. According to appellant, all of her actions pertaining to Montague's continuing tuition obligations to Port Jervis were required by this statute. However, those issues are not before the Commissioner as part of this appeal.[3]

Appellant's violations of the Act result not from her interpretation of the law, or her opinion that the DOE's directives were incorrect, but rather from her decision to make statements at the PJBOE Meeting and to vote on the Resolution without seeking recourse through proper legal channels. Even board members who believe that their actions are consistent with the law and their duties can be held accountable when those actions are in violation of the Act. *See In the Matter of Lorenzo Richardson, Jersey City Board of Education, Hudson County*, Commissioner Decision No. 19-21SEC (January 26, 2021) (finding a violation of the Act when a board member filed a petition of appeal before the Commissioner to attempt to enforce his interpretation of the law, without authorization from the Board).

[3] The Commissioner notes that neither she nor any former Commissioner has addressed the applicability of *N.J.S.A.* 18A:38-21.1(a)(3) following the termination of a sending-receiving relationship authorized by *N.J.S.A.* 18A:38-10, such as the one between Montague and Port Jervis that existed prior to 2013. The settlement agreement referred to throughout the proceedings, under which Montague paid tuition for its middle school students to continue attending high school in Port Jervis, was approved by Commissioner Hespe. However, approval of the settlement agreement does not constitute a determination that appellant's interpretation of *N.J.S.A.* 18A:38-21.1(a)(3) was correct or that Montague was required to make such tuition payments. It is the nature of settlement agreements that parties may exceed their legal obligations in order to resolve litigation.

At the time it voted on the Resolution, the Board, including appellant, had received two directives from the DOE, indicating that parents who wanted their children to continue to attend school in Port Jervis would have to bear the expense of tuition. Moreover, appellant was specifically advised in an email from the Executive County Superintendent that the Board should follow the process outlined in *N.J.A.C.* 6A:3 to challenge the Commissioner's decision. Exhibit R-13. Appellant herself indicated in her testimony that the outcome of meetings between Board members and DOE employees was that the Board should reach out to the Commissioner with a petition. Tr. June 17, 2019, p. 87, lines 5-7. But instead of seeking a legal remedy through established pathways, the Board chose to vote in defiance of Commissioner decisions and DOE directives – and appellant admitted as much in her testimony.[4] Tr. June 17, 2019, page 155, lines 12-17.

Additionally, appellant participated in that vote, rather than recusing herself, despite the fact that she would receive a personal financial benefit from the Resolution – the ability to send her child to school in Port Jervis at Montague's expense, rather than her own. The Commissioner does not find persuasive appellant's argument that *N.J.S.A.* 18A:12-24(h) provides a defense for her actions. This provision states, "No school official shall be deemed in conflict with these provisions if, by reason of his participation in any matter required to be voted on, no material or monetary gain accrues to him as a member of any . . . group, to any greater extent than could reasonably be expected to accrue to any other member of that . . . group." Appellant has not identified any statute, regulation, or policy requiring her to vote on the Resolution. Furthermore, the Commissioner notes that even if this provision precludes a finding that appellant violated *N.J.S.A.* 18A:12-24, appellant's actions regarding both the PJBOE

[4] Appellant is not absolved by the fact that other members of the Board may also have violated the Act by voting in the same manner. *See Cheng v. Rodas*, Commissioner Decision No. 22-17 (Jan. 20, 2017) (noting that board members are responsible for their own actions).

Meeting and the Resolution also violated multiple provisions of *N.J.S.A.* 18A:12-24.1, for which *N.J.S.A.* 18A:12-24(h) provides no defense. Three of those provisions - *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e) – do not require any evidence of a conflict of interest or a personal benefit.[5]

Appellant's arguments are primarily focused on her participation in the vote for the Resolution, but the Commissioner also concludes that appellant's attendance and statements at the PJBOE Meeting violated the Act, for the reasons detailed in the Commission's decision.[6] In particular, the Commissioner emphasizes that appellant's attendance at the PJBOE Meeting to discuss the various sending-receiving relationships, when appellant clearly understood that those relationships might require further litigation to resolve, exceeded the scope of her authority and had the potential to compromise the board. *N.J.S.A.* 18A:12-24.1(e);[7] *N.J.A.C.* 6A:28-6.4(a)(5); *see also Persi v. Woska*, 2017 *N.J. Super.* Unpub. LEXIS 625, *7 (App. Div. Mar. 10, 2017) (finding that action taken by a board member that is beyond the scope of his authority and duties as a board member meets the definition of "private action" and is sufficient to demonstrate a violation); *Cheng, supra* (finding a violation of *N.J.S.A.* 18A:12-24.1(e) when a board member

[5] The ALJ appears to have disregarded these provisions when she dismissed the charges based on her conclusion that appellant did not take personal action to achieve an unwarranted personal benefit.

[6] The Commissioner notes that the ALJ and the Commission made different findings regarding appellant's statements at the PJBOE Meeting, but a recording of the meeting was entered into evidence as Exhibit R-20, and it speaks for itself. Appellant indicated that the Board "can take corrective action" and "revisit maybe long-term plans on how the relationship with Port Jervis could be continued as much as possible given some of the hasty actions the Board has taken in the past." Suggesting that the Board could continue a sending-receiving relationship with Port Jervis, when that relationship had been explicitly terminated by the Commissioner and no legal challenge had been made to the Commissioner's decision or any other issues surrounding the various sending-receiving relationships, cannot reasonably be held to be within the scope of appellant's authority – even if appellant had the permission of the other Board members to speak at the meeting.

[7] Appellant contends that the Commission did not argue in its exceptions to the Initial Decision that appellant violated *N.J.S.A.* 18A:12-24.1(e), and that it therefore waived, forfeited, and procedurally defaulted this argument. Respondent points to no authority for this proposition, and the Commissioner finds that it is unfounded. Agency heads have the authority under *N.J.A.C.* 1:1-18.6(b) to modify conclusions of law – as the Commission did here in rejecting the ALJ's conclusion that appellant did not violate *N.J.S.A.* 18A:24.1(e) – regardless of whether exceptions were filed regarding those conclusions.

acted on his own rather than seeking an Advisory Opinion from the Commission after receiving uncertain legal advice from counsel).

The Commission's decision thoroughly details the individual provisions of the Act at issue and the reasons the Commission concluded that appellant violated each of them. The Commissioner concludes that the Commission was not arbitrary, capricious, or unreasonable when it determined that appellant's conduct was in violation of the Act. Furthermore, the Commissioner concurs with the Commission that the appropriate penalty is censure. The Commissioner has previously imposed a penalty of reprimand when board members violated the Act but did not receive a benefit from their actions. *See IMO Carvalho, Neron, Nina, and Rodriguez*, Commissioner Decision No. 168-18A (June 1, 2018) (violation of *N.J.S.A.* 18A:12-24.(c)); *Richardson, supra* (violation of *N.J.SA.* 18A:12-24(g) and *N.J.S.A.* 18A:12-24.1(e); *Cheng, supra* (violation of *N.J.S.A.* 18A:12-24.1(e)). Here, because appellant violated multiple provisions of the Act – and received a benefit – the Commissioner concludes that the Commission's recommendation of censure was appropriate.

Finally, following a comprehensive review of the record, the Commissioner determines that there was no impropriety in the Commission's acceptance of Complaint C08-16. First, the Commissioner finds that the complaint was timely filed. The meeting at issue in the complaint occurred on August 25, 2015.[8] According to *N.J.A.C.* 6A:28-6.5, complaints must be filed within 180 days of notice of the events which form the basis of the alleged violation. Here,

[8] The complainant argued that the minutes for the August 25, 2016 meeting were not approved until September 23, 2015, and that the time period to file did not begin to run until that date. The Commissioner notes that the time period begins to run from notice of the events at issue. While the approval of meeting minutes is one method by which the public could receive notice of actions taken by a board member, it is not the only method – for example, a member of the public present at the August 2, 2016 meeting would have notice on that date of the events that had occurred. As the record does not reflect when the complainant was actually on notice of the events at issue, the Commissioner finds that it is most appropriate to use the date of the meeting as the commencement of the time period to file.

the expiration of the 180-day time period was February 21, 2016, which was a Sunday. It is standard in legal practice that a deadline falling on a weekend is extended to the next business day. *See, e.g., N.J. Ct. R.* 1:3-1; *N.J.A.C.* 6A:3-1.2. Complaint C08-16 was initially filed on February 22, 2016, the first business day after February 21, 2016, meeting the 180-day deadline. The complaint was deficient, and the complainant was given an opportunity to cure any defects, which she did by filing an amended complaint in March 2016. The Commissioner finds any issues regarding the precise date of filing of the amended complaint to be irrelevant, as the Commission's rules clearly provide that a complainant may amend a complaint to "cure technical defects, clarify or amplify allegations made in the original complaint and such amendments will relate back to the date the complaint was first received by the Commission for the purposes of determining timeliness." *N.J.A.C.* 6A:28-6.7(b).[9]

Moreover, there is no evidence that appellant has been prejudiced by any alleged issues related to the filing of Complaint C08-16. She has been ably represented by counsel throughout the proceedings, submitted numerous briefs and items of evidence, and had the opportunity to present and cross-examine witnesses during multiple days of hearings at the OAL. Additionally, the Commissioner concludes that appellant's violations of the Act related to Complaint C14-15 are sufficient to warrant a penalty of censure, even in the absence of any violations related to Complaint C08-16.

[9] Notwithstanding the Commissioner's conclusion that the precise filing date of the amended complaint is irrelevant because it relates back to the date of the initial filing, the Commissioner does not find any fraud or impropriety in the Commission's explanation for any date discrepancies on the amended complaint. The record demonstrates that a faxed copy of the amended complaint was received on March 15, 2016, and when a hard copy was received and stamped on March 18, 2016, the date stamp was modified to reflect the first date on which the amended complaint was received – March 15, 2016. While the amended complaint was not notarized until March 16, that technical defect does not alter the date of the faxed filing.

Accordingly, appellant is hereby censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[10]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 22, 2021
Date of Mailing: June 22, 2021

[10] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

130-21

130-21

Agency Dkt. No. 40-3/21

New Jersey Commissioner of Education

Final Decision

In the Matter of the Teaching Certificates of Daniel Coviello, Board of Education of the Borough of Mendham, Morris County.

The record of this matter has been reviewed. The Mendham Borough Board of Education filed a petition seeking the suspension of respondent Daniel Coviello's teaching certificates pursuant to *N.J.S.A.* 18A:28-8 because he resigned without providing the Board with the requisite statutory notice. The Commissioner issued an Order to Show Cause on March 12, 2021, which the Board served on respondent on March 19, 2021. Respondent did not respond to the Order to Show Cause, despite being given multiple opportunities to do so. Accordingly, the Commissioner finds that the respondent's certificates should be suspended pursuant to *N.J.S.A.* 18A:28-8, and further finds that a one-year suspension of the respondent's certificates is the appropriate penalty.

Accordingly, the respondent's teaching certificates are suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 22, 2021
Date of Mailing: June 22, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

132-21

132-21

OAL Dkt. No. EDU 03609-20
Agency Dkt. No. 33-2/20

New Jersey Commissioner of Education

Final Decision

Tanya Tenturier,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

The record of this matter, the proposed Stipulation of Settlement and Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 25, 2021
Date of Mailing: June 25,2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 03609-20
AGENCY DKT. NO. 33-2/20

TANYA TENTURIER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

Randi Doner April, Esq., on behalf of petitioner Tanya Tenturier (Oxfeld Cohen, attorneys)

Heather Savage-Ford, Deputy Counsel, for respondent Board of Education of the City of Elizabeth (Elizabeth Public Schools Legal Department, attorneys)

Record Closed: May 3, 2021 Decided: May 6, 2021

BEFORE **GAIL M. COOKSON**, ALJ:

On or about February 7, 2020, petitioner Tanya Tenturier (petitioner) appealed alleged violations of her military service credit rights by the Board of Education of the City of Elizabeth (respondent). The matter was transmitted to the Office of Administrative Law (OAL), on or about March 11, 2020, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

I held several telephonic case management conferences with counsel, during which counsel requested time to conduct some further settlement discussions. Under cover of May 3, 2021, counsel for petitioner forwarded a fully executed Stipulation of Settlement and Release between the parties and requested that if approved, I incorporate same into an order.

I have reviewed the record and the terms of the Stipulation of Settlement and Release and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Gail M. Cookson

May 6, 2021
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 5-11-21

Date Mailed to Parties: 5-11-21
id

Oxfeld Cohen, PC
60 Park Place, 6th Floor
Newark, New Jersey 07102-5504
973-642-0161
Attorneys for Petitioner

TANYA TENTURIER, Petitioner, BOARD OF EDUCATION OF THE CITY, OF ELIZABETH, UNION COUNTY Respondent	: : : : : : :	BEFORE THE COMMISSIONER OF EDUCATION OAL DOCKET NO.: EDU 03609-2020N AGENCY REF NO. 33-2/20 STIPULATION OF SETTLEMENT AND RELEASE

This Settlement Agreement and Mutual Release ("Agreement") is made and entered into by and between Petitioner, Tanya Tenturier ("Tenturier") and Respondent, Board of Education of the City of Elizabeth ("Board") for full settlement of all claims,

WHEREAS, on or about February 7, 2020 Tenturier filed a Petition of Appeal before the State of New Jersey Commissioner of Education (the "Commissioner"), Tanya Tenturier v. Board of Education of the City of Elizabeth, Union County, OAL Docket No. EDU 03609-2020N, for the return of salary guide credit for active military service.

WHEREAS, this matter is currently pending before the Honorable Gail Cookson, A.LJ.; and

WHEREAS, the parties to this Agreement desire to amicably resolve their differences

and avoid additional expenses of further litigation in connection with the Petition of Appeal.

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, it is hereby agreed by and between the parties hereto as follows:

1. This Agreement shall not be construed as an admission by the Parties of any acts or omissions alleged or those that could have been alleged by any of the Parties, or of any acts or omissions alleged or which could have been alleged against any of the Parties. Each party to this Agreement specifically denies any liability.

2. In exchange for the valuable consideration set forth herein, the Parties mutually release and give up any and all claims and rights they may have against each other for any damages or injuries claims that could have been alleged by either party in connection with this matter.

The Parties specifically release the following claims as to each other:

(a) Any and all claims and. counterclaims that were brought and that could have been brought in the Petition of Appeal bearing OAL Docket No. EDU 03609-2020N; and

(b) Any and all claims for attorneys' fees and expert costs, and any other fees and costs.

3. In total and complete settlement of any and all potential claims referred to above, the Board shall:

(a) Provide employment credit to Tenturier for her military service in compliance with N.J.S.A. 18A:29-11.

(b) Provide monetary credit to Tenturier at the Step 12 salary beginning on November 18, 2019 with all necessary contractual adjustments to said salary thereafter.

i. Tenturier shall be reimbursed a total of $11,914 for the 2020-2021 school year

which shall be paid in a lump sum for the period prior to the execution of this agreement and the remainder in her regular paychecks for the rest of the school year.

ii. Tenturier shall be reimbursed a total of $9,956.25 for the school year 2019-2020 which accounts for the effective period of November 18, 2019 through June 30, 2020.

4. The Parties acknowledge that they are fully satisfied with their respective legal representation in this matter and that they have reviewed the terms of this Agreement with their respective counsel.

PETITIONER	RESPONDENT
Tanya Tenturier	Board Secretary/Business Administrator Board of Education City of Elizabeth
Dated:	Dated: 4/28/2021

133-21

OAL Dkt. No. EDU 0603-20
Agency Dkt. No. 313-12/19

New Jersey Commissioner of Education

Final Decision

Christine Lillis-Flaherty,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that item number 2 (two) of the Agreement references an action that was to have taken place in a time frame that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 25, 2021
Date of Mailing: June 25, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00603-20
AGENCY DKT. NO. 313-12/19

CHRISTINE LILLIS-FLAHERTY.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Crystal A. Alonso, Esq., for petitioner (Caruso Smith Picini, attorneys)

Heather Savage-Ford, Deputy Counsel., for respondent (Elizabeth Board Education, Legal Department, attorneys)

Record Closed: March 19, 2021 Decided: May 13, 2021

BEFORE **ANDREW M. BARON**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on January 13, 2019, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed an Agreement indicating the terms thereof, which is attached and fully incorporated herein.

Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that settlement should be approved. Accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

May 13, 2021
DATE

ANDREW M. BARON, ALJ

Date Received at Agency: 5-18-21

Date Mailed to Parties: 5-18-21

mm

SETTLEMENT AGREEMENT & RELEASE

This Settlement Agreement and Release (hereinafter referred to as "Agreement") is made this 23rd day of November, 2020, by and between Christine Lillis-Flaherty and her agents, successors, heirs and assigns (collectively "Lillis-Flaherty"), and the Elizabeth Board of Education and its agents, past and present members, employees, successors, heirs and assigns (collectively "the Board"). (Lillis-Flaherty and the Board will hereinafter be collectively referred to as the "Parties").

WHEREAS, Lillis-Flaherty has been employed with the Board as a social worker on a full-time basis for over twenty-six (26) years; and

WHEREAS, Lillis-Flaherty filed a Petition for Relief with the Commissioner of Education to challenge the Board's decision to wrongfully remove Lillis-Flaherty from the payroll on September 27, 2019 through November 22, 2019 [OAL Dkt. No. EDU 00603-2020N; Agency Ref. No. 313-12/19]; and

WHEREAS, the Board filed an Answer to Lillis-Flaherty's Petition for Relief, disputing her entitlement to the reimbursement of salary withheld during the period of time she was removed from the payroll; and

WHEREAS, the matter was transferred to the Office of Administrative Law and assigned to the Honorable Andrew M. Baron, A.L.J., for adjudication; and

WHEREAS, the parties are desirous to amicably resolve this matter in lieu of proceeding with litigation; and

NOW, THEREFORE, in consideration of the agreement contained herein, the Parties agree as follows:

1. In exchange for the below consideration, Lillis-Flaherty agrees to withdraw her Petition for Relief currently pending before the Office of Administrative Law against the Board [OAL Dkt. No. EDU 00603-2020N; Agency Ref. No. 313-12/19].

2. The Board will pay Lillis-Flaherty for six (6) full weeks of her salary within thirty (30) days of the execution of this Agreement.

3. The signatures of the parties below indicate that they have had an opportunity to review this Agreement with their respective Counsel;, that they have read and understood the provisions, terms and conditions of this Agreement; and that they have executed it voluntarily with full knowledge of the significance of all provisions, terms and conditions of this Agreement.

4. This Agreement is executed, and all consideration is given in final settlement of disputed claims and shall not be construed as an admission by either party.

5. This Agreement shall not be modified or amended except by writing duly executed and signed by the parties to this Agreement.

JLF

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement as of the date first written above.

By: _____
Christine Lillis-Flaherty

_____
~~Crystal A. Alonso, Esq.~~
Counsel for Petitioner

12-03-2020
Date

Joshua N. Forsman, Esq.
Joshua N. Forsman

_____
Heather Savage-Ford, Esq.
Counsel for Elizabeth Board of Education

11/23/20
Date

C
O
P
Y

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the attorney of record on behalf of the Elizabeth Board of Education has recommended settlement of Christine Lillis-Flaherty v. Elizabeth Board of Education, OAL Docket. No. EDU 00603-2020N Agency Ref. No.:313-12/19; and

WHEREAS, the Board has determined it to be in the best interest to settle this matter as recommended in the settlement agreement; and

NOW, THEREFORE, BE IT RESOLVED that the foregoing litigation is resolved and approved for a settlement; and it is

FURTHER RESOLVED that the attorney of record for the Elizabeth Board of Education is authorized to resolve the matter within the authority referenced above, bearing the signature of Heather Savage-Ford, Esq, which shall be filed in the Legal Department.

134-21

OAL Dkt. No. EDU 01929-21
Agency Dkt. No. 6-1/21

New Jersey Commissioner of Education

Final Decision

Terrance Burke,

Petitioner,

v.

Board of Education of the Northern Valley Regional High School District, Bergen County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 25, 2021
Date of Mailing: June 25, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01929-21
AGENCY DKT. NO. 6-1/21

TERRANCE BURKE,
Petitioner,
v.
NORTHERN VALLEY DEMAREST REGIONAL SCHOOL DISTRIST, BERGEN COUNTY,
Respondent.

Alfred F. Maurice, Esq., for petitioner (Springstead & Maurice, attorneys)

Mark A. Wenczel, Esq., for respondent (Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys)

Record Closed: May 6, 2021 Decided: May 7, 2021

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

On February 12, 2021, the Commissioner of the Department of Education transmitted this case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A.

52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

A copy of their settlement agreement is attached to this decision. Having reviewed the terms of the settlement agreement, I **FIND** that the parties have entered into their settlement voluntarily, as evidenced by their signatures, the signatures of their representatives, or both.

Moreover, I **CONCLUDE** that the settlement agreement is consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Therefore, given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of their settlement and that these proceedings are now closed.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this case. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days, and unless such time limit is otherwise extended, this recommended decision shall become a final decision under N.J.S.A. 52:14B-10.

May 7, 2021
DATE

BARRY E. MOSCOIWTZ, ALJ

Date Received at Agency: 5-18-21

Date Mailed to Parties: 5-18-21

dr

Mark A. Wenczel, Esq., (ID No. 017841992)
Cleary Giacobbe Alfieri Jacobs, LLC
169 Ramapo Valley Road
Upper Level 105
Oakland, New Jersey 07436
(973) 845-6700
(201) 644-7601 (Fax)
Attorneys for Respondent, Northern Valley Regional High School District Board of Education, (improperly pleaded as Northern Valley Demarest Regional School District Board of Education)

TERRANCE BURKE, Petitioner, v. NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU-1929-21 AGENCY REF. NO.: 6-1/21 **SETTLEMENT AGREEMENT**

This Agreement is entered into by and between the Petitioner, Terrance Burke, (hereinafter referred to as the "Petitioner"), and Respondent, Northern Valley Regional High School District Board of Education, (hereinafter referred to as the "Board" or "Respondent") (collectively referred to as the "parties" and individually as the "party,"), and supersedes and replaces any and all prior agreements between the Board and the Petitioner.

WHEREAS, Petitioner was employed as a custodian of the Respondent on February 13, 2015, at which time he filed a Workers Compensation claim and began a leave of absence from work;

WHEREAS, by Order of Total Disability dated December 2, 2020, the New Jersey Department of Labor Division of Workers Compensation determined Petitioner to have sustained temporary disability on February 13, 2015, culminating in an adjudication of permanent disability, with a permanent disability retirement date of June 1, 2016;

WHEREAS, the Petitioner has filed this action, seeking payment of salary and sick pay in accordance with N.J.S.A. 18A:30-2.1, during the first year of his absence from work due to a wor-related injury;

WHEREAS, the Board and the Petitioner have negotiated an amicable resolution of the issues in dispute, without any admissions or findings of liability as to either party, and wish to set forth the terms of their agreement in this settlement agreement ("Agreement"), which has been determined to be in the best interest of the parties;

NOW, THEREFORE, in consideration of the foregoing, the Board and the Petitioner agree as follows:

1. **Terms.**

(a) The Board agrees to pay to Petitioner and Petitioner agrees to accept the sum of Fourteen Thousand Four Hundred Eighteen Dollars and Seventy-Two Cents ($14,418.72) ("Settlement Sum") in full and final satisfaction of any and all claims asserted, or which could have been asserted by Petitioner, including but not limited to any and all claim for payments due in accordance with N.J.S.A. 18A:30-2.1, including salary and sick leave payable during Petitioner's first year of absence from employment due to work-related injury.

(b) Payment of the Settlement Sum shall be made by the Board to the Petitioner within thirty (30) days of receipt by the parties of the Final Decision of the Commissioner of Education, approving the terms of this Agreement.

(c) The Board will issue an IRS Form 1099 for the Settlement Sum, and makes no representations as to the tax and/or other withholding consequences with regard to the Settlement Sum being paid to Petitioner, Terrance Burke, herein.

Petitioner explicitly agrees to pay any and all taxes found to be owed from the payment of the Settlement Sum. Petitioner further agrees to indemnify and hold the Board harmless from any claims, assessments, demands, penalties and interest owed, or found to be owed, as a result of the payment made pursuant to this Agreement if Petitioner should fail to properly pay any taxes or other payments to which the Settlement Sum may be subject.

2. **Binding Effect.**

All parties to this Agreement, as well as their heirs, successors, and assigns, are bound by it. The other party and/or parties may rely upon his/her actual authority in connection with the signing of this Agreement. Additionally, each party to this Agreement is an intended beneficiary hereof.

3. **Release and Extinction of Claims.**

This Action is being settled, and Petitioner is receiving payment for salary during the first year of work-related disability, less adjustment for salary and temporary disability payments received by Petitioner during the first year of work-related disability. Accordingly, Petitioner, agrees to and hereby releases and surrenders any and all claims and rights which Petitioner may have against the Board, including its employees, elected officials, representatives, agents, attorneys, successors, or assigns. The effect of this Release is to waive all of Petitioner's claims, either present or future, including those of which Petitioner is not aware, and those not expressly mentioned in this Release resulting from Petitioner's employment with the Board, leaves of absence, disability, and disability retirement from the Board. It is expressly understood and agreed, however, that the parties reserve the right to bring a claim before any tribunal

of competent jurisdiction to enforce their rights under this Agreement.

4. **Integration Clause.**

This Agreement shall constitute the entire agreement among the parties and supersedes all prior or contemporaneous agreements, oral or written. This Agreement cannot be altered, amended, modified, terminated, or discharged except in a writing signed by the party against whom enforcement of such alteration, amendment, modification, termination or discharge is sought.

5. **Interpretation.**

The parties recognize that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties, obligations, requirements and limitations enumerated herein. The drafting and negotiation of this Agreement have been participated in by each of the parties and/or their respective counsel and, for all purposes, this Agreement shall be deemed to have been drafted jointly by each of the parties. No ambiguity shall be resolved against any party based upon authorship.

6. **Representation.**

(a) The Board hereby acknowledges that it has been represented by counsel throughout the existence of this Action, throughout the negotiation of this Agreement, and at the execution of this Agreement, and has read and consulted with counsel regarding this Agreement. The Board acknowledges and agrees that it is satisfied with its legal representation in this matter.

(b) The Petitioner hereby acknowledges and agrees that it he has been represented by counsel throughout the existence of this Action, throughout the negotiation of this Agreement, and at the execution of this Agreement, and has read the

Agreement and consulted with counsel regarding this Agreement. Petitioner acknowledges and agrees that he is satisfied with his legal representation in this Action.

7. **Voluntary.**

No representations have been made to Petitioner to induce or coerce Petitioner into entering in to this Agreement. Petitioner and the Board enter into this Agreement voluntarily.

8. **Governing Law & Venue.**

This Agreement shall be governed by the laws of the State of New Jersey. Any controversies or disagreements arising out of, or relating to this Agreement or the breach thereof, shall be resolved in the Bergen County Superior Court of New Jersey.

9. **Severability.**

If all or any portion of any provision of this Agreement shall be held to be invalid, illegal, or unenforceable in any respect, then such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and such provision shall be limited and construed as if such invalid, illegal, or unenforceable provision, or portion thereof, were not contained herein.

10. **Confidentiality.**

As further consideration for the Agreement, the parties agree that they will keep all terms of this Agreement completely confidential. Notwithstanding anything to the contrary contained herein, it is expressly understood and agreed that neither party nor any representative of the parties will take any action to disclose the terms or nature of this Agreement except that disclosure is permitted: (i) as necessary with regard to any proceeding for the enforcement of this Agreement; (ii) to the employee's immediate

family, accountants and attorneys for the parties, who shall agree not to disclose the fact of or any of the terms of this Agreement as if they were a party to this Agreement; (iii) as may be required, through subpoena or otherwise, by any court or agency of competent jurisdiction; (iv) as may be required pursuant to the Open Public Records Act; and (iv) as may be required by law.

11. **Counterparts.**

This Agreement may be signed by the parties in counterparts on separate copies of the Agreement, and all signature pages shall be incorporated into the Agreement as if all the signatures are affixed on one (1) page.

12. **Board Approval.** This Agreement is expressly conditioned upon and subject to the review and approval of the Northern Valley Regional High School District Board of Education.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth below.

BY SIGNING BELOW, THE PARTIES ACKNOWLEDGE THAT EACH HAS READ THE TERMS OF THIS AGREEMENT, UNDERSTANDS THE TERMS OF THIS AGREEMENT AND INTENDS TO BE LEGALLY BOUND BY THIS AGREEMENT AND ITS PROVISIONS. ADDITIONALLY, THE PARTIES ARE SIGNING BELOW VOLUNTARILY AND WITHOUT THREAT OR COERCION OF ANY KIND.

PETITIONER

Date: 4/12/21

TERRANCE BURKE

NORTHERN VALLEY REGIONAL BOARD OF EDUCATION

Date: 4/26/21

JOSEPH ARGENZIANO
Board President

CHRISTINA P. RASSEL
NOTARY PUBLIC OF NEW JERSEY
COMMISSION # 2397991
MY COMMISSION EXPIRES 7/6/2025

Northern Valley
Regional High School District

Marc A. Capizzi
School Business Administrator/Board Secretary

Administrative Offices • 162 Knickerbocker Road • P.O. Box 270 • Demarest, New Jersey 07627
Telephone: 201-768-2200 x12100 • Fax: 201-768-7356 • e-mail: capizzim@nvnet.org

April 27, 2021

The Northern Valley Regional High School District Board of Education at its Combined Meeting of April 26, 2021 approved the following resolution:

7.9 Settlement Agreement - Workers Compensation

Be It Resolved that the Board of Education approves the attached confidential settlement agreement.

I, Marc A. Capizzi, School Business Administrator of the Northern Valley Regional High School District in the County of Bergen, and the State of New Jersey do hereby certify that this is a true copy of the Original Minutes of the Northern Valley Regional High School District Board of Education's Combined Meeting of April 26, 2021.

Marc A. Capizzi
School Business Administrator/
Board Secretary

135-21

135-21
Agency Dkt. No. 62-4/21

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Amanda Harmon, Freehold Regional High School District, Monmouth County.

The record of this matter has been reviewed. The Board of Education of the Freehold Regional High School District filed a petition seeking the suspension of respondent Amanda Harmon's teaching certificates pursuant to *N.J.S.A.* 18A:28-8 because she resigned without providing the Board with the requisite statutory notice. The Commissioner issued an Order to Show Cause on April 29, 2021, which the Board served on respondent on the same date. Respondent did not formally respond to the Order to Show Cause but emailed the Department of Education on June 11, 2021, stating that she wished to "plead guilty and close the case." Accordingly, the Commissioner finds that the respondent's certificates should be suspended pursuant to *N.J.S.A.* 18A:28-8, and further finds that a one-year suspension of the respondent's certificates is the appropriate penalty.

Accordingly, the respondent's teaching certificates are suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 25, 2021
Date of Mailing: June 25, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

137-21

137-21

IN THE MATTER OF THE TENURE CHARGES BROUGHT BY

ELK TOWNSHIP BOARD OF EDUCATION
ELK TOWNSHIP SCHOOL DISTRICT
GLOUCESTER COUNTY, NEW JERSEY

DOCKET NO. 219-10/20

-AGAINST-

BEFORE JACQUELIN F. DRUCKER, ESQ.
ARBITRATOR

SONYA CRAMER

AWARD APPROVING
SETTLEMENT AGREEMENT

FOR THE DISTRICT:

SUSAN HODGES, ESQ.
PARKER MCCAY P.A.
9000 MIDLANTIC DRIVE
P.O. BOX 5054
MT. LAUREL, NEW JERSEY 08054

FOR MS. CRAMER:

HOP T. WECHSLER, ESQ.
SELIKOFF & COHEN, P.A.
700 EAST GATE DRIVE
MT. LAUREL, NEW JERSEY 08054

The Board of Education of the Elk Township School District, Gloucester County ("District," "Board," or "Employer") initiated, and the State District Superintendent certified to the Commissioner of Education, tenure charges seeking the termination of employment of Sonya Cramer ("Respondent" or "Ms. Cramer"). Respondent has been employed by the District as a certified teacher and holds tenure in that position. During her tenure, Respondent taught at the Aura Elementary School, within the District. The Commissioner of Education on October 30, 2020, referred the charges to this Arbitrator pursuant to N.J.S.A. 18A:6-16. Conferences were conducted with counsel, and scheduling and pandemic-related arrangements for hearing were discussed. As counsel reported that progress was being made regarding possible agreed resolution and as it was agreed that both parties wanted an in-person hearing, it was agreed that an extension of the statutory deadlines would be sought. Pursuant to the Arbitrator's request, the Office of Controversies and Disputes on December 9, 2020, granted an extension of the statutory deadline to June 30, 2021, for issuance of the award in this matter.

Following inquiries from the Arbitrator's office, counsel provided periodic updates on the progress of settlement discussions. On June 1, 2021, counsel notified the Arbitrator that settlement terms had been reached and, on June 11, 2021, counsel confirmed that the terms of the settlement had been approved by both parties. The parties conveyed to the Arbitrator a Separation Agreement and Release, executed June 1, 2021, by Respondent and, on behalf of the Board, on June 11, 2021. The parties also set forth a detailed statement of the grounds upon which they seek approval, in keeping with N.J.A.C. 6A:3-5.6 and the applicable factors set forth therein and in *In Re Cardonick*, New Jersey State Board of Education, 1990 School Law Decision 842.

The Arbitrator, being fully familiar with the charges and defenses set forth in this proceeding and being aware of the evidence expected to be adduced by the parties, has given full and careful consideration to the proposed terms of settlement. She finds same to be fair, appropriate, proper, and fully consistent with the applicable standards. The Arbitrator thus approves same and incorporates the Settlement and Release, with exhibits thereto, herein as her Award in this matter.

Dated: June 26, 2021

Jacquelin F. Drucker, Esq.
Arbitrator

Appendix A, Incorporated by Reference: Separation Agreement and General Release executed by Respondent June 1, 2021, and on behalf of the Board June 11, 2021.

State of New York)
) SS:
County of New York)

On this 26th day of June 2021, before me personally came and appeared Jacquelin F. Drucker, Esq., to me known and known to me to be the individual described herein, and who executed the foregoing instrument and acknowledged to me that she executed same.

Notary Public

JOHN H. DRUCKER
Notary Public, State of New York
No. 02DR6016984
Qualified in New York County
Commission Expires February 1, 2023

SEPARATION AGREEMENT AND GENERAL RELEASE

THIS SEPARATION AGREEMENT AND GENERAL RELEASE (hereinafter Agreement) is entered into between Sonya Cramer (hereinafter "Cramer") and the Elk Township Board of Education/Elk Township School District (hereinafter "Board"). Cramer and the Board are jointly referred to as the "Parties" or severally as a "Party" throughout this agreement.

As used in this Agreement, any reference to the Parties shall include their predecessors and successors, all of their affiliates, their parent or controlling corporations, partners, divisions, and subsidiaries, and all of their present, past, and future owners, directors, officers, employees, representatives, attorneys, insurers, reinsurers, third-party administrators, agents, and assigns.

WHEREAS Cramer has been employed as a tenured teacher by the Board;

WHEREAS Cramer and the Board mutually desire to settle all aspects of Cramer's employment by executing this Agreement,

NOW, THEREFORE, in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties, each intending to be legally bound, agree as follows:

1. Recitals. The above recitals are repeated and incorporated into this Agreement.

2. Separation From Employment. Cramer will voluntarily and formally retire from her position with the Board at the close of business on Friday, June 18, 2021. She will submit an irrevocable letter of retirement, effective at the close of business on Friday, June 18, 2021, which shall be in the form attached hereto as Exhibit A and shall be signed and attached to this Agreement. Cramer agrees not to seek re-employment from the Board and acknowledges that the Board has no obligation, contractual or otherwise, to hire, rehire, or re-employ Cramer in the future. Cramer will comply with all other contractual, statutory, and regulatory provisions concerning retirement, pension eligibility, and insurance coverage upon retirement. Cramer will further comply with all statutory and regulatory provisions concerning the purchase of service credit. The Board will cooperate fully with Cramer's application and will timely submit all required documentation to the New Jersey Department of the Treasury, Division of Pensions and Benefits (hereinafter "Division of Pensions"), including a certification of service and final salary.

The Parties mutually intend that Cramer will retire with a service retirement with twenty-five (25) years of creditable service. Cramer and the Board have checked and re-checked her pension credit as stated on her Member Benefits Online System ("MBOS") statement and both believe that she will have twenty-five (25) years of pension credit on June 18, 2021, subject to the approval of her application to purchase service credit. Should the Parties' mutual understanding be incorrect, the Parties agree in advance that Cramer's retirement date will be adjusted to the first day of the next month following the date upon which the Division of Pensions has certified in writing that Cramer's pension shall be fully vested and Cramer shall be eligible for regular retirement as defined in the applicable pension statutes, and no sooner than the date when Cramer has reached twenty-five (25) years of creditable service.

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Appendix A

The Board agrees that upon the Parties' execution of this Agreement, Cramer will be deemed to have satisfied any and all contractual and statutory notice requirement.

3. Withdrawal of Tenure Charges and Rescindment of Suspension. The Board will withdraw the tenure charges filed with the Commissioner of Education (hereinafter "Commissioner") in accordance with the requirements of N.J.A.C. 6A:3-5.6, as fully set forth in Paragraph 8 below. The Board will rescind Cramer's 120-day suspension without pay and reinstate Cramer with full back pay retroactive to October 8, 2020. Payment shall be subject to the standard salary and tax deductions, including but not limited to pension contributions, but excluding all pension loan payments and all AFLAC policy payments.

4. Leave of Absence. Cramer will take a medical leave of absence from February 8, 2021 through the close of business May 25, 2021. During this time period, Cramer shall have the unconditional right to full continuation of her health and major medical benefits, prescription health insurance benefits, dental and vision benefits (subject to mandatory Chapter 78 contributions) and all other emoluments of employment as set forth in the operative collectively negotiated agreement (hereinafter "CNA") between the Board and the Elk Township Education Association (Association) except that Cramer will not receive pay during this period. Cramer shall then use seventeen (17) days of her accrued contractual sick and personal leave from May 26, 2021 through June 18, 2021.

The Board will designate the first twelve (12) weeks of Cramer's medical leave of absence, from February 8, 2021 through the close of business May 7, 2021, as Family and Medical Leave Act (FMLA) leave. During the designated FMLA leave period, Cramer will be responsible for paying the employee share of her health insurance contributions in the amount of $415.46 per month, or $1,246.38 total. The Board will pay the employer share. During the additional two-week period of non-FMLA medical leave, Cramer will be responsible for paying both the employer and employee shares of her health insurance contributions, or $650.08 total.

The Board acknowledges the validity and sufficiency of the physician's certificate and FMLA leave documentation, including but not limited to the completed Form WH-380-E, provided by Cramer's medical care providers.

5. Payment for Unused Accrued Leave. Cramer will be entitled to payment for any unused accrued leave upon her retirement as set forth in the CNA between the Board and Association. Cramer and the Board have calculated that Cramer will have 13.5 unused accrued sick days as of her retirement effective 11:59 p.m. on June 18, 2021. Based on these calculations, the Board will reimburse Cramer at the applicable contractual per diem rate of $45 for a total amount of $607.50.

6. Waiver/Release of Claims: In exchange for the covenants contained in this Agreement, Cramer agrees as follows:

a. Cramer and her heirs, agents, executors, representatives, and assigns (collectively "Releasers") irrevocably and unconditionally fully and forever waive, release, and discharge the Board, including its members, agents, representatives, and employees, in their corporate and individual capacities (collectively "Released Parties"), from any and all claims, demands, actions, causes of actions, judgments, rights, fees, damages, obligations liabilities, and expenses (inclusive of attorneys' fees and costs) of any

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kind whatsoever, whether known or unknown (collectively "Claims"), that Releasers may have or have ever had against the Released Parties, arising out of, or in any way related to Cramer's employment with the Board by reason of any actual or alleged act, omission, practice, conduct, occurrence, or other matter from the beginning of time up to and including the date of Cramer's execution of this Agreement, including, but not limited to:

i. Any and all claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Family and Medical Leave Act (with respect to existing but not prospective claims), the Employee Retirement Income Security Act, the Equal Pay Act, the Civil Rights Act of 1991, Sections 1981 through 1988 of Title 42 of the United States Code, the Fair Credit Reporting Act, the New Jersey Law Against Discrimination (with respect to existing but not prospective claims), the New Jersey Conscientious Employee Protection Act, the New Jersey Civil Rights Act, the New Jersey Family Leave Act, the New Jersey Wage Payment Law, the New Jersey Wage and Hour Law, retaliation claims under the New Jersey Workers' Compensation Law, the New Jersey Equal Pay Act, the New Jersey Civil Union Act, the National Labor Relations Act, the Occupational Safety and Health Act, the New Jersey Worker Health & Safety Law, the Fair Labor Standards Act, the Health Insurance Portability and Accountability Act, all as amended, any other federal, state, local, or foreign law (statutory, regulatory, or otherwise) that may be legally waived and released, and any anti-retaliation provision of any of the foregoing laws; however, the identification of specific statutes is for purposes of example only, and the omission of any specific statute or law shall not limit the scope of this general release in any manner;

ii. Any and all claims for compensation or benefits of any type whatsoever, including, but not limited to, wages, stipends, bonuses, vacation pay, sick pay, insurance, or compensation or benefits of any kind;

iii. Any and all claims arising under tort, contract, or quasi-contract law, including, but not limited to, claims of breach of an express or implied contract, tortuous interference with a contract, breach of the covenant of good faith and fair dealing, promissory estoppel, equitable estoppel, detrimental reliance, wrongful discharge, retaliation, defamation, invasion of privacy, and negligent or intentional infliction of emotional distress;

iv. Any and all claims for monetary or equitable relief, including, but not limited to, attorneys' fees and costs, medical costs, back pay, front pay, other compensatory damages, reinstatement, punitive damages, liquidated damages, and penalties;

v. Any right to indemnification; and

vi. Any other matter between the Parties.

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b. This release specifically excludes claims arising under the Workers' Compensation Act, N.J.S.A. 34:15-1 *et seq.*; the Teachers' Pension and Annuity Fund Act, N.J.S.A. 18A:66-1 *et seq.*; the indemnity provisions of *N.J.S.A.* 18A:16-6 and 6.1 with regard to civil and criminal actions; claims by third parties; and claims arising from any breach of this agreement. Cramer is not presently aware of any such claims.

c. Neither Cramer nor any person or entity acting on her behalf except as may otherwise be provided herein will file any type of complaint, charge, claim, and/or cause of action, or cause or permit any complaint, charge, claim, and/or cause of action to be filed, against any of the Released Parties involving any matter whatsoever which occurred at any time from the beginning of time up to and including the effective date of this Agreement, or involving any continuing effects or any acts or practices which may have arisen or occurred prior to the effective date of this Agreement. It is understood that if a class action is filed, that the mere filing of said action does not place Cramer in breach of this Agreement provided that Cramer take reasonable steps with all due speed to remove herself from the class. It is understood that if a collective action is filed, Cramer will not opt into the collective action.

d. To the extent that Cramer has already filed, or caused to be filed by any person or entity on her behalf, a complaint, charge, claim, and/or cause of action in any administrative and/or judicial forum, she shall immediately notify the Board, in writing, of the nature of the complaint, charge, claim, and/or cause of action and shall provide all copies of the same to the Board. Further, Cramer agrees to immediately withdraw any complaint, charge, claim, and/or cause of action and to provide the Board with documentation proving the same. To the extent that any administrative and/or judicial agency fails and/or refuses to permit Cramer to withdraw a complaint, charge, claim, and/or cause of action, Cramer shall advise the Board, in writing, and Cramer shall refuse to cooperate with any investigation and/or proceeding regarding the complaint, charge, claim, and/or cause of action if the law permits. Should Cramer receive any damages, monetary reimbursement, or any compensation whatsoever as a result of having brought a complaint, charge, claim, and/or cause of action, Cramer shall immediately remit said damages, monetary reimbursement, or compensation to the Board.

e. Nothing in this Agreement shall preclude Cramer from cooperating with any investigation being conducted by the Equal Employment Opportunity Commission or state or local fair employment practices agency, or in any criminal, quasi-criminal, or law enforcement investigation, although Cramer waives any right to any monetary relief related to the same. This Agreement is not intended to waive any claims that cannot be waived by law.

7. No Admission of Liability. Neither this Agreement nor Cramer's retirement constitutes an admission of any liability or wrongdoing on Cramer's part, nor does the execution of this Agreement constitute an admission of liability or wrongdoing on the part of the Board or its employees, representatives, or agents.

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8. *Cardonick* Factors. Pursuant to N.J.A.C. 6A:3-5.6:
   a. A true copy of the tenure charges is attached hereto as Exhibit B;
   b. A true copy of Cramer's Answer to the tenure charges is attached hereto as Exhibit C;
   c. In consideration of the nature of Cramer's conduct, and in light of her years of service to the District and the potential for protracted litigation, the Parties have determined it is in their best interest and the public interest to amicably resolve the charges;
   d. Both parties have knowingly and voluntarily consented to the within Agreement, as indicated by their respective signatures below;
   e. Both parties have been fully apprised of their rights and obligations and have indicated their full understanding and acceptance thereof by their respective signatures below;
   f. The within good-faith settlement will serve the public interest by avoiding certain "time, money, and proof problems" as set forth in *Matter of Cardonick*, 1990 S.L.D. 842, 848; and
   g. This Agreement results in a withdrawal of the charges and Cramer's reinstatement and voluntary retirement. Nonetheless, Cramer has been advised of the Commissioner's duty to refer tenure determinations resulting in a loss of position to the State Board of Examiners for possible suspension or revocation of certificates.

9. Prospective Employers. Any prospective employer who inquires as to Cramer's employment history shall be referred to the Superintendent of Schools or their designee and informed only of Cramer's retirement. In no event will the Board or its officers, members, employees, or agents make any statement, verbal or written, to any current or prospective employer that is adverse to Cramer's interests. All such references shall be cleared through the Superintendent.

10. Non-Interference and Non-Disparagement. The Parties mutually agree not to make, publicly or privately, through any media or medium (including, without limitation, comments on social networking sites and social media), any defamatory, disparaging, or derogatory remarks or otherwise make statements that could injure the business or reputation of any of the Parties to this Agreement. In the event that a Party is alleged to have breached this provision, the other Party may commence appropriate legal action and the non-prevailing Party will be responsible for all attorneys' fees and costs associated with such litigation.

11. Non-Precedential. It is expressly understood that the settlement memorialized by this Agreement is predicated exclusively upon the unique and individual circumstances of this matter and shall not be construed to represent any policy or procedure of the Board.

12. Confidentiality. The Parties mutually understand and agree that the existence of this Agreement and the terms herein are completely confidential. The Parties, including their representatives and agents, further agree that they shall not reveal to anyone, other than as may be mutually agreed upon in writing, any information, facts, or terms and conditions concerning this Agreement. This non-disclosure provision does not bar the following disclosures: (1) disclosure by Cramer to members of her immediate family; or (2) disclosures by a Party for the purpose of obtaining legal, tax, accounting, or financial advice; or (3) disclosures by a Party that may be required by law;

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or (4) disclosures by a Party for the purpose of obtaining or maintaining publicly or privately funded benefits or insurance; or (5) disclosures by a Party to any governmental agency or entity on a need-to-know basis, including but not limited to the Department of Education, the Teachers' Pension and Annuity Fund, and the State Board of Examiners. This non-disclosure provision further does not bar disclosures pursuant to a lawful request under the Open Public Records Act (OPRA) or disclosures as may otherwise be compelled by law or Court Order. The Parties agree to inform those persons with whom they are permitted to share such information as to the confidentiality of this Agreement and further agree to require such persons to hold information received by them about this Agreement as confidential pursuant to the terms herein. Upon all other inquiries, the Parties shall only respond that the matter has been resolved to the satisfaction of all those concerned. In the event that a Party or Parties are alleged to have breached the confidentiality provision of this Agreement, then the other Party or Parties may commence appropriate legal action.

13. No Reporting Obligation. The Parties agree that because Cramer is not the subject of allegations involving child abuse or sexual misconduct with a child as defined by N.J.S.A. 18A:6-7.6, no reporting obligation under that statute is triggered. The Board further agrees that it has not taken and will not take any action to disclose Cramer's retirement from employment under N.J.S.A. 18A:6-7.6 *et seq.* However, the Board will comply with any state law concerning a response to requests for information.

14. Right to Consult Counsel and Understanding of Agreement. By signing this Agreement, the Parties certify that they have had the opportunity to discuss the Agreement with counsel. They are fully satisfied with the services of their counsel with respect to both this Agreement and all other aspects of this case and they enter into this Agreement knowingly, willingly, and without any coercion or improper inducements.

15. Governing Law and Forum Selection. This Agreement, and all matters arising out of or relating to it, shall be governed by and construed under the laws of the State of New Jersey, without regard to conflict of law principles. Any disputes relating to this Agreement shall be resolved exclusively in the Superior Court of New Jersey, Gloucester County. The Parties hereby irrevocably submit to the exclusive jurisdiction of such court and waive the defense of inconvenient forum to the maintenance of any action or proceeding in such venue.

16. Entire Agreement. It is understood between the Parties that neither Party has relied upon any representation, express or implied, made by any other party or their counsel or any of their representatives, and that this Agreement constitutes the entire understanding of the Parties and cannot be modified except in writing signed by all of the Parties hereto.

17. Modification and Waiver. No modification or waiver of any of the terms of this Agreement shall be valid unless in writing and executed by each Party with the same formality as this Agreement.

18. Legally Binding. The terms of this Agreement contained herein are contractual, and not a mere recital. This Agreement shall be binding upon the Parties hereto and upon their heirs, administrators, representatives, executors and assigns. Cramer expressly warrants that she has not transferred to any person or entity any rights, causes of action or claims released in this Agreement.

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The Parties further represent and agree that they are not impaired, whether by bankruptcy or otherwise, from signing this Agreement or releasing any of the rights or claims.

19. Rules of Construction. Cramer agrees and acknowledges that, as Cramer has carefully read, reviewed, and considered the terms of this Agreement and has had the full opportunity to obtain legal advice from counsel of her choice in connection with this Agreement, the normal principle of contract construction whereby all ambiguities are to be construed against the drafting party shall not be employed in the interpretation and construction of this Agreement. Any headings contained herein are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

20. Severability. Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid, or unenforceable, the Parties will make reasonable efforts to reform that provision to be legal, valid, and enforceable. Should the provision remain illegal, invalid, or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable, or invalid part, term, or provision shall be deemed not to be a part of this Agreement.

21. Counterparts. This Agreement may be signed in counterparts. Electronic scans or facsimiles of signatures will have the same force and effect as original signatures.

22. Revocation Period. Pursuant to the requirements of the Older Workers Benefit Protection Act, 29 U.S.C. §626 *et seq.*, Cramer acknowledges that she has been given the opportunity, if she so desires, to consider this Agreement for twenty-one (21) days before executing it. In the event that Cramer executes this Agreement within less than twenty-one (21) days of the date of its delivery to her, Cramer acknowledges that such decision was entirely voluntary and that she had the opportunity, if she had so desired, to consider this Agreement for the entire twenty-one (21) day period. Cramer further acknowledges that for a period of seven (7) days from the date of her execution of this Agreement, she shall retain the right to revoke this Agreement by written notice to the Board c/o its counsel:

Susan Hodges, Esq.
Parker McCay P.A.
9000 Midland Drive, Suite 300
Mt. Laurel, NJ 08054
shodges@parkermccay.com,

with a copy provided to Cramer's counsel:

Hop T. Wechsler, Esq.
Selikoff & Cohen, P.A.
700 East Gate Drive, Suite 502
Mt. Laurel, NJ 08054
hwechsler@selikoffcohen.com,

and that this Agreement shall not become effective or enforceable until the expiration of such revocation period.

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23. Board/Arbitrator Approval. This Agreement is subject to Board approval. The Board will make every effort to have the Agreement, once executed by Cramer, presented for approval at the Board's next scheduled meeting. The Board's Business Administrator will recommend approval. Upon approval, the Board President is fully authorized to execute this Agreement on behalf of the Board and will attach as Exhibit D to this Agreement a true copy of the Board minutes or resolution demonstrating Board approval. The Board will make all reasonable efforts to promptly provide a certified copy of the Board minutes and Board resolution to Arbitrator Jacquelin F. Drucker, Esq. The Parties will jointly work to obtain a final order approving settlement from Arbitrator Drucker.

Signatures on Following Page

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IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed.

SONYA CRAMER

By: Sonya Cramer, on her own behalf

On June 1st, 2021, before me personally came Sonya Cramer, known to me to be the individual who executed the foregoing Confidential Settlement Agreement and General Release, and duly acknowledged to me that she executed the same.

NOTARY PUBLIC
Daniel R. Dowdy, Esq.
Attorney at Law of the State of New Jersey
Attorney No. 276072018

The Notarization of the Signature of Sonya Cramer was performed utilizing communication technology in accordance with the provisions of P.L. 2020 c. 26, A3903 SA (1R) and Executive Order 103 of 2020.

THE ELK TOWNSHIP BOARD OF EDUCATION

By: , Board President

On June 11, 2021, before me personally came Mr. J. Wilson Hughes Jr. known to me to be the individual who executed the foregoing Confidential Settlement Agreement and General Release, and duly acknowledged to me that she executed the same.

NOTARY PUBLIC

NICOLE M. PRATT
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 9/12/2024

EXHIBIT A

[EXHIBIT A]

Sonya Cramer
528 Erie Avenue
Clayton, NJ 08312

~~May~~ June 1, 2021

Dr. Piera Gravenor
Superintendent of Schools
Elk Township School District
900 Clems Run
Glassboro, NJ 08028

Re: Letter of Retirement

Dear Dr. Gravenor:

I hereby submit my voluntary and irrevocable notice of retirement from all employment with the Elk Township Board of Education effective at the close of business on Friday, June 18, 2021 and subject to the Separation of Employment Agreement executed simultaneously herewith, the terms of which are incorporated herein by reference.

Sincerely,

Sonya Cramer

Sonya Cramer

139-21

139-21

OAL Dkt. No. EDU 04383-19
Agency Dkt. No. 34-2/19

New Jersey Commissioner of Education

Final Decision

N.G., on behalf of minor children, N.G.B. and H.B.,

Petitioner,

v.

Board of Education of the Township of Ewing, Mercer County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled September 30, 2020 OAL hearing, has been reviewed. Petitioner did not file an explanation for the failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 9, 2021
Date of Mailing: July 9, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

140-21

140-21

OAL Dkt. No. EDU 15388-19
Agency Dkt. No. 219-8/19

New Jersey Commissioner of Education

Final Decision

Scott Lloyd,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) that the New Jersey State Board of Examiners did not act in an arbitrary, capricious, or unreasonable manner when it denied petitioner's application for a Teacher of Physical Education Certificate of Eligibility (CE). The Commissioner further concurs with the ALJ that petitioner did not meet the requirements for a CE because he failed to earn the 2.75 grade point average required by *N.J.A.C.* 6A:9B-8.3(b)(1), and he was eight credits short in the subject of individual, dual, and team sports, as set forth under *N.J.A.C.* 6A:9B-10.3.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 9, 2021
Date of Mailing: July 9, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 15388-19

AGENCY DKT. NO. 219-8/19

SCOTT LLOYD,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,

Respondent.

Scott Lloyd, petitioner pro se

Michal Czarnecki, Deputy Attorney General, for respondent (Gurbir S. Grewel, Attorney General of New Jersey, attorney)

Record Closed: May 14, 2021 Decided: June 1, 2021

BEFORE **SARAH G. CROWLEY,** ALJ:

STATEMENT OF THE CASE

Petitioner Scott Lloyd (petitioner), challenges the denial of his application for a Teacher of Physical Education Certificate of Eligibility by the State Board of Examiners (the Examiners). The Examiners reply that Lloyd failed to meet the regulatory requirements for issuance of this certificate set forth in N.J.A.C. 6A:9B-8.3 and N.JA.C. 6A:8B-10.3(a)(1). The reasons for the denial were that he lacked the requisite cumulative grade point average (GPA) requirements in the regulations and was lacking the required courses in physical education in the area of individual, dual or team sports. The Board substituted some of his experience for six credits hours, but he was still deficient eight credit hours in this area.

PROCEDURAL HISTORY

Petitioner filed a petition of appeal with the Commissioner of Education (the Commissioner) on August 14, 2019. A Motion to Dismiss, in lieu of an Answer, was filed by the Examiners, and the contested case was transmitted to the Office of Administrative Law (OAL) on October 6, 2019. The motion was converted to a summary decision motion, which was denied. After discovery was conducted, the matter was heard via zoom on May 14, 2021, and the record closed on May 16, 2021 after a post hearing submission by the petitioner.

FACTUAL DISCUSSION AND FINDINGS

Scott Lloyd represented himself in the proceeding. He testified that he thought the cumulative grade point average requirements in the regulations were unfair. Many of his classes towards his degree in Chiropractic care were taken on a pass fair and he did not have a choice in that. Petitioner conceded that he did not have the requisite 2.75 cumulative GPA required under N.J.A.C. 6A:9B-8.3(b)(1). Lloyd's cumulative GPA is 2.15. Petitioner did not argue that his pass-fail courses were entitled to some grade point average above the 2.15. He did not argue that any particular alternative experience should have been credited with more than the six hours that were provided in the area of required coursework.

Rani Singh works for the Office of Credential and Induction with the State Board of Examiners. She testified that she reviewed the application of the petitioner for a Certificate of Eligibility to teach Health and Physical Education. She discussed the requirements of the certificate that are set forth in N.JA.C. 6A:9B-10.3. Petitioner was deficient in credits in certain subject matter areas in addition to not having the requisite GPA. Fourteen semester hours are required in individual, dual or team sports. After reviewing petitioner's transcripts and work experience, the Board did give him an additional six hours for his work as a surfing instructor and a strength and conditioning coach towards the requirements in Individual, Dual or Team Sports. However, he was still short eight credit hours in this area.

Ms. Singh set forth the requirements in N.J.A.C. 6A: 9B-8.39(b)(1). She testified that a candidate who graduated before September 1, 2016 shall have a cumulative GPA of at least

2.75 in a baccalaureate degree program. The petitioner graduated a 1996 from an accredited college but only earned a cumulative GPA of only 2.15. She also discussed the other requirements and testified that the regulations do not permit any substitution of professional background or relaxing or waving the GPA requirements. Accordingly, the application was denied for the failure to meet the GPA requirements as well as being six credits short in the area of individual, dual or team sports.

The above facts are not in dispute and are **FOUND** as **FACT.**

LEGAL ANALYSIS AND CONCLUSIONS

An applicant for a certificate to teach Health and Physical Education must meet the requirements set for in N.J.A.C. 6A;9B-10.3(b). Pursuant to the plain language of these regulations an applicant must have a cumulative GPA of 2.75 and have received course or experiences in certain areas. The petitioner had only a 2.15 cumulative GPA. In addition, after reconsideration of the experience of petitioner he was still deficient eight credit hours in the area of individual, dual and team sports. The petitioner does not dispute these facts. He does not offer any additional experience which he submits should be substituted. He argues that the GPA requirements are unfair. The petitioner has not demonstrated that he met the requirements of the regulations, or that there was anything improper about the board's decision.

The decision by the Board in this matter was consistent with the applicable statutory and regulatory provisions. The petitioner has the burden of demonstrating by a preponderance of the credible evidence that he is entitled to the certification he seeks. Farrar v. State Bd. of Exam'rs, EDU 13763-08, Initial Decision (April 27, 2010), aff'd, Comm'r (July 26, 2010), <http://njlaw.rutgers.edu/collections/oal/>. Moreover, an administrative **agency's interpretation of its own regulations** is entitled to substantial weight. Allen v. PFRS, 233 N.J. Super. 197, 207 (App. Div. 1989). The petitioner failed to meet this burden.

I, therefore, **CONCLUDE** that the Examiners' decision was consistent with applicable law and thus, must be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the Board of Examiners' Denial of the Certificates in **AFFIRMED** and the petition of appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 1, 2021
DATE

Sarah G. Crowley
SARAH G. CROWLEY, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

SGC/nd

APPENDIX

WITNESSES

For Petitioner:

Scott Lloyd

For Respondent:

Rani Singh

EXHIBITS

For Petitioner:

P-1 Letter from the petitioner

For Respondent:

R-1 Letter from the Board to the petitioner, dated July 1, 2019

R-2 Letter from the Board to the petitioner, dated May 3, 2019

R-3 College Transcript of petitioner, University of Western States

R-4 College Transcript of petitioner, University of Western States

R-5 College Transcript, Ocean County Community College

R-6 Credential Review Summary

R-7 Evaluation of Credentials

R-8 Letter to petitioner from the Board, dated March 5, 2019

R-9 Letter from petitioner to the Board, dated April 8, 2019

R-10 Letter to petitioner from the Board, dated February 20, 2019

R-11 Recommendation letter from Samantha Hendrickson, Excelsior College March 12, 2019

R-12 Letter to Board from petitioner, dated January 23, 2019

141-21

141-21

OAL Dkt. No. EDU 03972-21
Agency Dkt. No. 100-5/20

New Jersey Commissioner of Education

Decision

Scott Levy,

Petitioner,

v.

Board of Education of the Township of Wyckoff, Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon review, the Commissioner agrees with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that no issues remain in dispute and that the petition of appeal should be dismissed. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 9, 2021
Date of Mailing: July 9, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 03972-21
AGENCY DKT. NO. 100-5/20

SCOTT LEVY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWHIP OF WYCKOFF, BERGEN COUNTY,

Respondents.

Nicholas Poberezhsky, Esq. for petitioner

Stephen R. Fogarty, Esq., (Fogarty and Hara, attorneys) for respondent

Record Closed: May 19, 2021 Decided: June 2, 2021

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

On April 28, 2021, the matter was transmitted to the Office of Administrative Law for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Stipulation of Dismissal.

Having reviewed the record and the Dismissal terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the Dismissal as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 2, 2021 Ernest M. Bongiovanni

DATE **ERNEST M. BONGIOVANNI**., ALJ

Date Received at Agency: 6-2-21

Date Mailed to Parties: 6-3-21

id

Nicholas Poberezhsky, Esq.
Caruso Smith Picini, P.C.
60 US 46 East
Fairfield, New Jersey 07004
(p) (973) 667-6000
(f) (973) 667-1200
Attorneys for Petitioner,
Scott Levy

SCOTT LEVY, Petitioner, v. TOWNSHIP OF WYCKOFF BOARD OF EDUCATION, Respondent.	:	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **CIVIL ACTION** **STIPULATION OF DISMISSAL** **Agency Ref. No.: 100-5/20** **OAL Dkt. No.: EDU 03972-2021 N**

Petitioner Scott Levy and Respondent Township of Wyckoff Board of Education, having amicably resolved all issues in dispute in the above-captioned matter by way of settlement, it is hereby stipulated and agreed that the same be, and hereby is, dismissed with prejudice, and without costs or fees to either party.

By: _____
Nicholas Poberezhsky, Esq.

Caruso Smith Picini, P.C.
60 Route 46 East
Fairfield, New Jersey 07004
Telephone: (973) 667-600
Facsimile: (973) 667-1200
Attorneys for Petitioner,
Scott Levy

By: _____
Stephen R. Fogarty, Esq.

FOGARTY & HARA, ESQS.
21-00 Route 208 South
Fair Lawn, New Jersey -7410
Telephone: (201) 791-3340
Facsimile: (201) 791-3432
Attorneys for Respondent,
Township of Wyckoff Board of Education

Dated: May 14, 2021

142-21

142-21
OAL Dkt. No. EDU 00287-21
Agency Dkt. No. 252-12/20

New Jersey Commissioner of Education

Final Decision

P.V., on behalf of minor children, I.V. and I.V.,

Petitioner,

v.

Board of Education of the Borough of Alpha, Warren County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that paragraph sixteen (16) of the proposed Agreement states that the Agreement "will become effective immediately following final execution by the parties." The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 9, 2021
Date of Mailing: July 9, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT

OAL DKT. NO. EDU 00287-21

AGENCY DKT. NO. 252-12/20

P.V. ON BEHALF OF I.V. & I.V.,

Petitioner,

v.

ALPHA PUBLIC SCHOOL, BOARD OF EDUCATION, WARREN COUNTY,

Respondent.

P.V., petitioner pro se

Robert J. Meryman, Esq., for respondent Alpha Public School Board of Education (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: May 24, 2021 Decided: May 27, 2021

BEFORE **GAIL M. COOKSON**, ALJ:

In December 2020, petitioner P.V. (petitioner) appealed an adverse residency determination by the Alpha Borough Board of Education (respondent or District) with respect to her children I.V. and I.V. The matter was transmitted to the Office of Administrative Law (OAL), on or about January 12, 2021, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

I held several telephonic case management conferences with the parties, which also allowed us to engage in settlement discussions. Under cover of May 21, 2021, counsel for Alpha forwarded a fully executed Settlement Agreement between the parties and requested that if approved, I incorporate same into an order. A copy of the Board Resolution approving same was also submitted.

I have reviewed the record and the terms of the Settlement Agreement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Gail M. Cookson

May 27, 2021
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 6-1-21

Date Mailed to Parties: 6-1-21
id

CONFIDENTIAL

SETTLEMENT AGREEMENT

This Agreement is entered into by and between the ALPHA BOROUGH BOARD OF EDUCATION ("Alpha") and Petitioner, P.V. ("P.V.). In consideration of the mutual covenants and undertakings set forth herein, Alpha Borough and P.V. (collectively "the parties") hereby agree as follows:

1. In consideration of the terms of this agreement, P.V. agrees to pay to Alpha the total sum of Three thousand forty-five 00/100 Dollars ($3,045.00) on account of disputed claims for tuition.

2. The settlement proceeds shall be paid as follows: Within fifteen (15) days of the final execution of this agreement, P.V. will pay Alpha the sum of One Thousand 00/100 Dollars ($1,000.00). Between May 31 and June 30, P.V. will pay Alpha the additional sum of Two Thousand and forty-five 00/100 Dollars ($2,045.00). The payments shall be made by way of check made payable to the Alpha Board of Education, and delivered in person at the School District Offices located at 817 North Blvd, Alpha, NJ 08865.

3. It is agreed and understood that the tuition payment set forth herein is a legal obligation on the part of P.V. P.V. understands that her failure to provide payment in a timely manner will allow the District to pursue legal remedies to enforce the tuition obligation.

4. Alpha agrees to waive any claim for any additional monies, other than the sum described in Paragraph 2 above, whether by way of statute, regulation, contract, Board policy or otherwise, with regard to tuition and/or other costs as arising out of, or which could have been pursued in, the matter entitled M.P.V. o/b/o I.V. v. Alpha Board of Education, OAL Docket No. EDU- 00287-21.

Law Offices
Apruzzese, McDermott, Mastro & Murphy
25 Independence Boulevard, Warren, N.J. 07059
www.ammm.com

Apruzzese, McDermott, Mastro & Murphy, P.C.
(Established 1965)

Robert J. Merryman, Esq.
rmerryman@ammm.com

May 21, 2021

Ila.Dhabliwala@oal.nj.gov
Via E-Mail and Regular Mail
The Honorable Gail Cookson, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: P.V. o/b/o minor children I.V. and IV. V. Alpha Board of Education
OAL Dkt. No. EDU-00287-2021

Dear Judge Cookson:

Enclosed please find a Settlement Agreement executed on behalf of Petitioner, P.V. and the Alpha Board of Education. Also enclosed is a copy of the Minutes of a Meeting of the Board of Education approving the agreement in this matter.

With this submission, this matter should be fully resolved. Please let me know if you have any questions or require anything further regarding this matter.

Respectfully,

/s/ Robert J. Merryman

Robert J. Merryman

cc. Paola Velez via email
Seth Cohen, CSA via email

S:\RJM\Alpha Board of Ed\Residence matters\EDU Ltr to Judge Cookson with Settlement Agreement.doc

5. Upon execution of this agreement, P.V. shall dismiss with prejudice her pending Administrative appeal, on behalf of her minor children, in the matter entitled P.V. o/b/o I.V. and I.V. v. Alpha Board of Education, Docket No. EDU-00287-21, in its entirety and with prejudice.

6. It is understood that the daughter of P.V., I.V., will be permitted to remain as a student in the Alpha School District for the remainder of the 2020-21 school year on a tuition basis as a compromise of disputed claims in this matter. P.V. acknowledges and agrees that both her son, I.V. and her daughter, I.V. have been, and will be considered, residents of and domiciled in the Town of Phillipsburg for purposes of school attendance and entitlement to a public education.

7. Both parties acknowledge that they have had the opportunity to consult with an attorney before agreeing to these terms and signing this Agreement; that they have carefully read and fully understand all of the provisions of this Agreement; that they have had adequate time to review the Agreement and the provisions contained herein; and that they fully understand and voluntarily agree to the terms of this Agreement. .

8. The parties agree that this Agreement shall be construed in accordance with the laws of the State of New Jersey, and that the laws of the State of New Jersey will apply to any dispute concerning it. The parties choose the Superior Court of New Jersey as their forum for resolving any dispute concerning this Agreement.

9. Both parties acknowledge that the provisions of this Agreement include valuable and sufficient consideration for the obligations undertaken herein.

10. This agreement is a compromise of disputed claims and is not an admission of liability or wrongdoing by any party. It is entered into as a business judgment, bearing in mind the cost and uncertainty of litigation.

11. This settlement involves unique facts and circumstances and therefore shall not be considered as precedent in any other matter or with respect to any other party.

12. The parties acknowledge and agree that each party is responsible for its own attorneys' fees and costs and that neither party is a "prevailing party" with respect to any fee-shifting laws or provisions.

13. The signatories below hereby certify that they have the authority to bind the respective parties to the terms of this Agreement.

14. This Settlement Agreement contains the full agreement between the parties and may not be abandoned, supplemented, amended, changed, or modified in any manner, orally or otherwise, except in writing of concurrent date or subsequent date, signed by a duly authorized representative of each of the parties hereto. Each party agrees to be responsible for their own costs and fees.

15. If any term, provision or condition of this Settlement Agreement and General Release is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other sentence, paragraph, section, provision, term and/or condition of this Settlement Agreement and General Release, provided that the essential consideration received by each party is not eliminated or reduced as a result of such a declaration of invalidity.

16. This Settlement Agreement shall become effective immediately following final execution by the parties.

17. This Settlement Agreement contains the full agreement between P.V. and Alpha with regard to matters set forth herein and shall be binding upon and inure to the benefit of the parties, their officials (elected and/or appointed), officers, members, directors, attorneys,

representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs, successors and assigns of each and all other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith (past, present and future), except as set forth herein or as may be agreed to in a further writing between the parties and further execution by the parties.

Alpha Board of Education

By: Jennifer Pettinelli
Jennifer Pettinelli, Board President

P.V. o/b/o I.V and I.V.

By: Paola Velez
~~Paola Velez~~
Paola Velez

Witnesseth

Timothy Mantz. Board Secretary

Extract from the minutes of a meeting of the Board of Education of the Alpha Public School, Warren, County, New Jersey as recorded in the official minute book.

The Board of Education of Alpha Public School in the county of Warren New Jersey convened in Public Session on **May 18, 2021** the Alpha School, Alpha, New Jersey.

The following members of the board were;

ROLL CALL

Present	Absent
President, Jennifer Pettinelli	
Vice-President, Patrick Smith	
Travis Conway	
Christopher McGee	
Loretta Reed	

The following motions were offered:

Motion made by Patrick Smith, seconded by Travis Conway, to approve the following board affairs agenda items **1.1** through **1.2.**

1.2 To approve the settlement agreement in the matter of P.V. vs Alpha BOE.

Motion carried by unanimous roll call vote.

STATE OF NEW JERSEY)

) COUNTY OF WARREN)

I, Tim Mantz, secretary of the Board of Education of the Alpha Public School in the county of Warren, State of New Jersey hereby certify that the foregoing of **May 18, 2021,** has been compared by me with the original minutes as officially recorded in my office in the minute book of said Alpha Public School Board of Education and is a true complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have here unto set my hand and affixed the corporate seal of said Board of Education this **May 21, 2021.**

Tim Mantz, Board Secretary

143-21

143-21

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Jessica Macaluso, Board of Education of the Borough of Pompton Lakes, Passaic County.

Synopsis

This matter was opened before the Commissioner of Education on May 20, 2020, by way of an Order to Show Cause served by the petitioner, the Board of Education of the Borough of Pompton Lakes (Board) upon the respondent, Jessica Macaluso, requiring respondent to show cause why an order should not be entered suspending her teaching certificates for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 after she resigned her position without giving the sixty-day (60) notice required by her contract with the petitioner. Respondent was duly advised that – pursuant to *N.J.A.C.* 6A:3-1.5(e) – failure to respond would cause each allegation raised by the Board to be deemed admitted and might result in summary decision by the Commissioner. The respondent failed to answer the order, despite ample opportunity to do so.

There being no response to the order to show cause, the Commissioner concluded that the allegations, which respondent has chosen not to deny, may be deemed admitted and justify suspension of respondent's certificates. Accordingly, respondent's certificates were suspended for a period of one year from the date of the filing of this decision – a copy of which was forwarded to the State Board of Examiners for the purpose of effectuating this order.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

143-21

Agency Dkt. No. 80-5/21

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Jessica Macaluso, Board of Education of the Borough of Pompton Lakes, Passaic County.

The record of this matter has been reviewed. The Pompton Lakes Board of Education filed a petition seeking the suspension of respondent Jessica Macaluso's teaching certificates pursuant to *N.J.S.A.* 18A:28-8 because she resigned without providing the Board with the requisite statutory notice. The Commissioner issued an Order to Show Cause on May 20, 2021, which the Board served on respondent on the same date. Respondent did not formally respond to the Order to Show Cause, despite being given multiple opportunities to do so. Accordingly, the Commissioner finds that the respondent's certificates should be suspended pursuant to *N.J.S.A.* 18A:28-8, and further finds that a one-year suspension of the respondent's certificates is the appropriate penalty.

Accordingly, the respondent's teaching certificates are suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 9, 2021
Date of Mailing: July 9, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

144-21

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

July 9, 2021

Katherine A. Gilfillan, Esq.
Schenk, Price, Smith & King, LLP
220 Park Avenue
P.O. Box 991
Florham Park, NJ 07932

Marina Nikolaeva
25 Hideaway Lane
Sparta, NJ 07871

Re: *Board of Education of the Township of Sparta, Sussex County, v. M.N., on behalf of minor child, A.D., Agency Docket No. 87-6/21.*

Dear Counsel:

I have reviewed the petition for declaratory ruling in the above-captioned matter. Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq*.

Accordingly, petitioner's request for declaratory ruling is declined and this matter shall be transmitted to the Office of Administrative Law.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

c: State Law Library

VIA E-MAIL ONLY

144-21L

146-21

146-21

New Jersey Commissioner of Education

Final Decision

Kenya Moncur,

Petitioner,

v.

Board of Education of the City of East Orange
Essex County,

Respondent.

Synopsis

Petitioner, formerly employed by the respondent Board as a non-tenured Supervisor of Mathematics, appealed the non-renewal of his employment. Petitioner contended that the Board's stated reasons for his termination were specious, rendering its actions arbitrary, capricious, and unreasonable, and sought reinstatement and back pay. Specifically, petitioner argued that the Board failed to properly and timely conduct state-mandated evaluations of his performance, and that evaluations that were completed rated his work as effective and never addressed the issue of low student test scores. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; pursuant to *N.J.S.A.* 18A:28-5(b)(1), a teaching staff member earns tenure upon completion of four years of consecutive employment, together with reemployment for the fifth year; petitioner had not yet earned tenure when his employment was terminated; it is well established that a local school board has virtually unlimited discretion in hiring or renewing non-tenured teaching staff; and the Board has engaged in no conduct that violated petitioner's constitutional or legislatively conferred rights. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon comprehensive review of the record, the Commissioner concurred with the ALJ that summary decision is appropriate, and that petitioner is not entitled to the relief he sought because the Board's actions did not violate petitioner's rights. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

146-21

OAL Dkt. No. EDU 10105-20
Agency Dkt. No. 135-6/20

New Jersey Commissioner of Education

Final Decision

Kenya Moncur,

Petitioner,

v.

Board of Education of the City of East Orange, Essex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed.[1]

Petitioner, a former non-tenured Supervisor of Mathematics, alleges that his non-renewal by the East Orange Board of Education (Board) was improper. Following the Board's motion for summary decision, the Administrative Law Judge (ALJ) concluded that the Board's actions did not violate petitioner's constitutional or legislatively-conferred rights. The ALJ further concluded that even if petitioner was correct that the Board failed to properly or timely complete petitioner's evaluations, petitioner would not be entitled to reinstatement or a financial award.

In his exceptions, petitioner argues that the Board gave a reason for his non-renewal – his failure to improve math scores on standardized assessments – that was not

[1] The Board did not file a reply to petitioner's exceptions.

supported by the facts and was, therefore, arbitrary and capricious. Petitioner claims that he was not charged with improving test scores and that no concerns were ever raised by the administration regarding test scores during his employment; in fact, he received evaluations indicating that he was highly effective. Petitioner asserts that summary decision was inappropriate because of this dispute regarding the facts, and that he should have the opportunity to rebut the Board's stated reason for his non-renewal.

Upon a comprehensive review of the record, the Commissioner concurs with the ALJ that summary decision is appropriate, and that petitioner is not entitled to relief because the Board's actions did not violate petitioner's rights. A board of education has virtually unlimited discretion in hiring or renewing non-tenured staff members absent constitutional constraints or legislatively-conferred rights. *Dore v. Bedminster Twp. Bd. of Ed.*, 185 *N.J. Super.* 447, 456 (App. Div. 1982). Accordingly, when a non-tenured staff member challenges a board's decision to terminate his employment on the grounds that the reasons provided by the board are not supported by the facts, he is entitled to litigate that question only if the facts he alleges, if true, would constitute a violation of constitutional or legislatively-conferred rights. *Jamie Truncellito v. Bd. of Educ. of the Twp. of Lyndhurst, Bergen Cty.*, Commissioner Decision No. 271-19+ (December 3, 2019) (citing *Guerriero v. Bd. of Ed. of the Borough of Glen Rock*, decided by the State Board of Education February 5, 1986, *aff'd* Docket #A-3316-85T6 (App. Div. 1986)). As the ALJ noted, petitioner has not asserted any constitutional claims or alleged a violation of legislatively-conferred rights. Furthermore, any violations by the Board regarding petitioner's evaluations do not entitle him to the relief he is seeking. *Dore*, *supra*. The Commissioner does not find petitioner's exceptions persuasive, as they improperly attempt to place the burden on the Board to demonstrate a justification for the non-renewal, when the well-established standard

clearly requires petitioner to demonstrate a violation of his constitutional or legislatively-conferred rights – which he has failed to do.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board's motion for summary decision is granted and its decision to not renew petitioner's contract is affirmed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 12, 2021
Date of Mailing: July 19,2021

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 10105-2020
AGENCY DKT. NO. 135-6/20

KENYA MONCUR,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner (Schwartz Law Group, attorneys)

Ramon Rivera, Esq., for respondent (Scarinci and Hollenbeck, attorneys)

Record Closed: May 14, 2021 Decided: May 26, 2021

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, Kenya Moncur, a former non-tenured Supervisor of Mathematics for the East Orange School District, challenges the non-renewal of his employment. He urges that the reasons offered for his termination were specious, rendering the actions of the East Orange Board of Education ("the Board") arbitrary, capricious, and unreasonable. Moncur seeks reinstatement and back pay.

PROCEDURAL HISTORY

This matter arose with the filing of a petition of appeal with the Commissioner of Education ("the Commissioner") on June 19, 2020. An answer was filed by the Board on September 18, 2020, and the matter was transmitted to the Office of Administrative Law ("OAL") as a contested case on October 20, 2020. The Board filed a Motion for Summary Decision on April 15, 2021. Moncur opposed the Motion via brief and certification filed on April 22, 2021. The Board replied to the opposition on May 14, 2021, at which time the record closed.

FINDINGS OF FACT

The salient facts are uncontroverted, and I **FIND**:

Moncur began his employment with the Board in or about August 2016, when he was retained to serve as an Elementary Math Supervisor. He remained continuously employed in this capacity through the end of the 2019-2020 school year. On April 27, 2020, Moncur received a letter from Assistant Superintendent of Schools, Anita Champagne advising that a recommendation for nonrenewal had been forwarded to Labor Relations "based on but not limited to your overall performance, professionalism, and/or attendance." On April 28, 2020, Superintendent of Schools Kevin West wrote to Moncur and advised that his employment would not be renewed. On May 1, 2020, in response to Moncur's request for a statement of reasons for his nonrenewal, West advised that District mathematics scores under Moncur's leadership had "not shown significant improvement on State Standardized Assessments aligned to the [District's] expectations and standards of excellence." Moncur requested and was granted an appearance before the Board. By letter dated May 14, 2020, he was advised that the Board had declined to overturn the Superintendent's decision to non-renew his employment.

A chart attached to the Board's submission reveals that in the third, fourth and fifth grades, grades under Moncur's leadership, the percentage of students who met or exceeded expectations on Standardized Tests remained low; less than 50% in all the

grades, and as low as 38% in third grade.[1] Moncur does not challenge these figures, but argues that he received no indication that his supervisors were dissatisfied with his performance generally; or were specifically unhappy with that performance relative to the test scores achieved by elementary age students in East Orange. Moncur notes that throughout his employment with the Board he received evaluations that rated his work as effective or highly effective; none contained any criticism of his work relative to student test scores. And he points out that Standardized Test Scores remain unimproved in East Orange in the higher grades as well.

In March 2020, schools throughout New Jersey moved to remote instruction due to the COVID-19 pandemic. East Orange closed its doors to in-person instruction effective March 17, 2020. Guidance from the Department of Education provided that non-tenured educators were to earn a summative evaluation rating based only on observations completed prior to school closure. The guidance document also provided for a minimum of two observations; if two were not completed prior to COVID, the district was to reach out to the Department for further guidance. Although Moncur urges that he received no evaluations or observations for 2019-2020 school year prior to the closing of school in March 2020, he did receive an evaluation for the period from July 1, 2019 through November 30, 2019, although it was finalized on March 20, 2020. And on March 20, 2020, he also received a composite evaluation score for the period ending on December 5, 2019. Moncur likewise received an observation finalized on April 7, 2020, for the period ending on March 24, 2020, thus encompassing a few days after school was closed.

CONCLUSIONS OF LAW

N.J.A.C. 1:1-12.5(b) provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which

[1] The Board's brief cites different, lower percentages. I have relied on the figures in the exhibit attached to the Board's submission, which counsel certifies is an accurate copy of an excerpt from the 2018-2019 New Jersey School Performance Report for the East Orange schools.

provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'Fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 252. I **CONCLUDE** that this matter is ripe for summary decision, and that the Board is entitled to judgment as a matter of law.

In accordance with N.J.S.A. 18A:28-5(b)(1), a teaching staff member will earn tenure upon employment for four consecutive years, together with reemployment for the fifth year. Moncur had not yet earned tenure when his employment was terminated. But having commenced his employment with the 2016-2017 school year, he would have done so had he been reemployed for the 2020-2021 school year. Moncur's demand for reinstatement is thus tantamount to a request that the Commissioner afford him that which the Board declined to give, tenured employment in the East Orange Public Schools.

It is axiomatic that a local school board has virtually unlimited discretion in hiring or renewing non-tenured teaching staff members. RaShawn Adams v. Trenton Board of Educ., Comm'r (August 13, 2008), <http://njlaw.rutgers.edu/collections/oal/>, citing Dore v Bedminster Bd. of Educ., 185 N.J. Super. 447 (App. Div. 1982). As the Appellate Court held in Dore, "absent constitutional constraints or legislation affecting the tenure rights of [teaching staff members], local boards of education have an almost complete right to terminate the services of a [teaching staff member] who has no tenure and is regarded as undesirable by the local board." Dore v. Bedminster Bd. of Educ., 185 N.J. at 456. Indeed, "a non-tenured teaching staff member challenging a board's decision to terminate his employment on the grounds that the reasons given by the board are not supported by the facts is entitled to litigate that question only if the facts he alleges, if true, would constitute a violation of constitutional or legislatively conferred rights." Adams v. Trenton Bd. of Educ., citing Guerriero v Board of Education of the Borough of Glen Rock, State Board, (February 5, 1986), aff'd Docket #A-3316-85T6 (App. Div. 1986) <http://njlaw.rutgers.edu/collections/oal/>; John Kufel, Jr. v Board of Education of the Union County Vocational-Technical School District, 96 N.J.A.R. 2d (EDU) 446; Randy Pratt v Board of Education of the Borough of Butler, Morris County, State Board, (January 6, 1999) <http://njlaw.rutgers.edu/collections/oal/>.

Moncur has raised no claims of constitutional dimension, nor has he alleged a violation of legislatively conferred rights. Rather, he is aggrieved because he was terminated after receiving good evaluations, none of which raised a concern about low test grades. I **CONCLUDE** that even if the allegations of the petition are true, the Board has engaged in no conduct that allegedly violated Moncur's constitutional or legislatively conferred rights. The Board is entitled to the relief it seeks via this Motion.

The argument that some relief should flow from the Board's failure to comply with either statute, regulation, or informal Department of Education guidance relative to the evaluations and observations of Moncur's performance is a nonstarter. The school laws include requirements for evaluation of staff. See: N.J.S.A. 18A:27-3.1; N.J.A.C. 6A:10-2.4; N.J.A.C. 6A: 10-6.2. But it is well-established that a lack of strict compliance with these requirements does not give rise to reinstatement or a financial award. Dore v.

Bedminster Bd. of Educ., 185 N.J. at 455. See also: Tuck-Lynn v. The State Operated School District of the City of Newark, 201 NJ Unpub. LEXIS 518 (App. Div., March 3, 2011). I thus **CONCLUDE** that, even if assuming for argument's sake that the Board, through its administration, failed to properly or timely complete Moncur's evaluations, such a failure would not give rise to the relief sought by Moncur via this petition.

ORDER

Based on the foregoing, it is **ORDERED** that Summary Decision is granted in favor of the Board, and that the petition of appeal is **DISMISSED**.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 26, 2021

DATE

ELLEN S. BASS, Acting Director & Chief ALJ

Date Received at Agency: May 26, 2021

Date Mailed to Parties: May 26, 2021

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147-21

NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

IN THE MATTER OF THE TENURE HEARING OF:

UNION COUNTY EDUCATIONAL SERVICES
SCHOOL DISTRICT, UNION COUNTY

Petitioner

AND

ANN MARIE CASEY

Respondent

DECISION APPROVING WITHDRAWAL OF TENURE CHARGES

AGENCY DOCKET NO. 155-7/20

Before
James W. Mastriani
Arbitrator

Appearances:

For the Petitioner:
Eric L. Harrison, Esq.
Brent Pohlman, Esq.
Methfessel & Werbel, PC

For the Respondent:
Michael T. Barrett, Esq.
Bergman & Barrett

On July 27, 2020, I was appointed by the New Jersey Department of Education, Bureau of Controversies and Disputes to serve as arbitrator pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012, c. 26 and P.L. 2015, c. 109, to hear and make a final determination on tenure charges filed by the Union County Educational Services School District [the "Petitioner"] against tenured teacher Ann Marie Casey [the "Respondent"]. Upon receipt of that appointment, I reviewed the certified tenure charges and the answer opposing the charges, as well as all documentation accompanying those submissions. Thereafter, on August 11, 2020, I convened a conference call with counsel for the parties to discuss the issues presented in the submissions and the procedures to be used to develop a record.

On August 17, 2020, counsel for Petitioner accurately summarized the discussions that ensued during the August 11, 2020 telephone conference:

> Please find this correspondence as a confirming letter regarding our conversation during the initial planning conference that took place telephonically on August 11, 2020. In the course of this conversation counsel for Ms. Casey advised that his client had still not received a response from TPAF regarding a decision or even the status of her disability pension application. In the interest of trying to see if this dispute could be resolved amicably and without the need to incur unnecessary expenses all parties agree that the tenure arbitration should be stayed for a reasonable period of time to see if TPAF will render a decision with respect to Ms. Casey's application. It is believed by all involved that once a decision on the application is reached this dispute will be resolved. In exchange for this tolling or stay Ms. Casey is willing to waive any claim that she has for unpaid wages during the distance learning period of March

15, 2020 through June 20, 2020 as well as from September 1, 2020 through October 5, 2020.

The parties will reconvene a teleconference on October 5, 2020 to discuss the status of the disability pension application and to determine if this matter can be resolved without a full tenure hearing.

Due to the uncertainty as to the timing of the decision that TPAF was anticipated to issue, an extension of time was requested, and granted, to allow for a determination to be made by TPAF. An additional telephone conference with counsel on October 5, 2020 was held confirming that the application for disability pension remained active and pending determination.

On June 3, 2021, the Board of Trustees of the TPAF, in pertinent part, notified Respondent that "at its meeting of June 3, 2021 considered and approved your application for Accidental Disability retirement benefits effective February 1, 2021 under Maximum pursuant to N.J.S.A. 18A:66-39 and relevant case law."

On July 6, 2021, Respondent notified Petitioner that:

I Ann Marie Casey here by resign from my appointment as a Special Education teacher at Union County Educational Services Commission due to a Disability Retirement.

Based on Respondent's letter of resignation, the Petitioner, the Union County Educational Services Commission, accepted the resignation and formally

notified this arbitrator on July 7, 2021 of its decision to withdraw the tenure charges.

The arbitrator is required under N.J.A.C. 6A:3-5.6 to approve the proposed withdrawal of tenure charges and while doing so, address the standards established by the State Board of Education in the matter intitled In re Cardonick (1990 School Law Decision [S.L.D.] 842, 846). After review, I have approved the withdrawal for the reasons that follow.

The nature of the charges are substantially related to the subject matters raised in Respondent's application for a disability pension. That application was reviewed and approved by the Board of Trustees of the TPAF. Respondent's receipt of approval resulted in her resignation from employment. Upon receipt of the resignation, the Petitioner accepted the resignation and proposed withdrawal of the tenure charges. The record before me is clear that Respondent entered her resignation, and the Petitioner's proposed withdrawal of the tenure charges reflected a full and complete understanding of their respective rights that existed at the time of stipulation to hold the tenure charges in abeyance through the time of the TPAF decision.

I find the withdrawal of the tenure charges is fully in line with the public interest, as well as the intent of the Petitioner and Respondent. Respondent is no longer employed and is on a State approved disability pension. This being the case, Petitioner is without any logical or rational reason to pursue the tenure

charges and need not be compelled to expend public funds to pursue unnecessary litigation. Moreover, no issues appear in the tenure charges that would justify the pursuit of an arbitral determination on any potential disputed issue which would further the interests of the Petitioner, Respondent, the public or any agency of the government.

Accordingly, and based upon all of the above, I approve the Petitioner's proposal to withdraw the tenure charges that resulted in the July 27, 2020 appointment by the New Jersey Department of Education, Bureau of Controversies and Disputes.

Dated: July 13, 2021
Lincroft, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth }ss:

On this 13th day of July, 2020, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Gretchen L Boone
Notary Public
New Jersey
My Commission Expires 8-24-2022
No. 50066778

148-21

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

July 16, 2021

VIA EMAIL
Ashley E. Malandre, Esq.
Methfessel & Werbel
2025 Lincoln Highway, Suite 200
P.O. Box 3012
Edison, New Jersey 08818

Richard Friedman, Esq.
Zazzali, Fagella, Nowak, Kleinbaum and Friedman
150 West State Street
Trenton, New Jersey 08608

Re: *Robert Strauss v. Board of Education of the Borough of Metuchen, Middlesex County, Agency Dkt. No. 246-12/20.*

Dear Counsel:

I have reviewed the papers filed in connection with respondent's request for interlocutory review of Administrative Law Judge Kim C. Belin's Order denying respondent's motion to dismiss. Upon full consideration of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, respondent's request for interlocutory review is hereby denied.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

AAM/JKH
c: Kim C. Belin, Administrative Law Judge
Clerk, Office of Administrative Law

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New Jersey Commissioner of Education

Decision

Leonor Alcantara, individually and as guardian *ad litem* for E.A., et al,

Petitioners,

v.

David Hespe, Commissioner of Education; New Jersey State Board of Education; and the New Jersey State Department of Education,

Respondents.

Synopsis

Petitioners – who include parents of students in the Lakewood Public School District (Lakewood) – alleged that the funding formula under the School Funding Reform Act, *N.J.S.A.* 18A:7F 43 - to -70 (SFRA) is inadequate in regard to Lakewood because it does not deliver sufficient funding to provide the district's students with a thorough and efficient education (T&E). The petitioners attribute this shortfall to the extraordinary costs that Lakewood incurs by providing transportation and special education services to a large number of resident students who attend private schools.

The ALJ found, *inter alia*, that: under the N.J. Supreme Court's *Abbott* and *Bacon* decisions, T&E is measured through a combination of factors, ranging from test scores to dropout rates to diversity of course offerings; by most of these measures, the education received by Lakewood's students is not constitutionally adequate; petitioners have failed to show that the SFRA is solely or significantly responsible for Lakewood's inability to provide its students with T&E; Lakewood's failure to raise taxes as permissible under the SFRA reduced its ability to take necessary steps to provide T&E; Lakewood has not shown that rising transportation costs are totally attributable to an increase in the number of nonpublic school students, nor that the district has done everything it can to cut down transportation costs; Lakewood has failed to develop strategies to educate more special education students in district and has not made progress towards a comprehensive preschool program for at-risk children. The ALJ concluded that Lakewood has been unwilling or unable, on its own, to provide T&E to its students but such failure cannot be attributed to the SFRA. Accordingly, the ALJ recommended that the Commissioner conduct a needs assessment for Lakewood similar to the study conducted in 2009 following the *Bacon* decision.

Upon review, the Commissioner, *inter alia*: disagreed with the ALJ's determination that Lakewood is not providing its students with T&E, but agreed that petitioners have failed to show that the SFRA is responsible for Lakewood's deficiencies; notwithstanding this determination, in light of the factual record elicited by the OAL, the Commissioner directed the Department to conduct a comprehensive review of the District in order to assess its compliance with the quality performance indicators in accordance with *N.J.A.C.* 18A:7A-11. In so doing, the Commissioner acknowledged Lakewood's educational shortcomings but pointed out that the deficiencies do not rise to the level of unconstitutional; further, the SFRA is constitutional as applied to Lakewood.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

149-21

OAL Dkt. No. EDU 11069-14
Agency Dkt. No. 156-6/14

New Jersey Commissioner of Education

Final Decision

Leonor Alcantara, individually and as Guardian ad Litem for E.A.; Leslie Johnson, individually and as Guardian ad Litem for D.J.; Juana Perez, individually and as Guardian ad Litem for Y.P.; Tatiana Escobar; Henry Moro and Ira Schulman, individually and as Guardian ad Litem for A.S.,

Petitioners,

v.

David Hespe, Commissioner of the New Jersey Department of Education; New Jersey State Board of Education; and New Jersey Department of Education,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the parties and participants pursuant to *N.J.A.C.* 1:1-18.4, and their replies thereto.[1]

Petitioners in this matter are parents of children who attend Lakewood Township's public schools. In a 2014 petition[2] filed against the New Jersey Commissioner of Education, the New Jersey Department of Education (Department), and the New Jersey State Board of Education (collectively, "Respondents"), petitioners alleged that the Lakewood

[1] Participant Lakewood Township Board of Education did not file a reply.

[2] Petitioners amended their petition on September 4, 2018.

Township Board of Education (Lakewood) is unable to provide its public school students with a thorough and efficient education (T&E) because it does not receive sufficient funding under the School Funding Reform Act, *N.J.S.A.* 18A:7F-43 to -70 (SFRA). Petitioners maintain that the SFRA fails to account for the amount the district pays in special education and transportation costs for the large number of resident students who attend private schools. Subsequently, Lakewood and Paul Tractenberg, Esq., joined this matter as participants.[3][4]

Following a hearing, the Administrative Law Judge (ALJ) found that Lakewood's public school students are not receiving T&E; however, petitioners failed to meet their burden of demonstrating that the SFRA is solely or significantly to blame. The ALJ found that the population boom in Lakewood Township over the past twenty years has resulted in a rise in attendance at private schools, totaling almost 30,000 non-public school students compared to approximately 6,000 students who attend Lakewood public schools. This causes a strain on the district financially, as the private school students are entitled to transportation at Lakewood's expense; further, tens of millions of dollars are spent each year to send special education students to out-of-district placements.

The ALJ concluded that Lakewood's public school students are not receiving T&E as they are not being prepared for college, career and life under the New Jersey Student Learning Standards. The ALJ found that the education received by Lakewood's students is not constitutionally adequate based on cuts in industrial arts and auto mechanics, foreign language programs (leaving Spanish as the sole option), low standardized test scores, chronic absenteeism

[3] Mr. Tractenberg is a Professor of Law Emeritus and Board of Governors Distinguished Service Professor at Rutgers University. He established the Education Law Center, the Institute on Education Law and Policy, and the Center for Diversity and Equality of Education.

[4] While Lakewood initially declined to join this matter as a party and joined instead as a participant in 2016, Lakewood subsequently filed a motion to intervene as a party at the start of the hearing in 2018, which was denied.

rates, increased dropout rates, low graduation rates, and low New Jersey Quality Single Accountability Continuum scores. Additionally, the ALJ considered the increased rates of teacher turnover, low per pupil classroom spending and classroom salaries, and the lack of a preschool program for three-year-old general education students in determining that Lakewood students are not receiving T&E.

Nevertheless, the ALJ found that the SFRA is not unconstitutional as applied to Lakewood and that Lakewood has failed to take steps to increase its ability to provide T&E. For example, the ALJ explained that Lakewood's transportation costs have continued to increase annually from $23M in 2014-15 to $31M in 2018-19, and there is little evidence that Lakewood has done everything possible to cut down these costs; further, there is no evidence that these rising costs are solely due to the increasing number of nonpublic school students in the district. Additionally, the ALJ noted that a large portion of Lakewood's budget is dedicated to special education due to the number of out-of-district placements (specifically, 343 special education students were placed in private schools for a cost of $33M in 2018-19), but the record lacks evidence of any steps taken to set up a district-run program to save money by educating special education students in-district, as the Department has urged. The ALJ also reasoned that Lakewood has not made efforts to raise taxes to the extent permitted under the SFRA and does not offer a comprehensive preschool for three-year-old general education students. Further, the ALJ added that other legislation outside the SFRA has affected Lakewood financially, such as a tax levy cap on school districts and the annual Appropriations Act.

Finally, to address the deprivation of T&E, the ALJ recommended the Department to conduct a needs assessment with the goal of assessing Lakewood's educational needs and identifying ways to successfully address same. Through the assessment, the ALJ

hopes that the Department's transportation, special education, and preschool experts will be able to help identify strategies to deliver T&E to Lakewood's public school students.

In their submissions, petitioners agree with the ALJ that Lakewood students are not receiving T&E. Petitioners maintain that Lakewood's once rich curriculum has been reduced to bare-bones. Test scores have fallen, college enrollment is low, and any reported gains in those figures are insignificant. Petitioners explain that the district consists of low-income residents with a high minority population and limited English proficiency. Further, while Lakewood may offer educational opportunities to its students in areas such as vocational education, technology and the arts, petitioners argue that such programs provided through federal funding cannot be considered when evaluating whether students are receiving T&E as they are not funded through the district's operating budget.

While agreeing that Lakewood does not provide its students with the constitutionally required T&E, petitioners take exception to the ALJ's finding that the SFRA is not to blame for Lakewood's inability to provide T&E. First, petitioners argue that the ALJ applied the incorrect standard when she found that petitioners did not meet their "heavy burden," and instead should have applied a preponderance of the evidence standard. Petitioners then argue that the ALJ erred in finding that the district is not taxing up to its local fair share. According to petitioners, the ALJ improperly faulted Lakewood for not raising taxes by the maximum amount allowed during prior years when it did not need the additional funding, as well as for the failure of voters to pass a referendum. With respect to the Appropriations Act, petitioners maintain that they would not have had enough funding even with the amount that was cut in appropriations. Additionally, petitioners disregard the ALJ's findings on preschool because it was not addressed by the parties.

Petitioners emphasize that the SFRA provides funding based on 6,000 public school students, yet Lakewood is also required to pay transportation costs for an additional 30,000 private school students. Petitioners argue the ALJ erred in finding that rising transportation expenses are not totally attributable to the increasing number of nonpublic students. The record demonstrates that the district adds 2,500 to 3,000 nonpublic students each year, and the state monitors testified that Lakewood is operating its pupil transportation as efficiently as it can. Additionally, petitioners point out that the state monitors have not found ways to cut costs in special education. Finally, petitioners argue that the provision of advance aid is unsustainable and is a disguise for the failure to provide T&E; the ALJ should have found that the loans, as applied to Lakewood, are inconsistent with T&E. Accordingly, petitioners urge the Commissioner to reject the portion of the Initial Decision finding that SFRA is not unconstitutional as applied to Lakewood.

In their submissions, respondents take exception to the ALJ's conclusion that Lakewood is unable to provide T&E. Respondents argue that with the Department's assistance, the district has shown steady improvement on standardized test scores and graduation rates. Additionally, they contend that the district offers classes and opportunities to students in basic skills, vocational, arts and technology to prepare them for college, career and life. As such, respondents urge the Commissioner to reject this part of the Initial Decision.

Respondents, however, agree with the ALJ that the SFRA is not unconstitutional as applied to Lakewood. They argue that the ALJ appropriately applied a heavy burden on petitioners to demonstrate that the SFRA was solely or significantly to blame for any failure to provide T&E. Respondents are in accord with the ALJ's determination that Lakewood's fiscal mismanagement, general financial condition, and locally made choices have impacted

Lakewood's ability to provide a constitutionally-mandated education. Accordingly, respondents urge the Commissioner to reject the ALJ's conclusions regarding T&E.

Participant Tractenberg makes arguments similar to those of the petitioners. Specifically, he agrees with the ALJ that Lakewood cannot provide T&E to its public school students, but argues that: the ALJ applied the wrong burden with respect to whether the SFRA is constitutional; the ALJ's findings of fact do not support her conclusion that the SFRA is not significantly responsible for Lakewood's inability to provide T&E, and the ALJ's alternative explanations for Lakewood's financial situation are unsupported. Tractenberg further contends that the needs assessment ordered by the ALJ will not be helpful, and instead urges the Commissioner to take steps to forgive Lakewood's advance state aid repayments, support legislative action to adjust the SFRA's formula to respond to Lakewood's unique demographics, seek statutory changes so that the members of Lakewood's Board of Education accurately represents the public-school community rather than people who do not send children to public school, and consider a State takeover of the district.

Lakewood requests that the Commissioner reopen this matter and allow it to proceed as an intervenor – rather than a participant – so that it may present additional evidence of the significant progress and improvements the Board has made toward delivering T&E.[5] Lakewood contends that it is providing T&E to its students, but that the funding formula of the SFRA is unconstitutional as applied to Lakewood.

Upon review of the record in this matter, the Commissioner disagrees with the ALJ that Lakewood is not providing T&E to its public school students. While the Commissioner acknowledges the ALJ's findings regarding the district's shortcomings, the record does not

[5] The Commissioner denies Lakewood's request to reopen the case as a full record exists in this matter and such action would cause undue delay.

support a conclusion that Lakewood is failing to provide T&E. Notwithstanding, in light of the factual record elicited by the OAL, the Department is directed to conduct a comprehensive review of the District's organization, structure and policies to assess its compliance with the quality performance indicators in accordance with *N.J.A.C.* 18A:7A-11 to determine how the District can improve its educational program.

In *Abbott v. Burke (Abbott II)*, 119 *N.J.* 287 (1990), the New Jersey Supreme Court compared the educational opportunities available at affluent suburban schools and poorer urban districts to evaluate whether the urban schools were receiving a constitutional education. The Court looked at educational inputs, such as access to computers, science laboratories, foreign language instruction, music and art programs, vocational programs, and physical education. *Id.* at 359-62. The Court also explained that adequate physical facilities are also necessary for T&E so that children have an appropriate environment where they can learn. *Id.* at 362-63. Additionally, T&E can be measured by test scores, dropout rates, and attendance at college, in addition to teacher-student ratios and experience level of the staff. *Id.* at 366-68; 391. Similarly, in *Bacon, et al. v. New Jersey State Department of Education*, State Board Decision No. 4-03, decided January 4, 2006 at 39-40, the New Jersey State Board of Education evaluated whether districts were providing T&E and considered standardized test scores, dropout rates, and college attendance, in conjunction with "teacher-student ratios and the education and experience level of the professional staff, as well as facilities to accommodate appropriate class sizes, science labs, media centers and libraries, and the availability of advanced placement courses and programs for gifted students, art and music programs and quality physical education programs."

While Lakewood's standardized test scores are below the State average, they have shown consistent improvement. For example, in the 2014-15 school year, 23 percent of high

school students met or exceeded expectations on the PARCC English assessment, and 5 percent met or exceeded expectations in math. By 2018-19, those scores rose to 33 percent for English and 21 percent in Math. Additionally, graduation rates were close to 75% in the 2014-15 school year and rose to 81% in 2018-19. With the exception of absenteeism, Lakewood has also met all of its Every Student Succeeds Act (ESSA) accountability targets. Additionally, while some of the educational opportunities at Lakewood have suffered cuts, including programs in industrial arts and auto mechanics, Lakewood still offers a range of classes and programs. Lakewood offers all of the required classes for graduation, and also offers a gifted program beginning in elementary school, along with high school Advanced Placement (AP) classes across several subjects, including calculus, English, Physics I and II, Spanish, and U.S. History. Lakewood offers art and music programs at every level, including elementary school. Specifically, the district offers band, chorus, and orchestra, as well as music lessons beginning in fourth grade. Furthermore, computer skills and library skills classes are offered beginning at the elementary level, and guidance counselors are available at all grade levels.[6] While Lakewood only offers Spanish as a foreign language, it does provide opportunities for students to study other foreign languages online. Although Lakewood does have a high rate of teacher turnover and the student-teacher ratio in Lakewood's schools is higher than the State average, Lakewood did meet its ESSA facility accountability targets, with the exception of the middle school.

When considering the standards articulated in *Abbott* and *Bacon*, the Commissioner finds that the education provided by the Lakewood school district meets the constitutional threshold as students are prepared for college, career, and life under the NJSLS.

[6] Additional programs that are offered at Lakewood through Perkins or Title 1 grants include robotics, coding, horticulture, culinary, fashion and apparel, graphics design, photography and film, video technology, business data entry, and a technology classroom that has 3D printers, Apple TV, and a Mac Air Cart.

The following excerpt from *Abbott II* demonstrates the degree of deficiencies necessary to declare a failure to provide T&E:

> In an elementary school in Paterson, the children eat lunch in a small area in the boiler room area of the basement; remedial classes are taught in a former bathroom. In one Irvington school, children attend music classes in a storage room and remedial classes in converted closets. At another school in Irvington a coal bin was converted into a classroom. In one elementary school in East Orange, there is no cafeteria, and the children eat lunch in shifts in the first 1 floor corridor. In one school in Jersey City, built in 1900, the library is a converted cloakroom; the nurse's office has no bathroom or waiting room; the lighting is inadequate; the bathrooms have no hot water (only the custodial office and nurse's office have hot water); there is water damage inside the building because of cracks in the facade; and the heating system is inadequate.
>
> [*Abbott II,* 119 *N.J.* at 363.]

In evaluating the totality of the evidence, the Commissioner finds that while Lakewood may be struggling to provide its students with the premiere level of education that many have come to expect in New Jersey, these deficiencies do not rise to a constitutional deprivation. The record reflects that standardized test scores are below State averages, but the district is showing slow but steady improvement in that area. Lakewood offers a selection of educational programs, including multiple AP classes, as well as programs in music and art that begin at the elementary school level, which are more comprehensive and wide-ranging than those offered in the *Abbott* and *Bacon* districts. While some programs have suffered cuts, students still have a diverse array of educational course opportunities. The Commissioner acknowledges the lack of experience in Lakewood's teachers, however, in consideration of recognized teacher shortages, the improvement that the district has shown in test scores and graduation rates, together with the district's diverse curriculum, the Commissioner cannot conclude that Lakewood's students are not receiving T&E.

Because petitioners failed to meet the threshold inquiry of establishing Lakewood's failure to provide T&E, the Commissioner need not reach the issue of the constitutionality of the SFRA.[7] Nevertheless, the Commissioner agrees with the ALJ, for the reasons thoroughly set forth in the Initial Decision, that the SFRA is constitutional as applied to Lakewood.

Accordingly, the Initial Decision of OAL is rejected in part and adopted in part for the reasons set forth above. The petition is hereby dismissed.

IT IS SO ORDERED.[8]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 16, 2021
Date of Mailing: July 16, 2021

[7] For these same reasons, the Commissioner need not reach the issue raised in petitioners' exceptions regarding the burden of proof to be applied to the question of whether the SFRA is unconstitutional as applied to Lakewood.

[8] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11069-14

AGENCY DKT. NO. 156-6/14

LEONOR ALCANTARA, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR E.A.; LESLIE JOHNSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR D.J.; JUANA PEREZ, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR Y.P.; TATIANA ESCOBAR; HENRY MORO AND IRA SCHULMAN INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR A.S.,[1]

Petitioners,

v.

DAVID HESPE, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF EDUCATION[2]; THE NEW JERSEY STATE BOARD OF EDUCATION; AND THE NEW JERSEY DEPARTMENT OF EDUCATION,

Respondents.

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[1] Counsel for petitioners advised that petitioners included a student and parents of students who attend the Lakewood Township public schools and a parent of a nonpublic school student in Lakewood Township. At some point, Moro and Johnson appear to have withdrawn from the action.

[2] In 2017, Commissioner Hespe was succeeded by Commissioner Kimberly Harrington; in 2018, she was succeeded by Commissioner Lamont Repollet; on July 1, 2020, he was succeeded by Acting Commissioner Kevin Dehmer; and finally, on October 20, 2020, he was succeeded by current Acting Commissioner Dr. Angelica Allen-McMillan.

Arthur Lang,[3] Esq., and **Daniel L. Grossman**,[4] Esq., appearing for petitioners

Jennifer Hoff, **Lori Prapas**,[5] **Lauren Jensen**, **Geoffrey N. Stark**, and **Sydney Finkelstein**, Deputy Attorneys General, appearing for respondents (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Michael Inzelbuch, Esq., appearing for participant Lakewood Township Board of Education

Paul L. Tractenberg, Esq., appearing as a participant

Record Closed: November 28, 2019 Decided: March 1, 2021

BEFORE **SUSAN M. SCAROLA**, ALJ (Ret., on recall):

STATEMENT OF THE CASE

Petitioners, who included parents of children who attend Lakewood Township's public schools, filed a petition of appeal against respondents Commissioner of Education, the New Jersey Department of Education (DOE), and the New Jersey State Board of Education (collectively respondents), in which they allege that the funding formula under the School Funding Reform Act, N.J.S.A. 18A:7F-43 to -70 (SFRA), is unconstitutional as applied to Lakewood Township's (Township) public school students, such that the Lakewood Board of Education (Lakewood, BOE or district)[6] does not receive sufficient funding under the SFRA to provide its public school students with a thorough and efficient education (T&E) because the SFRA does not take into account the extraordinary costs

[3] Mr. Lang is also a teacher in the Lakewood public school district.
[4] Mr. Grossman, who was assisting Mr. Lang, was permitted to withdraw as co-counsel on January 10, 2019.
[5] Ms. Prapas participated in the hearing but, sadly, passed away before the completion of this matter.
[6] The Lakewood Township Board of Education and the Lakewood school district are referred to as Lakewood, BOE or district; the geographic entity of Lakewood Township is specifically referred to as Lakewood Township or Township.

that the district incurs to provide transportation and special education services to a large number of students who attend private schools.

Respondents contend that Lakewood's students are, in fact, receiving T&E, as measured by the New Jersey Student Learning Standards; that respondents have, over the years, taken extraordinary actions, including the appointment of State monitors in Lakewood and the provision of advance State aid payments to Lakewood to ensure that the district's students receive T&E; and that the district's financial difficulties are due to reasons other than the SFRA.

The issue is whether the children who attend public school in the district are receiving a constitutionally-required T&E and, if not, whether the reason for such deprivation is, in significant part, because the district receives insufficient funding under the SFRA to deliver T&E to its students. The school years at issue are 2014-2015 through 2018-2019.

PROCEDURAL HISTORY

The original Petition of Appeal was filed with the Commissioner on June 24, 2014.[7]

On September 2, 2014, the respondents filed a motion to dismiss in lieu of an answer. The Commissioner transmitted the matter to the Office of Administrative Law (OAL), where it was filed on September 4, 2014, as a contested case.[8] N.J.S.A. 52:14B-

[7] The petition asked the Commissioner for a declaratory ruling that all of Lakewood's students are entitled to the same services to which students similarly situated elsewhere in New Jersey are entitled, and to foreclose the possibility of a remedy that disparately impacts the children of Lakewood or that forces them to forego their rights and privileges under the current law.

[8] N.J.A.C. 1:1-2.1 defines a "contested case" as "an adversary proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing." Moreover, "[t]he required hearing must be designed to result in an adjudication concerning the rights, duties, obligations, privileges, benefits or other legal relations of specific parties over which there exist disputed questions of fact, law or disposition relating to past, current or proposed activities or interests" and "[c]ontested cases are not informational nor intended to provide a forum for the expression of public sentiment on proposed agency action or broad policy issues affecting entire industries or large, undefined classes of people." Ibid.

1 to -15; N.J.S.A. 52:14F-1 to -13. The motion was opposed by reply filing on October 22, 2014.

On January 14, 2015, Paul L. Tractenberg, Esq., filed a motion on his own behalf for leave to participate in the proceedings pursuant to N.J.A.C. 1:1-16.6 and in opposition to the motion to dismiss.[9] On March 11, 2015, the Hon. John Kennedy, ALJ, granted Professor Tractenberg's motion to participate.

Following the submission of briefs on the motion to dismiss and oral argument held on June 9, 2015, Judge Kennedy denied the motion to dismiss on July 24, 2015. He concluded that the petitioners had standing to challenge the SFRA and that the matter was appropriately brought in the OAL.

On or about February 19, 2016, the petitioners filed a motion for summary decision contending that a hearing was not necessary, as all data necessary to rule on the matter was in the public record. On April 14, 2016, the respondents filed opposition to the motion, and sought to join Lakewood BOE as a necessary party. The BOE voted to not participate in the action. On July 19, 2016, the Hon. Solomon A. Metzger, ALJ, t/a, issued an order denying the motion for summary decision. He noted that "Lakewood's demographics pose[d] singular problems for the public school budget, but that that fact alone was not sufficient on its face to establish a constitutional level of deprivation."

On October 4, 2016, the BOE filed a motion to participate, which was granted on November 21, 2016.

In May 2017, the petitioners filed a motion for emergency relief related to the district's 2017–2018 budget deficit. Respondents filed opposition on May 23, 2017.[10] That motion was withdrawn when the budget deficit was resolved through a State aid advance.

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[9] Professor Tractenberg is Professor of Law Emeritus Board of Governors Distinguished Service Professor at Rutgers University. He established the Education Law Center, the Institute on Education Law and Policy, and the Center for Diversity and Equality of Education.

[10] The matter was re-assigned from ALJ Metzger to ALJ John Schuster. After he retired, the matter was reassigned to me in June 2017.

On October 9, 2018, the BOE'S motion to intervene as a party was denied prior to the commencement of the hearing.[11]

The hearing commenced on February 5, 2018, and continued on February 7, 12, 13, and 22, 2018. After petitioners rested their case on February 22, 2018, respondents indicated that they wished to file a motion to dismiss. Following the last hearing date, the parties attempted to enter into some stipulations of fact but were unsuccessful. Following a March 27, 2018, conference on the record, the outstanding evidentiary issues were addressed, and a briefing schedule was set for the respondents' motion.

Respondents filed their motion to dismiss the amended complaint on April 30, 2018. Petitioners and participants opposed the motion. Before it was decided, the petitioners moved to re-open their case to present the testimony of another witness, which was opposed by respondents. Following oral argument, the petitioners were ordered to file an amended petition to clarify the relief they were seeking; respondents were permitted to file an answer. Petitioners were permitted to re-open the record to allow the witness to testify, and the motion to dismiss was held until the amended pleadings and answer were filed and the witness was permitted to testify.

On September 4, 2018, the petitioners filed their second amended petition which respondents answered on September 18, 2018.[12]

On December 18, 2018, the petitioners rested their case.

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[11] The Lakewood BOE had originally taken the position that it did not want to be included as a necessary party; however, the BOE's counsel had changed since the commencement of these proceedings. No appeal was taken from the denial of the motion to intervene as a party.

[12] The second amended petition asked the Commissioner to determine: 1) That the SFRA as applied to the Lakewood School District does not provide sufficient funding to enable the school district to deliver the core curriculum content standards and extracurricular and cocurricular activities necessary for T&E; 2) That the consequential reliance upon discretionary advance State aid payments pursuant to N.J.S.A. 18A:7A-56 to provide funding for T&E does not provide T&E funding in any given school year that is certain and predictable; 3) That the constitutional imperative regarding T&E requires sufficient funding that is not discretionary; and 4) That the Commissioner recommends that this matter be remedied by the Legislature.

On January 8, 2019, the respondents' motion to dismiss was denied, and the matter continued with hearing dates on July 9, 10, 21, and 22, 2019.

On July 29, 2019, the parties were asked, as part of their post-hearing briefs, to jointly stipulate, to the maximum extent possible, certain information relating to the district for each school year at issue in this matter (2014–2015 through 2018–2019), which should have been available to them as a matter of public record.[13]

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[13] The information requested the following:

School Funding Reform Act
(1) Adequacy Budget (include calculation)
(2) Local Fair Share (include calculation)
(3) Local Tax Levy (General Fund School Levy and Total School Levy)
(4) Equalization Aid
(5) Transportation Aid (include calculation)
(6) Special Education Categorical Aid (include calculation)
(7) Total Aid

Note: Where relevant for a particular category above, include the amount in Governor's Budget Message/revised amount in Appropriations Act/amount if SFRA fully funded.

Other State and Federal Revenue Sources
(1) Title I
(2) IDEA Part B
(3) Chapter 192 (Auxiliary Services)
(4) Chapter 193 (Remedial Services)

Expenditures
(1) Total tuition costs for private school special education placements (include number of private placements)
(2) Total transportation costs (include breakdown showing amount spent on mandatory busing for public school students/mandatory busing for private school students/special education busing/courtesy busing/hazardous busing)
(3) Actual costs amount per public school pupil
(4) Total classroom instruction costs per public school pupil

Assessments and Accountability
(1) PARCC results (include state averages)
(2) Any other Statewide assessment results (include state averages)
(3) QSAC placement results in areas of instruction and program, fiscal management, governance, operations, and personnel (include state averages)
(4) Any other relevant accountability results, including CAFR's from 2014–2018.

Public School Demographics
(1) Percentage of public school pupils who are at-risk (include state average)
(2) Percentage of public school pupils who are LEP (include state average)
(3) Percentage of public school pupils who are both at-risk and LEP (include state average)
(4) Graduation rate (include state average)
(5) Dropout rate (include state average)
(6) Teacher-student ratio (include state average)
(7) Percentage of public school pupils enrolled in AP/IB courses (include state average)

On August 28, 2019, the respondents declined, stating that they would stipulate to all documents already admitted into evidence at the hearing, but would not stipulate to any additional data to be part of the record without context for its consideration.

On September 4, 2019, the petitioners provided an itemization of the information that had been requested.[14]

The record closed on November 28, 2019, after submission of post-hearing summations.[15, 16]

On December 17, 2020, participant district submitted additional documents. The DOE objected to the consideration of these documents, so they were excluded from the record.[17]

FACTUAL DISCUSSION

The following witnesses testified:

For the petitioners:

Dr. Ross Haber, Laura Winters, Robert Finger, Malka Spitz-Stein, Marcy Marshall, Dr. Danielle Farrie, David Shafter, Michael Azzara, and Melvin Wyns;

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(8) Percentage of graduates enrolled in college (include state average)

[14] The information provided by petitioners was downloaded from either the DOE's website or the district's website as information provided to the State for the receipt of aid. The respondents would not stipulate to these statistics.

[15] Extensions of time were granted for the filing of this Initial Decision, first due to an extended personal medical emergency, and then in accordance with Governor Murphy's Executive Order 127, issued April 14, 2020, created by the COVID-19 emergency which provided that deadlines for filing of a recommended decision pursuant to N.J.S.A. 52:14B-10(c) in any non-emergent contested case were extended by the number of days of the Public Health Emergency declared in Executive Order No. 103 (2020), as extended, plus an additional 90 days.

[16] Following the closing of the record, participant Lakewood BOE continued to send additional documents to the OAL over objection by the respondents. Some were duplicative of exhibits in evidence; the items that were not in evidence were not considered.

[17] The documents included a settlement agreement between the Department of Education and the Township of Lakewood Board of Education dated December 11, 2020, concerning the NJQSAC score of 2020 (which were not addressed at this hearing), and a list of state aid advances from 2014 through 2021, the amounts repaid, and the amounts outstanding.

For the respondents:
Kevin Dehmer, Christopher Soleau, Catherine Anthony, Raymond Zirilli, Robert Ortney, and Glenn Forney.

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Witnesses for petitioners:

Dr. Ross Haber, a demographic consultant with a background in education, was qualified to testify as an expert in demographics. He has a doctorate in educational administration from Teachers College, Columbia University. He has conducted 300 studies in different districts regarding enrollment projections, redistricting, facility utilization, and transportation efficiency analysis. He is not an expert in finance, and has no background in accounting, finance, or statistics. He is not a certified government financial analyst.

Dr. Haber was retained by petitioners to provide an enrollment-projection report on public and non-public schools in Lakewood Township. For his report, he relied on certain DOE data and he used the cohort survival method of projections, including United States census projections, housing construction, and births to arrive at his conclusions.[18]

Dr. Haber's report included several tables of information. Table 1 was an enrollment comparison using data from the DOE, although he was not aware that non-public schools self-report enrollment information to the DOE and are not audited. Non-public school students may include students coming in from out of the district or out of state and may be counted without their parents paying taxes to the municipality.

Using the information obtained from the Application for State School Aid (ASSA) filed by the district, Dr. Haber examined school enrollment, school facilities, and student

[18] The Cohort Survival Projection Method forecasts the future population based on the survival of the existing population and the births that will occur.

transportation. In 2011–2012, there were 25,006 school-age children, 5,229 in public school and 19,777 in non-public school.

In Haber's Table 2, he used the cohort survival method, which used the average number of students as they progress from grade to grade, and also used the migration ratio. The projections were reliable for five years. For kindergarten, he looked at live-births rates and used that data plus residential housing growth. Haber thought growth looked to be about 5,000 more students by 2021–2022.

Haber used Table 1 to predict Table 2. He said the information came from the DOE website although no sources were provided. Table 1 relied on public school ASSAs from the DOE website. He agreed that if the underlying data were not reliable, then his conclusions were not reliable. He built upon enrollment projections to predict aid, but he is not an expert in finance or State aid.

Table 2 was a comparison between public and non-public schools and was the template for Table 3, but no source was given for historical data.

Table 3 was a projection of public school students but did not include data from pre-kindergarten. Haber listed 38,841 non-public school students for 2018–2019, but his Table 4 said 33,841 non-public school students. He said this was because of a typographical error on Table 2.

New Jersey has over six hundred school districts, but no other school district has a disparity between the numbers of public school and non-public school students as Lakewood Township does. Lawrence and Hewlett, New York, also have large numbers of students attending sectarian schools, but those towns have no outnumbering of the public school students by those attending the sectarian schools.

Haber's reports project substantial change in the district. He did not report any possible sources of funding. He did not remember whether he considered that Lakewood Township had one of the lowest equalization rates. He did not consider that Lakewood

Township has one of the lowest school-tax rates. He did not consider that voters could approve paying for non-public school transportation costs.

Table 5 showed a projected expense of $38 million for transportation in 2021–2022, up from $18 million in 2015–2016. This was an estimate based on transportation eligibility, as a percentage increase in enrollment would be commensurate with an increase in transportation expenses.

For school year 2017-2018, the adequacy budget to educate the public school students in Lakewood was $117,325,784. Tuition for enrolled public school students not actually going to the public schools, such as for special education, was $37,587,808. Transportation was $38,294,730, for a combined total of $75,882,538.

Haber said Table 5 transportation expenses could be reduced if the non-public schools were built closer to homes, or if bus routes were shared. With fewer children riding on buses the cost would be less. He did not consider things that did not exist, such as a bridge over Route 9. The tuition and transportation costs in Table 5 came from the Lakewood district and the user-friendly budget. His tuition numbers were off by $3 million for 2015–2016, and he agreed that his numbers did not match up. Two-thirds of the cost of special education should be included in tuition. He agreed it was possible he was double counting tuition and services, and that he had worked with petitioners' attorney while doing his analysis.

The tuition column in tables 5 and 6 showed $28,457,996, which correlated to school year 2015–2016, but the revised column was not the actual expense. The Table 5 history and projection of tuition contained an error, perhaps in typing, and a year was missing. While the Table 5 adequacy budget that was projected was an assumption, he did not detail his method of producing adequacy amounts or the source. He held adequacy flat through 2022, but it changed year to year as the state population changed.

Table 6 concerned the adequacy amount for tuition, transportation, and other required services such as occupational therapy (OT), physical therapy (PT), speech, and other related services. He carried over the numbers.

Haber's projections were based on trends for 2018–2019, 2019–2020, and 2020–2021. He applied a percentage of the increase to a weighted number. For example, if six children in class increased to ten, that might not mean one more bus, but 54 more children might mean another bus. He applied the growth to expenditures and economies of scale. The methodology was not explained. Haber also used residential-construction approvals in his calculations but did not include that. At some point, population growth should be capped because of space.

On Table 6, it was an error where his comment said Table 4, when he meant it should be Table 6. The tuition numbers did not match up. Adequacy and transportation matched to Table 5, but the tuition did not match the actual budget. Haber assumed that part of special education was included in the adequacy budget. Table 6 showed services such as OT, PT, and speech, but speech was entirely funded. Table 6 separated the costs for services from adequacy, but Haber did not know if this was included in funding.

Table 7 was extra aid available for public school students, but he did not include extra aid in his considerations. He did not know if the State provided technology aid or security aid.

The budget included equalization aid, which was $15 million in school year 2015–2016, special-education categorical aid, extraordinary aid, categorical security of $2 million in 2015–2016, Perkins grants, and other aid of $3 million in 2016–2017. The local-tax-levy contribution was not included, but it was $90 million in 2015–2016 and was one of the lowest in the state. He did not include federal aid available to the district under federal Titles II and III, or available under Individuals with Disabilities Education Act (IDEA) aid.[19] The State provided preschool aid, Chapter 192 and 193 services, and non-

[19] Title II grants to the states provide funds for supplemental activities that strengthen the quality and effectiveness of teachers, principals, and other school leaders. The purpose of this is to provide low-income and minority students greater access to effective teachers, principals, and other school leaders. Title III funds help ensure that English Learners (ELs) attain English language proficiency and meet state academic standards.

public school textbook aid, nursing aid, vocational-technical aid and security aid.[20] Some services and tuition were included in the adequacy budget.

In Table 8, his conclusions were that enrollment was growing, and that over the next five years, the number of non-public school students would increase. At the same time, the number of students in the public schools was growing, but not as fast. Ninety percent of public school students were in need; 88% were from non-English-speaking or partial-English-speaking homes. The percentage of special-education students in the Lakewood public school district is higher than the State average. Everyone agreed that there was a relationship between finances and education. Lakewood Township ranked 555 out of 564 communities in per-capita income.

In Table 9, the tuition costs did not match, and the transportation costs did not match. The projections for school year 2020–2021 were missing. The adequacy numbers did not match other tables and budget numbers. The most accurate year was 2015–2016. He came to his conclusions by taking the average from 2015–2016 and 2016–2017, but the number was wrong. And his conclusion was based on data that did not match historical data from Table 6. The total needed in Table 4 did not match Table 7's total needed. In certain areas the data did not match up or the data was missing, or no sources were cited.

A percentage of the district's budget is a loan from the State. Transportation and special-education expenses are $60 million in the budget, leaving only $80 million when the adequacy budget says that $117 million is necessary. The SFRA law never anticipated such a disparity with transportation and special-education expenses. The district cannot properly educate public school children over next five years; their needs cannot be met in Lakewood.

[20] Chapter 192 programs provide nonpublic school students with auxiliary services such as compensatory education, English as a second language, and home instruction. Chapter 193 programs provide nonpublic school students with remedial services such as evaluation and determination of eligibility for special education and related services, supplementary instruction, and speech-language services.

The law mandated that transportation was paid to and from school only for certain non-public school students, but not all. Non-public school students were not required to get transportation unless, from kindergarten to grade eight, they lived farther than two miles from the school, and in grades nine through twelve, farther than two and a half miles from the school. Students who lived closer were not entitled to transportation. Courtesy busing for those who lived closer than those distances was not required unless the Lakewood BOE decided to provide it.

Haber did not include in his report the $16 million that Lakewood received in Chapters 192 and 193 aid in 2015–2016. Haber's report did not mention Chapter 192–193 aid that Lakewood received every year. Lakewood Township's non-public school students received Title I aid for economically disadvantaged students from the federal government.[21] Haber did not mention IDEA funding in his report.

The State provided textbook aid for non-public school students. Haber did not know if the State provided other aid, such as nursing aid or home instruction.

The user-friendly budget matched up tuition and transportation, but some of the numbers did not match for 2016–2017. He was not sure if he omitted one year from his calculations and was not sure if he had the right draft.

Haber was not familiar with the DOE definition of adequacy as used in the Formula for Success (FFS). The FFS equalization is the adequacy budget minus what the township raises (local fair share), plus categorical aid, plus other aid and Chapter 192 and 193 funding. The adequacy budget is a theoretical concept of the cost estimate necessary to provide a T&E.

Haber did not know for certain whether tuition for public school students in out-of-district placements was included in the adequacy budget for public school students and said that this might represent a possible double counting of tuition. No sources were

[21] Title I is a grant program that provides aid to low income students for educational services.

provided for the data he used for the tuition cost or transportation cost. Any projections could only be as accurate as the data used.

Haber made an assumption of enrollment increase, but not whether the adequacy budget would change. He did not consider the impact on the district if the Lakewood School Transportation Authority (LSTA)[22] program expired. He agreed that if the LSTA program were to expire, it would cost the district more money to transport students. He did not consider whether costs could be saved if Lakewood Township built a bridge over Route 9 so more students could safely walk to school and avoid a hazardous condition. Haber did not consider a raise in the school-tax levy, or whether busing children to schools closer to their homes, or whether a growing population would mean more equalization aid. If enrollment increased 10 percent, he assumed that expenditures would increase 10 percent and that the adequacy budget would go up based on enrollment, but this was not considered in his calculations.

The source of his historical transportation information was the Lakewood business office, which provided him with district summary forms. He had no idea whether they were accurate.

Haber could not predict how costs might change if the law changed. And the estimates were based on a formula that did not match up. He did not consider a bridge over Route 9 because it did not exist. Nothing showed that the private schools were located closer to where their students resided. Ninety-eight percent of students attending sectarian schools did so in certain sects and gender-specific schools.

He did not consider the factors on State aid, as he was only looking at how much it cost to educate children. He did not go to how the cost was derived. He did not consider revenue, just expenditures.

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[22] The LSTA was created pursuant to N.J.S.A. 18A:39-1d, which became effective in 2016. That law "establish[ed] a three-year nonpublic school pupil transportation pilot program" under which "a board of education of an eligible district [with more than 5,000 students attending a remote nonpublic school] shall disburse to [a] consortium [of nonpublic schools] an amount equal to the aid in-lieu-of transportation amount for each nonpublic school pupil who is attending a nonpublic school which is a part of the consortium and who is required to be transported by the eligible district pursuant to N.J.S.18A:39-1."

Haber considered factors not mentioned in his report and added what was needed. He concluded that Lakewood did not have the financial means to conduct a thorough and efficient education. He did not consider a public question about raising taxes or the ability of the people of Lakewood Township to raise taxes. He looked at the per-capita income of people employed and because Lakewood Township had a low employment rate, he assumed it had less ability to raise taxes, not that it might mean a large under-age population.

Haber looked at the growth of public school and non-public school students and saw how Lakewood Township is unique with non-public school students. He looked at income, growth, and a large transient population. He rejected some factors not included in his report, such as growth of population, racial/ethnic origins, the number of free- and reduced-lunch students, and the number of special-education students.

He was not able to consider the ability of the town to expand, as he did not know the master plan and had no way to determine it. He used some census data but had no federal data. He did not consider the effect that bringing the out-of-district special-education students back to the district would have; rather, he looked at the budget as a whole, and did not break it down.

Dr. Laura Winters has been the superintendent of Lakewood public schools since 2012.

In 2018, Lakewood had 6,092 enrolled public school students: one high school with grades nine to twelve; one middle school with grades six to eight; five elementary schools—two with kindergarten and first grade, and three with grades two through five; one preschool for special-education children ages three and four, and one for general-education students age four. The middle school has from twenty-eight to thirty-two students per class when it should be twenty-four. All schools operate at full capacity. The graduation rate is 75%, up from 69%, but the state average is 90.1%. The district is 8.1% Black and 86% Latino.

The district includes many students who have limited English proficiency (LEP) and require ESL (English as a second language) instruction, which is provided for forty minutes per day in the elementary and middle schools. For school year 2015–2016, there were 1,630 ESL students; for school year 2016–2017, there were 1,426 ESL students; and for school year 2017–2018, there were 1,538 ESL students (or about 25% of the student population).

For school year 2017–2018, 100% of the students received free or reduced lunch paid for by the United States Department of Agriculture.

Winters's role in the development of the district's budget was to provide educational input and to describe the programs or facilities that are needed for the students. In 2017 the district initially proposed an expansion of four classrooms and an addition to the cafeteria, but this was eliminated at the final budget.

For school year 2018–2019, the district budget process commenced in January with a projected budget that had a $17–20 million shortfall just to maintain what they had, with nothing new added. If the projected shortfall were not covered, they would have to cut teachers for the fourth year in a row. In 2017, they sent out 140 reduction-in-force letters and lost 78 teachers either to their resigning in anticipation of layoffs, or because they had found employment elsewhere.

In 2017-2018, the budget was down $14 million. The district asked for $10 million in aid and received $8.5 million in aid from the State. The State also deferred a $1.5 loan payment that was due. This contributed to the ability to rehire some teachers and to avoid some of the budget cuts.

The Township also contributed $1.1M to have a sports program which would have been lost in the budget ($557,000 for public school sports, $600,000 for non-public school students). The Township has indicated that no funds will be forthcoming for the 2018-2019 school year. Lakewood Township, not the district, pays for courtesy busing.

For school year 2016–2017, the district paid $32,766,776 for out-of-district placements for 400 students who were registered as students in the public schools.[23] This is projected to increase to approximately $36–38 million in 2017-2018. The child study team has determined that there is insufficient space in the district for all special-education students, so many out-of-district placements are necessary.

Each year, the district generally conducts 500–600 evaluations for entry into its preschool program. There are 500 kindergarten students. The district features an academically gifted program in elementary school and a guidance counselor is present in the middle and high schools.

The biggest challenge to the budget is that the district cannot hire new teachers, and teachers are resigning because morale is low. The teachers' union prepares for reductions in force (RIF's), and the children are worried about sports. The district has too much professional turnover. The district spends about $2.7 million per year in professional development. It trains new teachers and then they leave, especially the ones without tenure, and find employment elsewhere. During the last year the district had fifty-three first-year teachers, forty-eight second-year, and thirty-six third-year. The district is always behind because it has new teachers who are not high-impact teachers or highly effective teachers. The average teacher in the district has only four to five years of experience.

The district is making progress in test scores, although they are well below where they should be. Twenty-seven percent of students are meeting expectations, and 73% are not, although 24% are approaching expectations. Lakewood is below the state average, although the students and teachers are working hard. The district keeps getting loans and issuing RIF's and it has become a cycle. The students' homes are not stable, and the schools are not stable. Lakewood has no industrial-arts programs; wood shop and auto mechanics were given up years ago. The gym is beautiful but has been there forever.

[23] Counting these students, total district enrollment is 6,492 students. Approximately 30,000 more school-age children reside within the Lakewood district but attend non-public schools.

Pursuant to statute, the district must certify that its budget provides a thorough and efficient education. And she certified the budget. But no one could tell her what a thorough and efficient education was: she did not know if it was counselors, libraries, or educational curriculum and instruction. As for facilities, the BOE could put the issue to the voters by special questions to seek additional funding.

As for Partnership for Assessment of Readiness for College and Careers (PARCC) testing, Lakewood is trying to raise PARCC scores. They have seen slow and steady growth with incremental progress. They have met Every Student Succeeds Act (ESSA)—the successor to No Child Left Behind—accountability in all targets but for absenteeism. ESSA facility accountability targets were met except for the middle school, which is overcrowded. Lakewood High School is considered a priority school because of its low test scores.

Graduation requirements are set in the regulations and require twenty credits in language arts, and fifteen in mathematics, algebra, and geometry. The district has all courses to meet graduation requirements for its students.

Lakewood has planned a response intervention reading program and career academics in high school (learning cohorts). The middle school has robotics, coding, horticulture, and journalism. It also has new technology classrooms and Apple TV. In foreign languages, only Spanish is taught in school, and that is what all students have chosen, but other languages could be taken online, although educationally it would be better to have a teacher in a classroom.

The library is open three days per week and a paraprofessional is in charge. The school provides remedial work and a homework club, and some advanced placement and honors classes in English, math, and Spanish.

For vocational-technical education the school has some in-house career programs and sends some students to the Ocean County Vocational Technical School (OCVTS) and career field. It is difficult to get into the OCVTS program, as it requires good grades

and has a strict attendance policy. Some students do not want to leave the district high school. Lakewood does not have the money for its own vocational-technical program.

Lakewood offers graphic design and fashion through Perkins grants; the school has a culinary and TV classroom (Title I and MAC rooms[24]), recording arts and media and data entry, plus an ROTC program. Other offerings include computer classes; library skills; art and music; chorus; band; and orchestra. Title I was cut this year and some after-school programs were cut.

Lakewood's athletic director was cut; now they have a part-time athletic director who is not an employee of the district. The New Jersey State Interscholastic Athletic Association (NJSIAA) says there should be a full-time athletic director and secretary, but both were cut from the budget.

Winters identified Lakewood's problem as not having enough highly qualified teachers, because of low salaries and high turnover.

Lakewood was always in need of Title I assistance. The high school was a priority school, but this year they received only $3 million in Title I funding, which paid for training, professional development, computers, reading, and materials.

The 2017 New Jersey Quality Single Accountability Continuum (NJQSAC) report showed that Lakewood passed in personnel and operations, and had less than 80% in instruction and programming, governance, and fiscal compliance. Instruction failed because it was based on the PARCC scores, which were low. Fiscal compliance failed because the budget has a deficit. The county reconfigured the budget and told them to apply for an equivalency waiver.

Robert Finger testified that he has been Lakewood's interim assistant business administrator since October 2017. He had previously been employed as business administrator and Board secretary in Lakewood from February 2008 to November 2010.

[24] Title I provides a grant for educational services for low income students, and MAC is a computer application that aids learning.

He worked for the DOE for fourteen years as an auditor, was county business administrator in Hudson and Essex counties, and served as tax auditor for the New York Department of Labor.

Finger left Lakewood in 2010 when there were no fiscal monitors in place and the audit showed a $5 million surplus. The fiscal monitor appointed by the State arrived in 2014.

Finger reviewed Lakewood's annual audits and budgets from 2013 to the present. Starting in 2013–2014, Lakewood was going into a deficit, which was then about $6.5 million. For 2016–2017, it was $4.3 million. For 2017–2018, Lakewood received a $8.6 million State aid advance. The hope is to spend less to bring down the deficit. He did not know if other districts received loans to meet their budgets.

As of December 31, 2017, Lakewood had more revenue than expenditures, but had the potential for another deficit. He looked at revenue and tuition and went through special-education and out-of-district costs. In some cases, students had not been accurately counted, and there were more than appeared enrolled.

The DOE relies on information received from the districts and reconciles this with the actual student count. Each year, the DOE issues bills to the districts for the estimated tuitions that the boards of education paid as tuition. Sometimes deficiencies showed up later and then the district would get re-billed. Lakewood received re-bills for 2016–2017 of almost $2 million, for which Lakewood must reimburse the state within two years.

Finger reviewed the 2017–2018 school year budget. He noted that the budget includes "undistributed expenses" which are, for the most part, expenses paid for public school students who go to special-education out-of-district placements, and for support services. When the budget was done for 2017–2018, Lakewood needed a $8.6 million advance State aid payment, plus $1.6 million from Lakewood Township toward sports and courtesy busing and related services. He did not know if Lakewood Township had a budget surplus.

For transportation, Lakewood gives the State the mandated amount for the LSTA program, and if the cost of transportation is less, the district pays $1,000 per student as aid in lieu for each student bused by the LSTA. The LSTA program will be reviewed in 2019, as he thinks it should.

For 2017–2018, Lakewood budgeted $20.2 million for the LSTA program. Enrollment in October 2017 was 6,090 on the public school rolls, plus another 361 who had been placed in private schools, 17 sent elsewhere, 173 received from elsewhere, and 6 in State facilities, for a total of approximately 6,600 students in the public school system. The general-fund operating expenses for 2017–2018 was $143,455,116; $27,600,000 was for transportation, with $20.2 million going to the LSTA. Lakewood pays for special-education services even for those who are sent out of district. The budget showed $31,963,753 for special-education expenses, but that might not have included some extraordinary services.

The budget process starts in mid-March when the proposed budget is advertised; in April-May, they have hearings; and if the budget is approved, it becomes final.

Lakewood Township has approximately 37,000 children who attend school; 6,000 are in the public schools, and the rest are not. The financial situation in the Lakewood public school district is unsustainable due to these unique demographics. It is a 6,000-to-30,000 disparity. In Teaneck it was 4,200 public to 2,200 non-public. Lakewood Township has five times the number of students in non-public schools as in public schools. This has a major effect on transportation, as the district pays $1,000 for each bused child.

Finger compared Lakewood to nearby school districts located in Freehold Borough, Jackson Township, Toms River Township, and Brick Township. Looking at these four, the cost of transportation and tuition for out-of-district students averaged about 4–7% of the budget. In Teaneck, with many students attending sectarian schools, it was 9%. Special education tuition and transportation could be 8–14% of the budget, but in Lakewood it was 38%, and the projected amount for 2018-2019 is 40%. These expenses—transportation for public school and non-public school transportation, tuition

for out-of-district placements for special-education placements—are mandated by the State.

This is unsustainable, because next year tuition is going to increase $7–8 million, plus another $3–4 million for transportation. Districts are permitted a 2% tax-rate increase, and for Lakewood 2% is about $2 million. For 2018-2019, without tax increases and more revenue, $17–23 million in additional funds would be needed without full funding of the SFRA or in extraordinary aid. This does not even include raises for district teachers or the $2.2 million the DOE has deferred for paying back previous loans, so there could be a $19–25 million shortfall. Even if the SFRA were fully funded according to the formula for public school students, the district would still be underfunded for its expenses.

Finger analyzed the cost of special education and transportation costs. About 35–36% of the budget is for special-education costs. For 2016–2017, the operating budget included $52 million for special education. The total in 2017–2018 was $52,438,739, and for 2018–2019 it was $58,622,034. Additional students are coming into Lakewood Township constantly, sometimes three per day, or fifteen to twenty per week.

The transportation aid received for school year 2017–2018 was $4,199,793. This was calculated by the State based on 2,336 public school students, 730 special-education students, and 19,174 non-public school students, for a total of 22,240 students. Mandated non-public school transportation is $1,000 per student. In 2017–2018, $28.7 million was spent on transportation. The State reimburses about $10 million per year for transportation, so the transportation budget is about $18 million.

For 2017–2018, the combined cost of transportation and special education was $49.4 million plus $28 million, for a total of $78 million out of the total budget of $144 million. More than 52% of the district's budget goes for special education and transportation. For 2018–2019, the projected costs for special education and transportation are a total of $88 million.

Every year Lakewood Township is adding 2,500–3,000 non-public school students who are eligible for transportation. He hopes the monitors are aware of these expenses. Next year's deficit is projected at $17–23 million. The district is trimming at the edges to get the numbers down. This budget goes up about 10% per year. The anticipated 2017–2018 budget showed that tuition and transportation had gone up.

The district has a revenue problem. The State-aid funding formula works well for 99% of the state. It does not work for Lakewood because the district cannot contribute to its adequacy budget because wealth and ratables are taken into account when calculating aid. The district gets some equalization aid. Lakewood has a base of 36,000 students, where one-sixth of the students are in public school and five-sixths are not. The tax levy is not determined just by the 6,000 attending the public schools, but by Lakewood Township's population and ratables. There is a bigger pot of money in Lakewood Township. The tax levy generated $96.9 million this year based on property taxes.

Finger was not aware that Lakewood Township's school tax rate was one of the lowest in the state based on equalization value and reassessment. The Lakewood BOE set the tax rate within a 2% levy cap. Although revenue is restricted to the 2% hard cap, a legislative determination, Lakewood Township voters could exceed the cap if they wanted to pay for things such as transportation costs as long as the money was not for mandated expenses. In 2016 voters rejected a proposal to exceed the tax cap to cover courtesy busing. If busing is provided for public school students, then it must be provided for those attending non-public schools. The budget does not pay for courtesy busing.

Until now, the State has deferred payback of advance aid, but David Shafter, a State monitor, told him Lakewood will have to pay back $2.8 million in 2018–2019, and the State has been recouping it since September.

In projecting the 2018–2019 budget, Finger understood that the LSTA would still be in place, but it would be up to the Commissioner to continue it and to include it in the budget.

The count from the District Report of Transported Resident Students (DRTRS) was 19,174 students effective October 15, 2016. If there were more students, the district would receive more transportation aid.

The district received $4.2 million in transportation categorical aid and was reimbursed that year for mandatory expenses: the State reimburses $290 to get to $1,000 per student. Basically, the district pays the first $710 per student and the State picks up the next $290. If the LSTA were abolished, he did not know if the district would be able to run buses for less than $710 per student, because it would depend on who provided the buses, the bids, etc.

If Lakewood is receiving less money because the State is taking money back from the loans, cash flow will suffer. There is a line on the budget for all revenue from all sources, including DOE State-aid advances. They work with the state monitors and would be seeking $17–20 million in aid for the next school year.

Malka Spitz-Stein is the supervisor of STEM (Science, Technology, Engineering, and Math) for Lakewood and she oversees Sections 192 and 193 grants. She entered the district in 2007 and has been in Lakewood for ten years. Before that, she was a teacher in Long Branch for seven-and-a-half years. She supervises seven schools in the district as curriculum supervisor of math and science to make sure the curriculum is implemented correctly in class.

Spitz-Stein works on curriculum; writes lessons; gives professional development; and visits classrooms and gives feedback. Some districts have superintendents for grades six to twelve, but Lakewood has had no assistant superintendent in this area since it eliminated the position five or six years ago. Spitz-Stein is involved in the hiring process for science and math teachers and in the evaluation of teachers. After teaching, the focus is on the curriculum and strategies. As teachers progress, they are trained.

A tenured teacher is rated. More experienced teachers are better for students. It takes about four years to have actual professional development and to be able to

implement a program. At the five-year mark, a teacher gets to know students and understand them.

In the high-school mathematics department, four teachers out of thirteen are tenured. Sixty percent of high-school math teachers are non-tenured. Teachers who are non-tenured have less experience; they need training; they do not yet have methods to reach individual students. Teachers need to differentiate with their students.

This year there were three first-year teachers (new) due to turnover in the math department; two second-year teachers; and three teachers who are nearing four years of experience.

Spitz-Stein has concerns about holding on to teachers. If teachers are not confident that they will have a job at the end of the year, it leads to teacher instability and the school is not stable. The median teacher salary is $52,046. When teachers leave Lakewood, they are receiving salary increases of $10,000–15,000 per year.

Lakewood has had twenty new hires in math since 2011. Teachers new to the district have been certified by the DOE and could have experience in other districts. Only two teachers have received tenure since 2011, and two already had it. Lakewood complies with New Jersey tenure law: in 2015-2016, only 2 out of 396 teachers were rated not effective, and in 2014–2015, only 2 out of 304.

In the spring of 2017, only 7% of high-school students were tested as proficient in math, and students are in need of teachers to get them to learn algebra 1. In the sixth and seventh grades, there are twenty to thirty students in math and science classes.

PARCC target benchmarks showed that in math, at the sixth-grade level, 12–13% of the students were proficient; at the seventh-grade level, 14%; and at the eighth-grade level, under 20%. Twelfth grade proficiency was under 10%. The high school did not meet its target level, but the elementary school did.

Statewide PARCC results were 54% for elementary students and 23% for high-school students. In Lakewood, elementary grades three to five showed that 20–25% met their target, as compared to statewide, where in the same grades, 47% did. Judging from the PARCC results, the students are not on grade, although performance improved in school years 2015–2016 and 2016–2017. Grades three to five showed significant improvement in math.

The State sets the target; the district did not reach a target in math for middle school. Students in science and math are not on grade level. Based on scores from the State, math is showing a downward trajectory; they need to make sure that elementary students have their needs met and that these projections are addressed.

Five or six years ago Lakewood had more than twenty interventionists who would provide services (four were for math but the math ones were eliminated). It would help students to have them back. English/language arts teachers were also cut. Readiness is a computerized intervention program that was used last year and was reliable.

In technology and English, students have computers to use from elementary school. In middle school, one quarter of students are enrolled in robotics, which is paid for by Title I. Success in high-school algebra is a predictor of graduation, but students in algebra 1 are not on grade level.

Teaching in kindergarten through grade 12 is based on the State Learning Standards. She writes curriculum and lessons consistent with State standards. Teachers never receive education in these standards, so they need to learn on the job. At Stage 1 for the PARCC, standards are addressed for the children's level; at Stage 2, they are rolled out to teachers who were trained on what to say and how to get kids to use generalized knowledge; and at Stage 3, classes are observed and teachers receive feedback. Stage 3 is the most critical, as everything must be done at grade level and get implemented. At elementary school, every teacher must be observed for any needed follow-up and feedback. They want proficiency in every child, and Lakewood was performing well below standard.

Marcy Marshall testified that she is in her fifth year as principal of Lakewood High School. She entered the district in 1996, and worked as assistant principal, director of guidance, counselor, and teacher. She has two master's degrees in administration and education. The student population of the Lakewood public schools is 85% Latino, and less than 5% Caucasian; the rest are African-American. One hundred percent of the student body receives free or reduced lunch.

The high school has lost programs in the past eight years, including auto mechanics, graphic arts, and metal shop. The rooms were repurposed for other uses, and BOE offices are now located there. They now have culinary, photography, and fashion design, among other programs, funded by Perkins grants. Federal funding in 2016–2017 was $1.5M; for 2017–2018, it was $183,000. As a consequence of the financial loss, teachers' stipends and programs were cut; after-school programs were affected; twilight academy (a program from 2 p.m. to 7 p.m. with math consultants) and college visits were cut.

School starts at 7:00 a.m. for the 1,200 students in the high school (350 freshmen, 320 sophomores, 280 juniors, and 220 seniors). (Prior to the 2016–17 school year, school started at 7:15 a.m.) It is early, and it is a problem. Many students have jobs after school, and when they start school early, their attendance is affected; they have chronic attendance problems because of their jobs. The buses come at 6:15 a.m. Some students come to school late. The school has eight security guards plus metal detectors. Incidents of violence are mostly fighting. The high school building dates from the 1970's.

The State graduation rate is around 90%; the rate has slowly been rising in Lakewood from 74.8% to 75.4%. The dropout rate was about 4%, although some students drop out and then return. Ten to 12% of the students go to a four-year college and 40% go to a two-year college.

The school has successful athletic programs and about 400 student athletes. In the fall, they have volleyball, football, field hockey, and tennis; in the winter, bowling, basketball, and track; and in the spring, softball, baseball, track, and tennis. Lakewood Township, not the BOE, funded athletics this year. Before this it was in the school budget

and comparable to what is being presently offered. The school has full-time coaches who are teachers who coach after school, and a part-time trainer. The athletic director is a teacher of physical education and health who receives a stipend as the athletic director. Prior to this, the school had a full-time athletic director and trainer who were part of the budget. The athletic program is important for students, as it provides a safe place after the school day ends. Athletics gives them a sense of family and something to do.

For foreign languages, Spanish is funded by the district. When Marshall started, German was taught, and many years ago, they had French.

Marshall reviewed the New Jersey School Performance Report for school year 2016–2017, which is put out by the State in October or November. The data comes from the reporting districts and the schools and includes the graduation rate, absenteeism, and shared instructional time.

About 120 students at most went to the vocational-technical school during junior and senior years. There is a charge to Lakewood for this that is paid from the district budget.

Most teachers started right out of college, but each one is certified by the DOE and qualified by the BOE. For school year 2017–2018, the high school had eighty-four teachers, of whom approximately thirty to forty were non-tenured. (Nine were first-year teachers, ten were second-year, and fifteen to twenty were third-year.) Fourteen teachers left last year, some tenured and some not, for stability and better pay. This year seventy teachers stayed. Lakewood is one of the lowest-paid districts in the county. Monmouth County pays higher salaries. Teacher retention is a problem, as teachers want stability in their careers.

Marshall spends her summer trying to find experienced teachers, but mostly she gets new ones, which negatively affects the students, who need consistency and stability. Teachers must be rated in the evaluation system used by the State, and Lakewood is in compliance. In school year 2015–2016, only two were rated as non-effective.

The district has four curriculum supervisors: STEM, ELA (English Language Acquisition) & social studies; ELL (English Language Learner) and ESL; and special education. When she started there were more, and the areas of supervision were very content specific. When these positions were lost, the impact was apparent, as she could see the difference because she did not know specific content. She can tell good teaching, but it helps to know content. They do not always have a content specialist to do the review. The STEM supervisor will observe the non-tenured teachers.

In 2007, there were one or two assistant superintendents who helped with curriculum and instruction; now there are none.

Seventy-five percent of the student body comes from non-English-speaking families; less than 15% are non-English speakers. ESL has one teacher, and the district funds a newcomer program for twenty students.

Every other district has remediation and intervention specialists where students get extra support, but Lakewood does not have this program. They do have a class for remedial math in ninth grade. Lakewood is struggling with attendance, language, and test scores.

Lakewood has twelve to thirteen special-education teachers who teach eighty to eighty-five students with IEP's, for in-class support and resource pull-out, but they do not have teachers in all areas of specialization. There are about seven students to a teacher. They have in-class support for language arts (LA), and resource pull-out in math and LA (every grade), and for science and social studies (ninth and tenth grades). They need extra teachers. If a student is classified in LA, they need support in other classes. But funding is why they do not have them.

PARCC scores were improving. Lakewood High School applied for an equivalency review for its PARCC assessment scores in its next improvement plan and has been identified as a priority school. Other than chronic absenteeism, it has met its ESSA accountability goals.

Perkins grants are provided for vocational-technical education. Lakewood does not have an in-house vocational program, but Jackson does, and Toms River will open a career center in September. The high school offers two art classes, TV production, MAC labs, media center, photography, and recording arts.

Lakewood offers courses in all requirements for graduation: twenty English courses; fifteen math, geometry, algebra, and pre-calculus courses plus advanced placement (AP) courses (eleven students); fifteen science, chemistry, physics, AP physics 1 (twenty-five to thirty students) and AP physics 2 (nine to ten students) courses; and fifteen social studies, United States and world history, and AP United States history (fifteen to twenty students) courses. The high school also offers financial and entrepreneurial skills; online language; Spanish; AP English language and composition; AP English literature (thirty to fifty students); AP Spanish (ten to twelve students); New Careers academy program; STEM, business, 2 pathways; Oceans 1 and 2—marine studies; horticultural and greenhouse; music, film, and performance ensembles; and band, choir, and orchestra. No student is presently taking an online program offered by and paid for by the district. The BOE pays for choir and music programs, and art classes. Students have a fine-arts requirement for graduation, and the foundation class is the one that most students take.

In the AP courses, students received grades of 3's and below; none passed the AP physics course. For AP college credit, colleges require grades of 4 or 5. One student received a 4 or 5 in AP Spanish, and one did well in AP physics.

Danielle Farrie, Ph.D., has been the research director for nine years at the Education Law Center (ELC) and works to enforce the rights of public school students. She is responsible for data analysis. Dr. Farrie has a doctorate in sociology from Temple University. She did analysis for the New Jersey Supreme Court in Abbott XXI, for the 2011 fiscal year, about the impact of the budget on students, and her report was accepted by the Court. She prepared a report at the request of the petitioners. She has never been to Lakewood Township.

The ELC prepares a school funding report annually. Dr. Farrie does research and writing on school funding and has worked with Professor Baker on school funding and educational outcomes. She worked with another author on a book chapter tackling school-funding equity around the country; her chapter was "From Rodriguez to Abbott." She wrote about the SFRA and Abbott. A separate report identified disadvantaged students in markets. A 2016 report discussed school funding, from resources to educational outcomes.

Dr. Farrie holds no degree in accounting or public funding, and she is a researcher, not an educator or a business administrator. Her dissertation was on school choice and economic segregation. She previously worked in the Institute for Public Affairs which does not deal with financing. She began working on school funding when she started work at the ELC. She has no experience in developing educational policy or implementing policy. She does not do professional analysis and does not put together a school budget.

She has testified in court before and was accepted as an expert in educational funding.

Dr. Farrie is familiar with the SFRA standards, which are linked to a weighted formula. The SFRA determines the level of funding to provide students an educational curriculum. It is the base cost for regular education plus additional funding for special education, at-risk students, and poor students. The funding level is divided into the local share and the State share (called equalization aid). The adequacy budget is the local fair share and the State equalization aid. The adequacy budget is supplemented by categorical aid paid by the State to cover the costs of transportation, security, and special education.

For special education, the SFRA pays one-third of the cost through categorical aid, and two-thirds as equalization aid. The local fair share is based half on income and half on the equalization of property values in the district.

Dr. Farrie studied Lakewood's school funding through the State aid notice. The base amount per pupil is $11,042 and is the same for all students. Those at-risk students receive the base plus 57% more. There is also a geographic cost adjustment.

The SFRA uses a census-based formula; it assumes an average classification rate for special education of 14.92%, and Lakewood is funded as if it had an average classification rate. If the district has a greater percentage of special-education students, then the district is underfunded. Speech is funded separately from special education; the state average is 1.63%.

Dr. Farrie was not sure how the average classification rate was calculated. If the average were determined by the district, then Lakewood would be higher.

The State calculates how much a district needs to raise as local revenue to meet its adequacy budget. The local fair share is how much residents are willing to pay to fund the local schools. Equalization aid is adequacy budget minus local fair share.

Special education is paid at one-third categorical aid and two-thirds from the local fair share. For security aid, low-income districts receive more. Transportation is also paid as categorical aid. It is based on population and non-public school students, plus aid in lieu based on enrollment in the district and the length of bus routes.

SFRA funding was phased in as State aid for one year; it was reduced in the second year, was cut in the third year, and has been flat-funded since. Most districts have not received SFRA aid.

CAP adequacy is defined as the adequacy budget plus other categorical expenses.

Titles I, II, and III funding do not have any bearing on SFRA, and SFRA does not include federal funding or non-public funding. The SFRA was declared constitutional. However, Lakewood Township is unique, as its public school population is not reflective

of the school-age population. The majority of Lakewood Township's students attend non-public school.

For special education, a similar demographic is present. The adequacy budget is based on district enrollment and special education is funded on a percentage basis. Lakewood is different because special education and transportation are mandated costs for the district. Classified students receive services through IEP's. There are three reasons behind Lakewood's higher special-education costs: a large population of special-education students; a large number of students with the highest cost of disabilities; and higher-than-average out-of-district placements, which are more expensive.

The special-education student population differs from the general-education population. The comparison is to the school-age population with race and age, as compared to special education. White students are more likely to be classified, which suggests that some white students opt into the public school setting in order to get special-education services.

Lakewood's classification rate is above the state average, but those decisions are made by the school district. Some districts are even higher than Lakewood because the statewide 14.92% classification rate is an average. She did not remember if the district provided mandated special-education services, nor was she familiar with the State funding them through Sections 192 and 193.

The State rate is based on the average number of classified students, an average number of high-cost disabilities, and the average cost of school. Lakewood places more students in private placements, so its special-education costs are higher.

Transportation gets paid per pupil. Lakewood's transportation costs exceed what the formula provides for the district. Lakewood had a pilot program for transportation, the LSTA, but funding did not capture the total cost.

New Jersey has one of the best educational funding systems in the United States. It is a state with high funding for low-income districts. The New Jersey is fair and is second in the nation in school funding. Her report was a State report, not a local one.

The SFRA is a national model of school funding, but Lakewood is an extreme case; this has caused constant fiscal distress, with transportation and special education eating up the budget, so the money must be taken from other areas. The decline in academic performance correlates with it. The district is academically performing in the lowest 5% of all districts across the state in nearly every tested area, a significant decline in relative performance. The SFRA does not dictate how money should be spent, but some costs are mandated, such as special education and transportation. These two areas get their funds first and the rest of the budget has to support all other education expenses. Lakewood spends far less on regular education than the formula suggests is adequate. Compared to districts with 3,500 children or more, Lakewood spends about 50% less than other districts in classroom-instruction costs.

Changes are necessary in the funding structure: it must take into account that the Lakewood school population is not reflective of the number of students who live in the district and attend non-public schools. The funding is not adequate for Lakewood, especially in special-education costs. Lakewood spends about $40 million more than a district its size should spend due to special-education and transportation costs.

Based on Dr. Farrie's analysis, the State does not pay enough because it is per-pupil aid in theory, but not in practice. The district received $4.5 million in 2017 for extraordinary aid for special education, and received $4.1 million in 2016, and $3.1 million in 2015. It was 2.4% of the State's extraordinary aid in 2016, and 1.9% in 2015.

New Jersey has 1.4 million public school children. Lakewood has 6,000, representing one-half of 1% of the state population, but the district received 2.4% of State extraordinary aid for special-education students. Dr. Farrie believes special-education aid should be based on the percentage of children in special education. Students placed in out-of-district placements are enrolled in the public school system. These students are

counted for equalization aid, categorical aid, special-education aid, and extraordinary aid. When she said Lakewood was underfunded, she considered extraordinary aid.

The SFRA provides for transportation per pupil, which is mandated under the SFRA based on distance from school. The formula provides the same amount, but the district does not spend that amount. Lakewood was forced to pay for transportation for non-public school students, money that it could be spending on public school students. She was not familiar with Lakewood spending money on public school transportation. She was not familiar with the Bacon cases in particular. Lakewood had been spending too much on courtesy busing and non-public school transportation. Dr. Farrie stated that Lakewood's transportation cost exceeded the State formula, but it was contingent on local funding and that was included in the adequacy budget.

She had no idea if Lakewood could raise additional funds. The State does not restrict local fundraising, but there is a 2% annual cap on how much the municipality can raise through taxes, and so it has limited ability to raise funds. She was not familiar with whether Lakewood Township had attempted to raise funds through special questions on the ballot.

Dr. Farrie's report stopped analyzing scores in 2014; she did not dispute that PARCC scores were improving, but it would not have affected her opinion.

Dr. Farrie concluded that the SFRA cannot address Lakewood's conditions, and that changes to the SFRA formula were necessary to ensure that Lakewood Township's public school students received a thorough and efficient education. Changes were needed to the SFRA as it functions in Lakewood. Working to reduce out-of-district special-education placements would help address Lakewood's budget, although she wants students in their proper placements. Working to make the walk to school safer in the Township might save some costs of hazardous-route busing.

She believed that the Lakewood school district was an outlier, although she had not studied other districts in detail.

David Shafter is a state monitor in Lakewood. He has a bachelor's degree and a master's degree in accounting; he is a certified public accountant and a certified school business administrator. He later worked in Willingboro, New Jersey; he then became a state monitor in Beverly, New Jersey. He has also worked in Camden for two years as interim business administrator, then worked in fiscal compliance.

Shafter is employed by the DOE to go into distressed school districts to monitor them. He has worked in Lakewood since 2014 as a fiscal monitor with Michael Azzara, who arrived there first. Shafter reports to Glenn Forney in the DOE, who is responsible for all state monitors.

The State uses NJQSAC evaluations of school districts for determining performance and to see if a district is below level. Lakewood is in a deficit.

As a state monitor in Lakewood, Shafter attends board meetings, and is involved in finances, budgets, purchasing, and grants. He approved the school year 2016–2017 and 2017–2018 budgets, prepared with the assistance of an able business administrator. At the time of this hearing, the 2018–2019 budget was being worked on with the business administrator.

When Shafter was first placed in Lakewood in the fall of 2014, there were concerns with record keeping and finances. There had been poor record keeping and there were issues with purchase orders. Financial records were not accurate, and the budget was about 50% accurate. There was a lack of purchase orders for out-of-district placements. Monthly records were not closed timely and ran three to four months behind. On other purchase orders, when a line item was at its limit, items were charged elsewhere. Lines were over-encumbered, and a report would show negatives. The records could not be relied upon; the position-control roster was not reconciled with the names of staff. This presented problems for tracking expenditures.

Corrections to the budget started during the 2015–2016 school year, and this affected planning. The budget was then 90–95% accurate, as it was corrected by 2016–2017 with correct purchase orders and funds allocated for anticipated expenses. He has

not discovered any expenditures that were not legitimate. Over $1 million in extraordinary aid was found and corrected.

When he first arrived, the *Comprehensive Annual Financial Report (CAFR)* findings showed the numbers were off. Ideally, what is wanted are no findings in the CAFR. Having twenty-three to twenty-four findings in a CAFR is a high number. Since he has been the monitor, the number of CAFRs has gone down. This year it was reduced to eight, which was a definite improvement. The issues he identified have been improved.

Also, when he first arrived, some special-education students had not been counted correctly, and some students placed in-district had not been included as special education students. Some students had been eligible for additional financial aid but as no application had been made for financial assistance for them, money had been left on the table. That problem was also corrected.

Also, when he first arrived, Lakewood provided courtesy busing, but that has now stopped. Now Lakewood provides non-public school busing through the LSTA. The District pays a per-pupil amount of $1,000 per year. Prior to formation of the LSTA, the cost per pupil was $650. The cost has gone up under the LSTA for two reasons: the actual cost increased from $650 to $710 in the first year, and the number of students being transported increased.

The first budget he worked on was for school year 2015–2016 and was extremely responsible. No deficit was apparent at first, but in October/November, they realized there would be a deficit for the rest of the year concerning transportation. Bids went out and were supposed to save money, but they did not.

The referendum to fund courtesy busing had been defeated and the DOE directed Lakewood to continue it. The State advanced $4.5 million in aid for this. It would have been dangerous to stop busing for the children because of traffic and some hazardous routes, so that was the reason to cover the transportation deficit.

For the 2016–2017 budget, they realized they had a deficit, and that for the first time there would be layoffs. The budget was $5 million short, so the State loaned Lakewood $5.4 million to avoid layoffs and increases in class size. Without the loan, teachers would have been released. Courtesy busing was eliminated.

Lakewood was short of funds because of increases in the costs of programs, the 2% tax cap, and mandated costs for special-education placements. Transportation costs increased for the LSTA. Those costs had been less than the cost assigned to the LSTA and was more than tax increases could sustain. The budget was cut as much as possible, an assistant principal was let go, and anything that could be taken from the budget was done, such as leasing textbooks. Leased/purchased buses brought some transportation into the district.

Transportation for 2016–2017 was very efficient, and the budget was approved by the monitor. They started tiering (starting school at different times) and filling the buses. Lakewood High School started at 6:45 a.m. and provided breakfast before school; 7:45 was the second tier, and 8:30 was the third.

The 2017–2018 budget was never passed. It was approved by the monitor in May/June (usually submitted in March and approved by May). The budget was not approved by the Board because "it did not provide the services they wanted."

The 2017–2018 budget had some deficit, but by March the deficit was $13.5 million. After the budget was approved, the superintendent did not recommend the budget and the first draft was not approved. (It included cuts to guidance, cutting 80–100 teachers, and cutting the library, extracurriculars, and athletics.) Class size would be in the thirties in elementary school, and in the forties in the middle school. The budget was finally adopted after negotiations with the DOE, with $11 million cut and $2 million for paybacks of previous loans waived for one year. Some cuts remained, some athletics were cut, some co-curricular activities were cut, and some other reductions were made in non-public school-related services. After the State's loan of $8.5 million, the budget was acceptable in its bare-bones form.

The district cannot cut any more from special education or transportation, so cuts come from regular education and administration. New Jersey has been a model for class size. The average in grades K–1 is twenty-one students; in grades 2–8, twenty-two students; and in grades 9–12, twenty-three students. But in Lakewood, it is twenty-four to twenty-five in grades K–1, and twenty-eight to twenty-nine in grades 2–8. The effect is an increase in class size, and this affects education, administration, libraries, media, etc. They do not want to cut security.

Lakewood does not have a spending problem; it has a revenue problem. Shafter goes over the budget carefully; he makes sure the budget is correct; he looks at projections. He believes that on the expense side, the budget is not an issue.

Some special-education classes have been opened in Lakewood, with additional classes for special education and pre-school disabled. In 2018-2019 the pre-school-disabled class will be expanded, and it is in the budget. Instead of spending for out-of-district schools, keeping students in the district (first graders) will save money. That program started this year. Beyond first grade, the district looks for least restrictive environment. It is hard to bring students back from previous out-of-district placements. By the district starting programs for younger students, a long-term solution is provided.

Comparing Lakewood to Abbott districts, Shafter noted that he had previously worked in Trenton and Camden. Camden is urban and Lakewood is not considered urban. Camden has a large public school population and a smaller non-public school population. Camden had no problem matching expenditures to revenue—it was easy to balance its budget. One hundred percent of both Lakewood and Camden school students are entitled to free breakfast and lunch.

Lakewood has a unique situation in its student population. Usually the number of public school students in any district is greater than the number of non-public school students. For example, Camden has 13,000 public school students, but only a small percentage of students attend non-public schools. East Windsor has the same situation. But in Lakewood there are 6,000 public school students and 30,000 non-public school students.

The challenge is that when taxes were raised, they covered public schools and State aid was increased. But now, in Lakewood Township, the number of public school students stays about the same, while the non-public school student population goes up about 10% per year. This affects the budget in transportation, because Lakewood has to pay the LSTA $1,000 per student per year, which actually comes to about $710 per student after State aid is factored in. Usually taxes and State aid are sufficient for most communities to cover this expense, but in Lakewood, even with categorical aid and equalization aid, it is not enough because the equalization aid and the categorical aid are frozen. It is not enough because increased taxes do not cover the costs.

In 2016–2017, an additional 2,000 non-public school students needed transportation. The number for 2017–2108 was not then known. Out of the increased number of children living in the district, some will enroll in public school and need placement and transportation. There are over 100 non-public schools in Lakewood that are not calculated into categorical aid.

For 2017–2018, Lakewood received a $8.522 million loan. Two million dollars was for deferred repayment. One million dollars was received from the Township to pay for athletics.

The budget for 2018–2019 was then in preliminary stages and showed a potential deficit of $17 to $23 million. If nothing changed from the 2017–2018 budget, and no salary increases were included, plus $3.2 million to be paid for increased benefits, plus $5.9 for out-of-district tuition, plus $2.283 million for transportation, plus charter-school costs of $728,000, the total projected deficit was $23,290,988. The district already owes the State DOE $8.5 million, plus $4.5 million, plus $5 million, for a total of $18 million. Loans given by the State must be paid back within ten years, and a state monitor must be in the district as long as the debt is outstanding.

On February 5, 2018, a letter was sent to the acting Commissioner indicating that Lakewood did not want to fire teachers. The monitor has the power to fire teachers, and it is part of his role, if necessary. The budget must be completed by the end of March,

and the district has two options: to leave the budget unbalanced and to write to the DOE for more assistance, or to reduce the budget line by line the way they did the previous year. As for the first option, they can ask the State for more aid to balance the budget. The DOE refers the budget to the county business administrator, who reviews it. By law, the budget must be balanced. In 2017, he made suggestions. The letters for a reduction in force went out. There is time yet to resolve issues, so those letters may be sent and retracted later. He had no opinion yet of what he would do for school year 2018–2019. Each year stands on its own.

The local fair share in SFRA is broken down into two categories by weighted enrollment. The cost factor is how much it costs to educate each student. The adequacy budget is the local fair share without equalization value times a percentage of gross income. State aid is supposed to make up the difference. Adequacy has nothing to do with local fair share. All educational aid is controlled by the Legislature. Categorical aid is frozen; it is set by the Legislature's annual appropriation budget. The amount of equalization aid, the 2% tax cap, and the LSTA are all controlled by the Legislature. Lakewood Township has no ability to raise taxes and is at the 2% cap. One special question on the ballot to raise taxes failed by a huge margin.

Shafter has not spoken with Lakewood Township about contribution to the school budget. One thousand dollars is the State-aid amount in lieu paid to parents of non-public students not transported. A bid is rejected if it costs more. The $1,000 is calculated with the first $710 from the local district; the amount from $884 to 1,000 comes from the State.

Courtesy busing for students in K–8 is one-half to 2 miles and for grades 9–12 it is one-half to 2.5 miles. Courtesy busing now costs Lakewood Township $1.3–1.5 million per year, but if it were eliminated, there was no guarantee that Lakewood Township would provide the funds to the Lakewood public schools. Courtesy busing could be reduced if sidewalks were added, crossing guards were increased, and hazardous routes were reduced. In summer 2016, a Lakewood consultant met with officials to plan to increase sidewalks, and there was some discussion about this.

The budget is very tight and has no room for cutting. Lakewood needs increases in revenue, either increases in State aid to full funding or increases in taxes. Lakewood Township could use its surplus, or a formula so that some portion of those non-public school students could be counted in the adequacy budget.

If Shafter had more money, he would balance the budget: he would pay for the transportation, health insurance, and charter school expenses that are required.[25] He would fund new facilities for Lakewood, especially for the middle school, so that special education could be offered in-district which would save the district money. Class size could be reduced, and languages could be offered. More money might be needed in the beginning, but savings would be afforded over time.

Michael Azzara started working for the DOE in 1978 and is the leading New Jersey state monitor. There are about ten monitors in the State. He was appointed by the Commissioner to be the state monitor for Lakewood, where he served for four years prior to April 2018. He oversees finances in the district and reports to the Commissioner through Glenn Forney.

He has forty years of experience in education and was the director of fiscal policy in Paterson, a state-operated school district, as an assistant superintendent. Previously he worked in Jersey City, Camden, and Newark. All were state-operated school districts. He has a bachelor's degree in business, and a master's degree in education.

Lakewood has a revenue problem, not a spending problem. They have made every reduction possible to maintain education. The budget is what is needed to get the county to sign off on it, and it really cannot be cut any more. Special-education expenses cannot be cut. Security cannot be reduced. A deficit is anticipated this year.

The State set up the LSTA and paid $1,000 per student. Transportation was brought in house and it is efficient. Courtesy busing was put out for a $6.2 million referendum to pay for it, but that expense was rejected by 98% of the voters the following

[25] Lakewood has one charter school with 150 students. The budgetary impact is minimal.

January. After that, courtesy busing was eliminated by the district; it is not on the table. They used a tiering system, but the bids were so high, they could not do it for the following year. So, the Legislature created the LSTA consortium for busing.

One referendum passed in the district which was for a building roof repair and an HVAC system.

Monitors have proposed ballot questions, but the Lakewood BOE has rejected them. Consequently, they did not bother to spend money on a referendum.

Lakewood Township was not considered an Abbott district, such as Newark, Jersey City, and Paterson, but shared some characteristics, such as free lunches, etc. The Abbott District Factor Groups (DFGs) were generally classified as district factor A and B.[26] Lakewood was not included as an Abbott district because it was not considered poor. The Abbott rulings were supposed to permit poorer districts to have sufficient financial support to meet district factor I-J standards, but there was not enough money in the state budget to ever meet the I-J standard. Abbott was abandoned in the SFRA.

The problem with the budget is that the school-funding formula is frozen. The non-public school population (30,000 children) is growing, and this puts stress on the budget, particularly on the costs of special education. The SFRA uses census data and calculates that approximately 15% of enrolled students require special education, but in Lakewood the percentage is so much greater. The Orthodox children attend non-public school yeshivas, but generally, if they have a learning disability, or need special education, they are enrolled in the public school district.

Lakewood spends about $30 million for special education but is funded for only about half the classified students in the district. This puts a strain on the taxpayer, as the

[26] The DFGs represent an approximate measure of a community's relative socioeconomic status. The classification system provides a tool for examining student achievement and for comparing similarly-situated school districts in other analyses. Subsequent to the Abbott IV court ruling, the DFGs were also used to define the group of school districts on which Abbott v Burke parity remedy aid would be based. District factor groups range from A (the poorest) to J (the wealthiest) districts.

township has to support public school services. Other municipalities would not put the same strain on taxpayers.

This municipal overburden puts a strain on the tax base and the State needs to develop a budget that takes that into consideration. Thirty thousand non-public school students put a burden on the district, as that kind of population creates expenses that are not addressed by the SFRA school-funding formula.

Student enrollment drains the adequacy budget. The local fair share of $102 million would not change, but the adequacy share could improve. Lakewood needs more revenue, whether it comes from the Legislature or Lakewood Township residents, but Lakewood is capped at what it can raise, although it has a large tax base. The amount of aid appropriated is controlled by the Legislature. The levy cap is also controlled by the Legislature.

When Azzara came into the district as monitor, he was familiar with aid in lieu of transportation. But after two years, he discovered that the district was sending money directly to non-public schools by checks and not to the parents. Lakewood did not own its own school buses in 2015, just a couple of vans. They saved money for the district by purchasing buses and doing some transportation in house.

The Legislature determines school financial aid based on municipal income and property wealth, which equates to an ability to pay for the local schools. But aid is also a product of how much the State has available to it to assist the local districts. The per-capita income of Lakewood Township is low at $15,000, and less than half of the state average, but the median age of the population is also very low.

Melvin Wyns testified that he worked in the NJ DOE Division of Finance for thirty-one years. For thirteen years until his retirement from the DOE in 2001 he was director of the Office of School Financing, where he was responsible for all twenty-seven major school-aid programs in New Jersey designed to provide a thorough and efficient education. He reviewed school-aid applications, insured that payments were timely

made, and conducted audits. While he worked in the DOE, there were many major court decisions affecting school funding.

Following his retirement from the State, he went into consulting, until his final retirement in 2017. In his consulting firm, he has worked for municipalities and school districts on school-funding issues and regionalization issues. He has testified on the SFRA and regionalization and is considered an expert in Abbott XX and Abbott XXI for the Special Education Law Center.

In Abbott XX and Abbott XXI, the plaintiffs challenged the constitutionality of the SFRA, and the Supreme Court delegated those matters to a special master, Hon. Peter Doyne, J.S.C. In Abbott XXI, the third year of SFRA, the law was underfunded. Wyns testified as an expert in that case.

Wyns has continued to follow school funding since his retirement and has testified as an expert following his retirement. He had a consulting agreement with Lakewood from January through June 2018.

Wyns was accepted as an expert in school funding.

Wyns started with Lakewood in July 2003 and was a consultant to the BOE. From 2003 to 2018 he had various consulting contracts with Lakewood covering six to eight years. The tax levy was repeatedly voted down, and then the BOE would have to go to the township for funds. He was supposed to be an intermediary, but it did not work out that well. He is not now under contract with Lakewood.

After the SFRA was enacted in 2008, Wyns identified earlier problems that had not been resolved with the new law. The school-funding formula created problems for the Lakewood school district because of its unique distribution of sectarian to non-sectarian students.

Wyns reviewed the May 7, 2018, letter written to the Lakewood superintendent by Forney in which the State approved $28 million in advance State aid for the 2018–2019

school year to balance the budget. This aid provided additional revenue to Lakewood as an advance (loan) for the purpose of enabling Lakewood to provide a thorough and efficient education to its students beyond SFRA funding. The State could only do this because Lakewood has a fiscal monitor in place. The revenue request must be certified by the State BOE to the state treasurer before the money can be released.

The May 7 letter was sent on the budget-cycle deadline for Lakewood to have its budget approved for the 2018–2019 school year. Absent this revenue, Lakewood would have had a shortfall and would have had to cut staff.

Wyns reviewed the letter of October 26, 2018, which indicated that when the Appropriations Act was passed, Lakewood's funding was reduced by $1,566,821 million, creating a shortfall. Lakewood was notified that it could not raise taxes; it could either cut the budget or apply for emergency aid for districts in financial distress. The letter approved the emergency request so the budget would remain sound. A total of nearly $30 million in funding was provided to Lakewood by the State to provide a thorough and efficient education.

Wyns reviewed Commissioner David Hespe's letter dated June 23, 2016, to the state treasurer, in which Hespe asked for $4.5 million in order to a provide thorough and efficient education for 2016–2017 school year. He also noted a similar request for 2016–2017 sent to the acting state treasurer requesting $5.4 million in order to provide a thorough and efficient education for Lakewood's public school students.

He reviewed the letter dated November 9, 2017, in which former Commissioner of Education Harrington asked for $8.522 million for State aid for the 2017–2018 school year, again certifying that without it, the school could not provide a thorough and efficient education for Lakewood's students.

All these letters showed that the four advances in State aid (loans) were made to assure that the students received a through and efficient education.

Lakewood needed the loans because the SFRA is not working in Lakewood and does not provide adequate resources to Lakewood. The DOE has been able to intervene because Lakewood has a fiscal monitor and the State has intervened to provide a through and efficient education.

The statute provides that the State-aid advances of $4.5, $5, $8 and $28 million must be repaid within a ten-year period out of future State aid; thus, money will be taken away from future students to serve present ones. This is money that must be paid back; this year they paid back $3 million to the State from the money they received.

In school years 2004–2005, 2005–2006, 2006–2007, and 2007–2008, Lakewood received aid from the State for about four years through budget footnote language and received about $1 million in grants from the State. There have been special appropriations for Lakewood in previous years. Then-Commissioner Librera was convinced that Lakewood had school-funding issues. They understood the problem, and they had to convince the governor and Legislature that Lakewood had a problem. The advances were not paid out of the goodness of their heart; it was because of Lakewood Township's unique demographics.

Wyns has written papers for Lakewood relating to Lakewood's unique demographics. He wrote in 2008 about the SFRA and pointed out problems with Lakewood's demographics that continue. These problems pre-dated the SFRA and remain. The SFRA is not working in Lakewood, as is seen in the May 7 letter regarding the increased amount of aid. The situation is worsening, and worsening quickly, under the SFRA.

Lakewood Township's demographics show a rapid population increase. The public school population is below 6% of total population; typically, it is about 16%. Lakewood has a large non-public school population. Forty-one percent (41%) of the township population is below the age of eighteen; on a statewide basis, it is 22%. Lakewood Township is double the average. Lakewood Township has had a large increase in property value and income, which, because it is disproportionate to the growth in the rest of the state, negatively impacts the public schools.

The largest calculation in State aid is equalization aid, which is based on property value and income. Lakewood's equalization aid is disappearing because of its increase in property value, and Wyns predicts that it will soon be zero. This is a consequence of recent amendments to the SFRA: adjustment aid and equalization aid will be gone, and only categorical aid of special education and security aid will be left.

In his opinion, more money is needed. Next year, $43–45 million will be needed. Lakewood will need $30 million just to sustain this year's level without any enrollment changes, or additional demand because of non-public school students requiring special-education services.

The only thing the State can offer is advances; it has no ability to provide grants. It is a non-sensical cycle leading to disaster because the amount to be paid back will become most of the aid Lakewood receives.

Funding will be reduced in the new statute. Lakewood now owes about $40 million. Averaged over ten years, it is about $4 million per year. It is in the budget now at about $3 million per year. In a couple of years, $70 million will be needed to be paid back.

The loans were made because the SFRA is not doing what it is supposed to be doing, providing adequate revenues for the district to provide a through and efficient education for its students. It is possible mathematically that if this process continues, all the State aid that is supposed to be used for providing children with a thorough and efficient education will be used to pay back the loans. The SFRA cannot provide revenues for a thorough and efficient education. The SFRA is supposed to provide funding for districts to provide a thorough and efficient education. It is a question of how long the State allows this process to continue.

State aid is not going to grow. Two things occurred after May 7, 2018, that negatively impacted State aid to Lakewood: first, the Appropriations Act language for the 2018–2019 school year reduced aid by $1.5 million (which is why Lakewood received emergency aid); and second, adjustment aid was eliminated for school districts for 2018–

2019. Chapter 67 removed adjustment aid permanently, and there will be no more adjustment aid in the future. (The State-aid cap was also removed, but this would have no impact on Lakewood.)

Based on recent legislation, Lakewood's equalization aid will disappear next year or the year after and will not be offset by any State-aid advances. If the loan process continued for three years, Lakewood would owe $140 million, and most of the State aid advanced would be money owed back to the State. The larger the property value and income, the lower the school aid from the State, relative to the public school population, and not to the total number of students in the district. The relative wealth per public school student because of the growth in population and the increase in property value and income causes Lakewood's local share in the school-aid equalization-aid formula to be too large, because the district appears to be disproportionately wealthy relative to the small public school population. The demographics attached to property value, income, and special-education enrollment all must be addressed. The formulas and their components must be tweaked by the Legislature to help Lakewood.

Lakewood Township cannot just raise taxes, because of the 2% tax-levy increase cap. Lakewood has been doing this, but it cannot have a referendum except for things not required for a thorough and efficient education, as the law does not permit Lakewood Township to do this.

Lakewood requires legislative action; there is nothing the DOE can do administratively except to provide the advances. The DOE is doing everything it can do.

Wyns understood that the SFRA was designed to meet the constitutional mandate to provide a thorough and efficient education. The previous act relied on discretionary action, which was ruled unconstitutional. Funding for a thorough and efficient education is the continuing obligation of the State. It should be predictable for appropriate budget planning; it should be formulaic and not discretionary. It is unconstitutional if State-aid advances are unpredictable and subjective and not continuing until a decision is made. The intention in Abbott was to have a unitary funding formula to enable all districts to provide a thorough and efficient education, and it is not happening in Lakewood.

Witnesses for Respondent:

Kevin Dehmer has been with the DOE since 2007 and is the assistant commissioner of the Department of Education, assigned to the Division of Finance. As assistant commissioner, he has broad responsibilities, overseeing school facilities, grants, management, state monitors, and non-public and choice schools. He is acting commissioner in the event the commissioner is absent.

Since 2008, Dehmer has worked with the SFRA, a formula passed by the Legislature for school funding. The law considers enrollment as the main input to the formula. This feeds into the adequacy budget for the State and local districts, as well as into the categorical funding available for specific items. The state has 577 school districts. The adequacy budget does not count non-public school students.

The adequacy budget is calculated based on enrollment, with different factors weighing in costs for ESL students, needy students, speech-only services, and special-education services multiplied by a base amount. The local component is the local fair share: it equalizes property value and income and applies a rate which determines the dollar amount each district can pay to support the local schools. The State component is the equalization aid, which is the State's contribution to school funding. Two-thirds of special education is equalization aid, and one-third is for categorical funding, plus transportation aid and security aid (which is based on the number of students and the number of at-risk children).

On March 15, 2018, the Governor's budget message was sent out to all school districts providing a detailed outline of the calculation for the district following the funding formula and how the proposed aid was calculated. Lakewood received that notice. On July 13, 2018, notice was provided to the district to show the changes to the proposed funding amount after the Appropriations Act was modified. The adequacy budget was calculated on enrollment in public schools, and transportation for non-public school students was counted as required by the SFRA. The adequacy-budget calculation considered lack of English proficiency and low-income students (who receive free or

reduced lunch) in its weighted formula. Some districts spend over or under their adequacy budgets.

The local fair share takes into account property valuation and district income. The data comes from other State agencies like the Department of Community Affairs and the Department of Taxation. The local fair share is a calculation in the school-aid formula and considers the local tax levy. There are restrictions as to how much a district can raise. It is a 2% cap raise, but some exceptions were included in that law such as an allowance for increased enrollment and health-care costs. Districts can bank their cap. The levy cap can be exceeded, but districts must have ballot initiatives to increase the levy over the cap.

There are two types of State aid: equalization and categorical. Transportation categorical aid includes regular-education students and special-education students who do not require special services for transportation as one category. For special-education students who require an aide, a higher level of categorical funding is provided. The totals were $11,144,460 for the first category and $2,312,507 for the second.

Special-education categorical aid takes the district's total enrollment multiplied by 14.92% (statewide average classification), so using the $17,343 per-pupil amount and adjusting that for the geographical cost, it is multiplied by one-third. Since two-thirds is already included as equalization aid, it is multiplied by one-third, for a total of $5,007,392. The reason for the two-thirds, one-third split is to ensure that each district receives some aid for special-education costs. Security aid is calculated by the total number of students in the district, and also takes into account the concentration of low-income students in the district. Security aid and low-income aid totaled $2,722,718.

Special-education extraordinary aid is outside these calculations; there is a formula for this. Extraordinary aid covers a portion of special education to cover both in-district and out-of-district placements, and is reimbursement based on the cost and the prior-year expenditure. Separate spending is included for non-enrolled students, but it is not included in the SFRA.

During the 2011–2012 grant year, the district received the most nonpublic school IDEA basic funding in the state. Lakewood received $4 million, approximately 18% of total state non-public IDEA basic funding; the next district received $700,000, a fifth of what Lakewood received. A recommendation had been made in 2014 for the district to determine whether other IDEA-approved programs or services could potentially benefit a greater population of non-public school students with disabilities and be a better use of the aid received.

The approximately 31,000 non-public school students in Lakewood Township make up approximately 25% of non-public school students in New Jersey. In 2017, Lakewood received 2.33% of total State aid, even though its share of total public school enrollment was less than 0.5%. Out of 577 school districts in New Jersey, Lakewood received a total of 21% of other non-public school aid. In 2017, the State provided approximately $62 million in total aid for public and non-public school students to Lakewood Township.

Dehmer noted that Lakewood's tax-levy history showed it was consistent, but only started to increase in 2015. In the early years, Lakewood was taxing a little above fair share, and was very close starting in 2014, but from 2014 to 2018 they were below local fair share. Lakewood's school-tax rate for K–12 districts with 5,700 to 6,300 students compared to the statewide average showed that Lakewood was below the state average and was below other districts.

Lakewood has had a fiscal monitor since 2015. The monitor must remain with the district until the State-aid loan advances are repaid. Districts must meet benchmarks. Dehmer does not communicate frequently with the monitor. The monitor has authority to override the local BOE and adopt a budget with a tax increase, but it is limited to the 2% tax levy, with some exemptions.

Lakewood received State-aid advances in 2015–2016, 2016–2017, 2017–2018, and 2018–2019. Funding for Lakewood increased in 2018–2019. Loans were requested to balance the budget and to provide a thorough and efficient education, but he was not involved in that decision.

The commissioner is the authority who requests the supplemental-aid advances in funding: it is not determined by the formula or by the number of children in the district. He or she determines the amount based in part on the recommendations of his office. There are no negotiations. It is based on the recommendations of the monitor, office, and district. It is based on need, and a thorough and efficient education is the benchmark.

Some of the money received by the district is necessary for the paying back of old loans. The $28 million loan would have to be repaid, so some of it had to be used to pay back the State. The Commissioner recommended aid advances, which are generally paid back over ten years. The advances take into consideration not just the budget deficit, but also the need to repay previous aid advances.

The problem is an unbalanced budget. Local revenues must be maximized. High past non-mandatory expenditures can cause an unbalanced budget. The state monitor has been in Lakewood for five years. Dehmer reviews the budget plan set by the monitor: the monitor has plans to move the district ahead, Dehmer approves expenditures and plans to lower expenditures. Lakewood needs to do a more strenuous job of planning.

The SFRA adequacy budget is the school-funding formula that estimates what is necessary for a thorough and efficient education. It has nothing to do with Sections 192 and 193 aid. The loans are not based on a formula, they are determined based on the budget submitted by the district and items indicated to the DOE by the monitor. Dehmer does not know the exact expenditures, or tuition paid to schools outside the district. The loan is based on getting to a balanced budget and local control with the monitor, who reports to Glenn Forney.

Dehmer did not recall the months the advance aid loans were made to the district. Most districts start budget planning well in advance, as it is a statutory process. The districts are notified of the Governor's budget proposal, but do not know what it entails until the budget is signed. Lakewood needed more money in its adequacy share and has received the largest State advance. Ultimately, they are all trying to get to a balanced

budget, and, with State-aid advances, the district can provide a thorough and efficient education.

Dehmer had no day-to-day knowledge of the district. He just looks at expenses and revenue. The SFRA is funded every year according to the annual Appropriations Act but is not as fully funded as it could be.

Christopher Soleau testified that he has been employed by the Office of Legislative Services as a principal auditor since 2001. He is a field supervisor and assists in conducting investigations. He has a Bachelor of Arts degree in accounting.

As a trained auditor, he audits state agencies and programs with the goals of improving accountability, efficiency and the effectiveness of public spending. He has personally been involved with audits in Trenton, Asbury Park and Lakewood.

An audit is comprised of three phases: planning (meeting with personnel, reviewing records, reports and data); testing (reviewing documents and verifying processes and control; and reporting (compiling the audit, drafting a report, and obtaining approvals).

The site investigation in Lakewood commenced in January 2013 and ended in June 2014. The auditors found a general fund deficiency and the district was placed on an audit plan.

The audit report was issued in August 2014. It noted a few issues involving financial transactions that were not consistent with government auditing standards, a projected deficit, a lack of control environment leading to a lack of stability, and a growing population with flat property taxes which affected the budget and created a deficit. The report made recommendations for long-term goals.

The review noted that state and federal grant programs under Title I that were provided to low income students, showed that reconciliation procedures were lax. Title I

waivers lacked supporting documentation. The board had approved contracts without review, and other expenses were questionable.

Programs (under Sections 192 and 193) provided for auxiliary services, compensatory education, ESL and home instruction, and remedial and speech-language services. Lakewood received $13.9 million in fiscal year 2012, and $14.8 in fiscal year 2013. Other areas of concern in the report included: compensatory education, speech-language instruction, home instruction, school visits, legal costs, purchasing procedures, lease agreements, information technology, business continuity, special education tuition, payroll and personnel, criminal history background checks, final leave balance payments, salary allocations, employee contracts and salary increases, leaves of absence, observations, and the IDEA program.

After his report was issued, it went to the district and some of the identified problems were fixed.

Catherine Anthony is a dispute resolution specialist with the DOE. She opens mediation and due process files and is assigned special projects. Files are retained for twenty years and a data base is used to track cases from filing through outcomes.

Anthony researched agreements that Lakewood had reached on special education due process matters appealed to the OAL and found that 75 special education settlements had disenrolled those students from the district between 2013 and 2018.[27] The total cost to the district for these 75 students was $10,176,771.[28]

Raymond J. Zirilli, Jr., has been a senior transport specialist at the DOE for almost twenty years. His primary role is to gather data for paying state aid and regulating student transportation; he has other duties as well.

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[27] One student was disenrolled in 2013; 26 in 2016; 37 in 2017; and 11 in 2018. Other years were not provided. This is not the total number of special education students in the district.

[28] These settlement agreements were reached between parents acting on behalf of their children and the district, approved by the monitor, and then submitted to an ALJ in accordance with N.J.S.A. 18A:46-14(h).

In 1999 an audit was performed in Lakewood to see how efficiently the district was transporting students and their particular transportation needs. For example, if the district was running separate male and female buses, they would be running buses with fewer students and thereby running more buses than necessary. More efficient districts staggered bell times, and he needed to know if Lakewood was coordinating these. These concerns were shared with the district.

Zirilli noted that Lakewood's non-public school students were receiving courtesy busing. Courtesy busing is busing provided at the discretion of the local board of education and at local taxpayers' expense; it was not paid by the state as the state just pays for mandated busing which is two miles for elementary students and 2.5 miles for high school students.

Zirilli referred to the District Report of Transported Students (DRTS) which is the data collection to process state aid for transportation. The data consists of mandated transported students with sub-categories of actually transported and aid in lieu (AIL) which is the payment provided to parents equal to a maximum statutory amount that changes with each budget year to arrange for their own transportation. Aid is paid to the parents in lieu of the district providing transportation. The amount was $1,000.

After 2015-16, New Jersey established the Lakewood School Transportation Authority (LSTA) with aid in lieu. The district paid the AIL to the LSTA to provide mandated transportation services for non-public students. By comparison, in 2009-2010, the district transported 8,914 students and provided AIL for 156; by 2016-2017, the number went to 8 transported students and 15,919 transported by the LSTA.

Robert Ortley testified that he was employed as a manager of the New Jersey State Aid Audit Unit for nineteen years until he retired after 38 years with the State. The unit reviews and evaluates a school district's compliance with the requirements of the State division of finance to ensure that school aid is properly calculated by comparing the district's data to that on file with the state. The standard methodology is to compare lists of data submitted with accounting records, purchase orders, and other documents to see if the district's calculations were accurate.

An audit was conducted in Lakewood at the request of various government officials, and the final report was submitted on May 19, 2014. The audit used information as of October 14, as the statute required the last enrollment data on or before October 15 of that audit year. The purpose of the audit was to determine the accuracy of the data based upon enrollment records and accounting records of the school district for State aid reporting purposes.

The Application for State School Aid (ASSA) is an annual report filed by every district in the state to report the number of students enrolled. Deficiencies in the audit impact the amount of state aid a district receives or has to refund to the state. The linchpin for all reporting is the official New Jersey school register which is a contemporaneous and continuous document which indicates daily attendance and absence for the school year. The official New Jersey school register reflects daily attendance for the entire school year as compiled by the Office of Fiscal Accountability and Compliance (OFAC). If there is a difference, it can impact State aid. The audit showed that Lakewood had a disparity in student enrollment of about 84 students.

Within the resident enrollment count, the number of students who have limited English proficiency and those who are eligible for free or reduced meals is significant because the base id factor of the funding formula provides extra aid for these at-risk students. In various subset categories that can provide for additional finding and impact funding, the results were also disparate. The number of students eligible for free or reduced meals showed a disparity of 207; for Limited English Proficiency a disparity of 96 students; and for transported students in regular and special education a disparity of 326.5. These audit exceptions were reported in September 2013 and the State worked with the district to reduce them. Ultimately some adjustments were made.

These students represented approximately $2,308,500 that the district could have lost had the district been fully funded under SFRA. Recommendations were made to the district to ensure that future state aid would be calculated accurately. With such a high volume of data, they met with the district to review a draft so that the district could see the volume and magnitude of the findings.

Generally, the district's time to respond to the OFAC report is 75 days. The district can accept the report, appeal the report, or appeal specific findings in the report. Lakewood formulated a corrective action plan (CAP) to ensure the accuracy of its reporting which was submitted to the agency and shared with others in the DOE in finance and field services. Lakewood was advised by letter that its CAP was approved by the state. Follow-up meetings with the administrators were held and some adjustments were made. The final State aid recovery was reduced to about two million dollars.

According to the fiscal year report ending in 2018, $2,305,605 was owed to the state due to this audit if the district had been fully funded under SFRA but it had not been. Ultimately, for that budget cycle, it was recommended that the district reimburse the state for one-fifth of that total amount to be recovered by the DOE. However, Lakewood still owed the State $17,198,843 in outstanding loans as of 2018.

Accepting the DOE's numbers as correct as far back as 2011, Lakewood Township then had 5,248 students in the public school system and was transporting 13,676 students, more than 50% of the student population.

Glenn Forney is the deputy assistant commissioner of finance for the DOE. He has significant experience in budgeting and financing for school districts of the state. He is the Commissioner's designee for recruiting and placement of state monitors. He follows the statute that permits the appointment of monitors and which defines their authority in a district. Forney reports to Dehmer.

The DOE reviews the CAFR's of each district, analyzes them and reviews the qualifying elements for placement of a monitor. The DOE identifies districts that have qualifying elements that could result in the placement of a monitor. If a district just has one or two elements, the solution is remediation or a budget manager. If a district cannot remediate, then a monitor is placed. If it is in a deficit and can pay its bills, it gets help. If a district is in a deficit and cannot pay its bills, then a monitor is placed. A monitor is someone with a fiscal or superintendent's background. The DOE has found that having

a monitor in place generally provides a better rate of success for those districts with issues.

Lakewood has had a monitor since 2014 after a district audit was conducted in 2011. At that time, Lakewood's deficit was approximately $6.4-6.5 million. Currently, eleven districts have monitors, but not all receive state aid advances. The goal is to help fix the district and then to exit. The monitor remains in place until the situation is remediated which is determined when it has a stable administration, the CAFR findings are cleaned up and the loans (advance state aid) have been paid back. Monitors are paid by the district.

Forney does all the recruiting and day-to-day operations involving the monitors with whom he communicates as often as needed. He oversees them, prepares their contracts, oversees hiring, etc. Lakewood presently has one monitor, but at one point there were three. Monitors have helped. The deficit balance is going down and the number of CAFR findings is getting better. But it will be a long hard road to fix past damage.

The growth in the number of non-public school students far out paces the number of public school students which is not seen in any other district. It is also a by-product of zoning, and the town council appoints the zoning board. The district is responsible for transportation of non-public school students, Child Find and IEP teams. State aid provides Sections 192 and 193 funding and federal aid helps with the IDEA funding.

The financial stressors on the Lakewood public school district are for transportation for non-public school students and special education.

Transportation is mandated for 21,000 non-public school students, and the DOE cannot limit the number. Students in grades K-12 who live beyond a two-mile limit and students in grades 9-12 who live beyond 2.5 miles get bused. The district cannot choose which school the non-public school students attend and must pay mandatory transportation costs. The cost for this runs about $20-22 million per year.

Lakewood gets transportation aid for mandatory busing; the formula sets the amount. It comes from State appropriations funded by taxpayer revenue.

The cost of special education is another stressor in the district. These students are registered with the public school district and as public school students, they get IEP services. These students are counted in State aid. Extraordinary aid is paid for special education students with out-of-district placements where costs exceed the threshold. The State pot is divided up and Lakewood receives this aid as well.

Lakewood Township has been growing. He reads the CAFR and statistics show its population growth. The district gets it from the DCA. Lakewood Township has new construction; its ratable balance is growing. School taxes go to the township, and first year tax payments stay with the township. The school levy is set by the school board. The township does not have to go above the levy to give money toward education. Ratables are the assessed value of property and are recorded in the county schedule of ratables and in CAFR.

Forney looks for trends and analyses. The tax rates in Lakewood Township have been decreasing; as the ratables go up, the tax rate goes down.

The SFRA determines local fair share by considering town wealth and property values. The DCA provides the data about income, wealth and property value. The district contributes to the local fair share; it is what the township can pay toward school funding. The district is not required to tax up to the local fair share but it can do it. Lakewood is not raising enough for its local fair share. The levy struck by school board is less than total fair share. The tax cap restricts it to 2% and Lakewood capped out at 2%.

Forney looked at Ocean County. Lakewood is in middle of the pack of tax rates. The tax rate is the by-product of tax levy. The tax levy in Lakewood had been stagnant, then it decreased, and it is now increasing. Lakewood Township's population is growing, not stagnating.

In 2015, the levy went up 9.2%. The monitor struck the tax levy that year and they raised taxes to the maximum amount. That tax levy increase in 2015 did not fix the problem because they had a deficit from previous years and costs were rising. The tax levy cap can be overcome to cover increased cost of medical insurance; enrollment; pension and government duties to another entity.

N.J.S.A. 18A:22-40 provides that a district such as Lakewood can raise funds for the general fund deficit and is not limited to the cost of a thorough and efficient education. Other districts have used this statute to raise more revenue. Lakewood Township put out a referendum, but it did not pass. The monitor cannot direct the township to raise taxes.

Voter approval could bring in more funds for the district to cover non-T&E items. Funding comes from the tax levy, federal aid and state aid. State aid comes through the Appropriations Act. Lakewood was frozen in the past and was getting the same amount as prior years. The Appropriations Act did the freezing and it could cause an issue, but school districts can plan for that. The State aid process starts in November and December and is based on what the district is receiving. The governor's budget is prepared in February and March and state aid letters go out March 20 when the budget is due. Once the Appropriations Act is passed, the districts get the aid.

School districts must have a balanced budget; revenue must equal expenses. In some years, Lakewood's budget was balanced with a state aid advance which is a loan. This is all part of the school funding scheme; other statutes permit districts to raise funds. The DOE does not have the funds itself; it must request them from the state treasurer. They want to make sure a district gets the right amount of aid. Forney works with the monitor, county offices, etc., to calculate the true cost for expenses and to compare those costs to the district's costs. Streams of revenue are ascertained and if there is a gap, an advance of state aid is provided. They rely on the school superintendent for educational experience. They look at any costs or efficiencies. The district provides the data and the state looks at aid.

State aid advances are not determined by formula but rather they are given at the discretion of the Commissioner and the Treasurer. The State works with the district to

determine need. The State needs correct numbers before it can determine amount of aid for the district. The funding formula recognizes the number of public school students. State aid advances started in 2015 and filled the gap between spending and what the district had available to spend. Once the state is confident that the amount requested is correct, the Commissioner requests funds from the state Treasurer.

On June 15, 2015, the treasurer approved $4.5 million requested by Hespe for Lakewood; on June 23, 2016, $5,640,183 requested by Hespe; on November 9, 2017, requested by Harrington, $8,522,678. That year they had problems getting data from Lakewood, so the State recreated what the dollar amount would be. On May 7, 2018, Forney advised Winters that Lakewood would receive $28,182,090 for that fiscal year. But Lakewood had some banked cap rate it could have used to avoid some of these advances. In 2016-17 there was still a shortfall, and the budget was as low as possible. In 2017-18, State aid was $8.5 million, and the budget was balanced with the loan. The advance State loan was paid on May 17, 2018. Any loan can only be for ten years; he has not seen that loans can be forgiven.

The deficit is the amount that the district is short after it pays its bills, including the loan payback. At the end of the year, the short fall is the deficit. Lakewood's annual deficit is dropping but aid to it is increasing. Some payments have been made to the outstanding balance. Lakewood has a general fund deficit of $3.8 million down from $12 million that would free up money in the budget. Lakewood must repay these state advances starting the following year. No interest is paid, and the advance is deducted from aid in future years. Lakewood could ask Lakewood Township for more money.

Reductions in force are something to be avoided. But revenues must equal expenditures. The district could go out in November to ask voters for extra aid; the district could reduce expenditures or raise funds if there is a deficit. He works with Shafter on the budget. Forney was not aware if Azzara said that Lakewood has a revenue problem, not a spending problem. But the budget must be balanced either with advances on state aid, or by reductions ordered by the monitor to get to the balanced budget.

Forney consulted with Shafter about the 2018-19 budget as adequate to meet the district's needs. The tax levy increased. SFRA and State aid were locked in and Lakewood needed another advance. The State must help Lakewood achieve a balanced budget every year.

The monitor can override the board as long as there is a fiscal nexus. If the board does not take action, the monitor can strike the tax levy. Taxes can be raised by the 2% tax cap.

State aid is not provided for non-thorough and efficient education items. In 2016, the state monitor ordered the school board to put to a voter referendum a tax increase for courtesy busing, a non-T&E item; however, the Lakewood Township voters defeated the proposal for payment of courtesy busing by approximately 7,000 to 100.

Seventy-three to eighty percent of the budget is salaries. Forty million dollars is for tuition. Lakewood has significant out-of-district special education costs which put a strain on the budget. Transportation costs are a major contributor to cost increases at $710 per child. The 2014 monitors noted that the cost for transportation and out-of-district special education expenses were going up and trending higher.

The SFRA was developed for school funding and was approved by the New Jersey Supreme Court. A state monitor is required to get a State aid advance. Lakewood still meets the qualifications for the presence of the monitor due to deficit, internal control issues, federal funds refund, and CAFR findings. The monitor stays in the district at the discretion of the commissioner until the condition has been remediated. Lakewood has $46 million outstanding.

The annual budget process needs to address economies and efficiencies. Lakewood's CAFR in June showed a $3.1 million deficit due to operations, $11 million in total, due to late State benefits as June payments were late. The district is made whole in June or July as State aid is paid out two times per month. The SFRA is not fully funded. The year by year approach is working. The plan with CAFR is to have the monitors fix the district and get out.

FINDINGS[29]

Much of this case is about numbers and statistics: the SFRA funding formula, Lakewood's revenues and expenditures, demographics, test scores, course offerings, graduation rates, and more. Many of these numbers and statistics are a matter of public record, are not in dispute, and have been explained and contextualized by witness testimony.

For "testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself." In re Estate of Perrone, 5 N.J. 514, 522 (1950). A credibility determination requires an overall assessment of the witness's story "in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952)(citation omitted).

Upon consideration of the public documents, exhibits, and witness testimony relevant to this matter, I **FIND** the following as fact:

In 2000, Lakewood Township had a total population of about 60,000 people. In 2019, the estimated population was roughly 106,000, which represents a seventy-six percent population increase over nearly two decades. This rapid population growth is largely attributed to the burgeoning Orthodox community in Lakewood Township.

A large percentage of Lakewood Township is composed of persons under the age of eighteen, or school-age children. Among the school-age children in Lakewood Township, there is a stark dichotomy between attendance at public schools and

[29] The facts have been gleaned from the rather disjointed testimony, the evidence presented by the parties, and certain publicly available information and data from DOE's website. Unfortunately, the parties could not jointly stipulate to facts.

attendance at private or sectarian schools. For the 2008-2009 school year, approximately 4,900 students attended the public schools, while 14,460 attended non-public schools, which meant that about twenty-five percent of the school-age population was then in public school. However, as of 2019, the public school population increased to about 6,000 students, while the private school population had grown to more than 30,000 students.

This means that, currently, only sixteen percent of Lakewood Township's students attend public school while eighty-four percent attend private or sectarian schools. This statistic is so deviant from the average in New Jersey as to be an outlier. The non-public school students in Lakewood Township make up approximately 25% of all non-public school students in New Jersey, and the private school population will continue to outpace the public school population at a geometric rate.

The petitioners' witnesses testified credibly about the effect the rapid growth in private school attendance has had on the district's finances. In particular, Finger, Shafter, and Azzara credibly described Lakewood's on-going budgetary issues arising from the costs borne by the district in accordance with State law for the transportation and special education of students attending private schools.

Finger credibly testified and I accept as fact that when he first left Lakewood's employ in 2010, the district had a budget surplus. Since his return in 2017, the district has needed significant financial help from both the State and the Township to balance its budget. The district's financial issues can be attributed in large part to the extraordinary cost the district bears for its legal mandate to pay for transportation for private school students and for tuition for special education students the district places in out-of-district private schools. For instance, for the 2017-2018 school year, these transportation and special education costs consumed more than half of the district's budget, or $78M out of a total budget of $144M. However, in neighboring districts such as Toms River, Brick, Jackson, and Freehold, the average transportation and special education tuition costs make up only 4-7% of their budgets.

Because Lakewood started going into a deficit in 2014, a State monitor was appointed to the district to supervise financial operations and to ensure accountability for

the expenditure of public funds. In 2013-2014, the deficit was approximately $6 million. For 2016-2017, it was approximately $4.3 million.

Shafter and Azzara, the State monitors, echoed Finger's sentiments about the correlation between Lakewood's private school expenses and its budget problems. Since their placement in Lakewood in 2014, these monitors have rectified several issues with recordkeeping and financial waste in the district. To avoid teacher layoffs, increased class sizes, and program cuts, and to balance the annual budget, the district has borrowed millions of dollars from the State in the form of advance SFRA aid.

Lakewood received $4.5M in advance aid in 2015; $5.6M in 2016; $8.5M in 2017; and, $28M in 2018, for a total of nearly $50M. As noted by several of the witnesses for both parties, advance aid is essentially a loan from the State with money from future SFRA aid. Lakewood must repay these loans out of future aid, creating an unsustainable cycle of borrowing and repayment that will be difficult for Lakewood to break. Only districts with State monitors are eligible for advance aid, and State monitors cannot be removed unless and until a district repays the advance aid it receives.

With Lakewood's budget issues as a backdrop, Winters, Spitz-Stein, and Marshall provided valuable insight into the characteristics of Lakewood's student body, teachers, and programs, and credibly described Lakewood's efforts to deliver T&E to public school students.

The socioeconomic makeup of the district's public school students is 94% Latinx and Black; 100% percent of the student body is eligible for free or reduced-price lunch based on household income. Lakewood also has a high percentage of ESL and LEP students.

The district's course offerings meet the State's requirements for graduation, with twenty English classes, and fifteen classes each in Math, Science, and Social Studies. The district also has AP classes in English and Spanish, and several classes in music, art, and computers. However, over the years the district has cut programs for industrial arts and auto mechanics, and the only foreign language study offered in-district is

Spanish. Also, the district has a special education preschool program for three- and four-year-old students, but only offers general education preschool for four-year-old students.

Winters, Spitz-Stein, and Marshall also credibly discussed relevant characteristics of Lakewood's teachers. Teacher turnover is significant in Lakewood, where the average teacher salary is below the State average. The average teacher in Lakewood has between only four and five years of experience, and Lakewood must spend significant money on teacher development and training. Marshall and Spitz-Stein bemoaned the lack of remediation/intervention specialists in the district who can provide students the extra educational support they require in their areas of struggle or deficiency.

Lakewood lags well behind other districts in terms of per pupil classroom instruction spending and classroom salaries. For example, according to the DOE's Taxpayers' Guide to Spending 2018, Lakewood spent $7,427 per pupil on classroom instruction for 2016-2017, which ranked as the second lowest amount among the ninety-eight K-12 school districts with more than 3,500 pupils.[30] And, for the same school year, Lakewood spent $6,906 per pupil on classroom salaries, which also ranked as the second lowest among comparably-sized school districts.

Winters and Spitz-Stein also testified about how standardized test scores and other educational benchmarks are improving but are still well below State averages, and their testimony is supported by publicly available information compiled and disseminated by the Department of Education.[31]

For the 2014-2015 school year, only twenty-three percent of high school students met or exceeded expectations on the PARCC assessment for English, placing them in the twenty-third percentile in the State, while only five percent of high school students met or exceeded expectations on the PARCC assessment for Math. On the New Jersey Biology Competency Test (NJBCT), only thirty-two percent of high school students were proficient, while sixty-eight percent were partially proficient.

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[30] Taxpayers' Guide to Education Spending 2018, available at https://www.nj.gov/education/guide/2018/.

[31] This information is available at New Jersey School Performance Reports, https://rc.doe.state.nj.us/SearchForSchool.aspx.

On the SAT, only six percent of students scored above the benchmark of 1550, placing Lakewood High School in the thirteenth percentile in the State and well below the Statewide target of forty percent. Moreover, only twelve percent of Lakewood high school students were enrolled in at least one AP/IB course, well below the State average of thirty-six percent. And a mere twelve percent of students scored a three on an AP test or a four on an IB test, while the State average was seventy-two percent.

Finally, for 2014-2015, the graduation rate was seventy-four percent, or the sixth percentile in the State, where the Statewide target was seventy-eight percent; the dropout rate was nearly four percent, or double the Statewide target of two percent; and, only forty-four percent of students were enrolled in either a two- or four-year postsecondary school, compared with seventy-eight percent across the State.

For the 2015-2016 school year, twenty-three percent of high school students met or exceeded expectations on English assessments, or the twenty-third percentile in the State, while seven percent of high school students met or exceeded expectations on Math assessments, or the thirteenth percentile in the State. And on the Biology assessment, only twenty-two percent were proficient, compared with a forty-one percent State average.

On the SAT, twenty-three percent met the College Readiness Benchmarks on the reading and writing portion, compared with seventy-one percent Statewide, and on the math section, eleven percent met the benchmarks, compared with fifty-three percent Statewide. And only fourteen percent of students were enrolled in at least one AB or IB course, compared with thirty-nine percent across the State.

Finally, the graduation rate was seventy-five percent, or the ninth percentile in the State, where the Statewide target was eighty-one percent; the dropout rate was nearly three percent, while the Statewide target was one percent; and, only thirty-seven percent of students were enrolled in either a two- or four-year postsecondary school, compared with seventy-seven percent across the State.

In 2016-2017, only twenty-five percent of students met or exceeded expectations on state English assessments, and only eighteen percent met or exceeded expectations on state Math assessments. Lakewood also suffered from chronic absenteeism, with thirteen percent of students absent for ten percent or more of days enrolled. Finally, for 2016-2017, the four-year graduation was seventy-five percent in Lakewood, while the State average was ninety percent, and the rate of college enrollment (two- and four-year programs) in Lakewood was forty-four percent, while the State average was seventy-six percent.

In 2017-2018, some of the metrics improved slightly: twenty-eight percent of students met or exceeded expectations on state English assessments, and twenty percent met or exceeded expectations on state Math assessments. Chronic absenteeism increased slightly over the previous year, with a rate of sixteen percent. The district's graduation and college enrollment rates still fell below the State average (eighty-two percent versus ninety percent) and (forty-one percent versus seventy-eight percent). Finally, the district's AP and dual enrollment (college courses taken by high school students) rates were also well below State averages (seventeen percent AP enrollment versus a State average of thirty-five percent and zero percent dual enrollment versus a thirteen percent State average).

In 2018-2019, some of the metrics continued to improve, but they still fell well short of State averages. Thirty-three percent of students met or exceeded expectations on state English assessments, and twenty-one percent met or exceeded expectations on state Math assessments. Chronic absenteeism decreased from the previous year, with a rate of nine percent, which was below the State average of eleven percent. The district's graduation and college enrollment rates continued to fall below the State average (eighty-one percent versus ninety percent) and (forty percent versus seventy-eight percent). Finally, the district's AP and dual enrollment rates were also well below State averages (twenty-one percent AP enrollment versus a State average of thirty-five percent and zero percent dual enrollment versus a nineteen percent State average).[32]

[32] The DOE website provides a statistical analysis of all school districts in the state if comparison is necessary.

Another measure of whether a school district is providing its students with T&E, the NJQSAC, also provides evidence of the education situation in Lakewood. The NJQSAC measures a district's effectiveness in five performance areas, including instruction and program, fiscal management, governance, operations, and personnel, with a score of less than eighty-percent in any category necessitating improvement activities.[33] For example, for the 2016-2017 school year, Lakewood scored at fifty-four percent in instruction and program, which measures such things as student performance and progress on state assessments, graduation rates, and alignment of curriculum to state standards.

Several witnesses discussed the SFRA in general and as applied to Lakewood. The SFRA formula bases the calculation for state aid on the number of students in the public school system and not the total number of students or school-age children residing within the district. The core of the SFRA is the adequacy budget, which is a State calculation of the amount of money a district needs to provide its students with T&E.

A school district contributes to school funding through the local fair share, which is determined by equalizing property value and income in a district and calculating the dollar amount each district can pay to support the local schools. The State component is the equalization aid, which is the State's contribution to school funding.

The funding formula includes transportation aid and special education aid. The transportation and special education aid that Lakewood receives under the SFRA does not cover its actual transportation and special education costs. Dr. Farrie credibly noted that Lakewood spent about $40 million more than a district its size should spend due to special education and transportation costs.

The following table provides the relevant SFRA numbers for Lakewood for school years 2014-2015 through 2018-2019, rounded to the nearest million:

[33] See NJQSAC User Manual, available at https://www.nj.gov/education/qsac/manual/.

Year	Adequacy Budget	Local Fair Share	General Fund School Levy	Equalization Aid	Transpo. Aid	Spec. Ed. Categorical Aid
2014-2015	$109	$85	$85	$13 (fully funded); $15 (actually appropriated)	$9 (fully funded); $4 (actually appropriated)	$4 (fully funded); $3 (actually appropriated)
2015-2016	$119	$97	$90	$12 (fully funded); $15 (actually appropriated)	$10 (fully funded); $4 (actually appropriated)	$5 (fully funded); $3 (actually appropriated)
2016-2017	$119	$93	$94	$10 (fully funded); $15 (actually appropriated)	$12 (fully funded); $4 (actually appropriated)	$5 (fully funded); $3 (actually appropriated)
2017-2018	$110	$102	$97	$8 (fully funded); $15 (actually appropriated)	$13 (fully funded); $4 (actually appropriated)	$5 (fully funded); $3 (actually appropriated)
2018-2019	$114	$112	$101	$2 (fully funded); $15 (actually appropriated)	$13 (fully funded); $3 (actually appropriated)	$5 (fully funded); $3 (actually appropriated)

The Department of Education provided the following chart of Lakewood's tax levy and local fair share history under the SFRA:

Fiscal Year	Previous Year Tax Levy	Local Fair Share	Difference	Levy as % of Local Fair Share
2011	$71,593,625	$64,019,995	$7,573,630	112%
2012	$71,593,625	$64,019,995	$7,573,630	112%
2013	$70,238,004	$65,400,388	$4,837,616	107%
2014	$70,630,210	$71,198,357	-$568,147	99%
2015	$77,097,641	$85,419,632	-$8,321,991	90%
2016	$84,693,837	$96,735,200	-$12,041,363	88%
2017	$90,350,168	$92,974,112	-2,623,944	97%
2018	$94,088,028	$102,034,106	-$7,946,078	92%

Dehmer credibly noted that Lakewood's tax levy history showed it was consistent, but only started to increase in 2015. In the early years of the SFRA, Lakewood was taxing a little above fair share, but from 2014 to 2018 it was below local fair share. Lakewood's school tax rate for K–12 districts with 5,700 to 6,300 students compared to the statewide average showed that Lakewood was below the state average. In 2016, Lakewood put to a public vote a referendum to increase the school tax levy to raise more than $6M to help pay for transportation costs; that measure was defeated by Lakewood Township voters by a margin of 99% to 1%.[34]

As is clear from the record and testimony, the two major budgetary stressors for the Lakewood district are the cost of transportation and special education placements for children who attend private school.

The following table shows Lakewood's special education tuition expenditures for private school tuition for school years 2014-2015 through 2018-2019:

School Year	Number of Students	In State	Out of State	Total Tuition
2014-2015	207	21,056,687	65,240	21,122,137
2015-2016	260	25,083,549	125,476	25,209,025
2016-2017	299	27,891,730	281,215	28,172,945
2017-2018	296	29,305,180	593,975	29,899,155
2018-2019	343	33,232,478	72,900	33,305,378

Dr. Farrie credibly testified that the reasons for Lakewood's high special education costs are a large population of special education students, a large number of students whose disabilities carry high costs, and higher-than-average out-of-district placements, which are more expensive. She posited that fewer out-of-district special education placements could help reduce Lakewood's special education costs.

The following is a table of the district's transportation expenditures:

[34] Clearly the local voting populace has not demonstrated enthusiasm for an increased tax levy.

School Year	Public School Students	Private School Students	Aid in Lieu of Transp.	Total Transported(Non Spec Ed)	Total Cost
2014-2015	2,052	13,832	462	16,346	$23,235,597
2015-2016	2,038	15,982	286	18,316	$26,343,391
2016-2017	2,163	15,919	1,050	19,132	$25,732,995
2017-2018	2,336	8	19,166	21,510	$29,739,226
2018-2019	2,285	84	20,147	22,516	$31,155,570

Although Lakewood has stopped directly paying for courtesy busing of children who live close enough to school such that they do not qualify for publicly-funded transportation, Lakewood's transportation costs continue to rise. Testimony indicated the need for more sidewalks, crossovers of Route 9, and crossing guards to reduce the number of hazardous walking routes in Lakewood.

In or about 2009, the Department of Education issued a "Lakewood Needs Assessment" in response to a State Board of Education directive arising from litigation first brought in the late 1990s by several then-rural and property-poor school districts, known as the Bacon districts and including Lakewood. See Bacon v. Dep't of Educ., 398 N.J. Super. 600 (App.Div.2008). In that case, the State Board ruled that several of the Bacon districts (not including Lakewood) were unable to provide T&E under the statutory funding scheme in place at the time. Bacon v. Dep't of Educ., 2006 N.J. AGEN LEXIS 108 (Jan. 4, 2006). However, due to a jurisdictional lack of "authority to direct that additional resources be provided to any school district in New Jersey," but acknowledging the need for some remedy, the State Board directed the Commissioner of Education to conduct a "needs assessment" for all of the Bacon districts, including Lakewood. Id. at *96.

The purpose of the needs assessments was to "assess[] the adequacy of the educational inputs and programming currently being provided" and to "identify the unique educational needs of the students in those districts requiring additional programs to address them." Id. at *103. According to the State Board, "an assessment of the educational needs and the identification of approaches that will successfully address those needs is a prerequisite to ensuring that adequate resources, including fiscal

resources, are provided and appropriate accountability for their use is guaranteed." Id. at **97-98.

In the Lakewood Needs Assessment, the Department made several observations, conclusions, and recommendations. The Department noted a large percentage of Lakewood Township's public school students were "at-risk (defined as being at or below 185% of the federal poverty guidelines)," and that "[a]lthough public school enrollment is stable, the nonpublic population increases by close to 1,000 students each year."[35] The Department remarked that a large part of Lakewood's budget was directed toward transportation and special education costs associated with private school students.

On the issue of transportation costs, the Department stated that "[t]he district is aware that the high cost of transportation, due to increased numbers of nonpublic students, staggered start times and its courtesy busing policy [under which the district opted to spend during the 2008-2009 school year $4M on busing private school students who did not live remote from their schools], is a significant financial drain." As for special education costs, the Department found that "[a]nother large budget expenditure is for out-of-district special education placements, which includes transportation for those students."

The Department concluded that Lakewood, "while facing significant challenges, could do significantly more with the funds currently available to it" and "find ways to ensure that its resources are directed to meet the instructional needs of its students." The Department recommended that Lakewood reconsider its courtesy busing policy and "continue to develop strategies to educate more of its special education students in-district." The Department acknowledged that "[t]here are many areas which Lakewood needs to improve in terms of student performance," including proficiency on English assessments, but stated that "the district also has significant resources to address those needs." The Department recommended that one "successful strategy for improving student performance is to provide a high-quality preschool program as required by the SFRA."

[35] An underestimate of the increase in non-public school students to be sure.

Lakewood was also the subject of a State audit that revealed issues with the district's spending on transportation and special education. As Soleau credibly testified at hearing, in 2014, the Office of the State Auditor issued a report on its audit of Lakewood for the period of July 1, 2011, to December 31, 2013. The purpose of the audit was "to determine whether financial transactions were related to the school district's programs, were reasonable, and were recorded properly in the accounting systems." The auditors found that "financial transactions . . . were not always reasonable or properly recorded in the accounting system" and that the district had a projected budget deficit of $5M for FY 2014, and that "[i]ncreases in student transportation costs for public and nonpublic school students and special education tuition account for $2.6 million of this projected deficit."

On transportation costs, the auditors noted that "[b]ecause of significant student population growth within the municipality, transportation costs had increased to $19.6 million for the 2012-2013 school year," which included the cost of "provid[ing] non-mandated (courtesy) busing to public and nonpublic school students who would otherwise walk along the numerous hazardous routes identified in the township." The auditors suggested that "transportation costs of the district could be reduced with the implementation of certain initiatives," including the following:

- The majority of the nonpublic school bus routes in the district are segregated by gender. Since most of these schools have a 9:00 a.m. start time, the demand causes increased pricing by the vendors. Separately tiering the bell times for the girls and boys' nonpublic schools could save the district up to $6.7 million. For example, starting school at 8:30 a.m. for girls and 9:15 a.m. for boys would enable the busing contractors to bid on tiered routes which would reduce the overall number of buses needed and create more competitive route pricing.

- Currently, there are separate buses for each nonpublic school. Savings of approximately $750,000 could be achieved if routes were developed by school locations, not specific schools. This would result in shorter bus routes and fewer buses.

- Currently, nonpublic schools could have two starting times and as many as five ending times which creates inefficiencies and the need for one-way routes. Providing transportation to nonpublic schools based on a single opening and closing bell schedule for each school building could save the district up to $1.2 million. This initiative has been presented to the board's transportation committee.

- [And] tiering the bus routes could reduce the savings of other proposed initiatives.

And in terms of special education costs, the auditors found a lack of "proper approval, tuition documentation, and attendance records . . . for students placed in unapproved nonpublic schools."

The auditors recommended that "the district, in coordination with state and local officials, develop long-term goals that will address the costs associated with the rapid growth in the district."

In response to the auditors' findings regarding special education costs, Lakewood indicated that "no additional students will be placed in private programs without the approval of the Commissioner of Education," and in reply to the findings on transportation costs, Lakewood stated that the district was "piloting a staggered nonpublic school schedule for 7 of the largest nonpublic schools during the 2014-2015 school year based on the premise that all nonpublic schools will go to a staggered school schedule in the 2015-2016 school year, which is expected to greatly reduce transportation costs." Yet special education and transportation costs have continued to increase.

In sum, based on the foregoing testimony, exhibits, and publicly available information and data, I **FIND** that Lakewood Township has experienced a population boom that has had a profound impact on the municipality's private and public schools. The overall population growth in Lakewood Township over the past twenty years has been accompanied by an almost proportional rise in attendance at the municipality's private schools. Many of the private school students, who now number more than 30,000, are, by law, entitled to transportation to and from school at public expense. In addition to the significant transportation costs associated with private school students, the Lakewood

Public School District also spends tens of millions of dollars in tuition each year to send a few hundred special education students to private schools. SFRA aid covers only a portion of these costs.

The school district's transportation and special education costs have strained its annual budgets and have led the school district down an unsustainable path of borrowing millions upon millions of dollars in the form of advance SFRA aid. The school district's financial difficulties have negatively affected its public school students, teachers, and programs. This is evident from a narrowed breadth of course offerings, relatively low per pupil classroom instruction spending and classroom teachers' salaries, and marked teacher turnover.

The 6,000+ public school students, nearly all of whom are Latinx and come from low-income homes where English is not the primary language, have fared poorly in terms of performance on English and Math assessments, graduation and dropout rates, and college enrollment.

In the past decade or so, the school district has been given recommendations by both the DOE and the State auditor for reigning in transportation and special education costs, and the Commissioner of Education has appointed a State monitor to oversee the school district's financial operations and to operate with a balanced budget. The continuation of State aid advances as an unreliable source of funding, and the obligation to reimburse the State over time, have contributed to the situation, as the school district's financial problems persist, and unrestrained growth continues in the Township.

LEGAL DISCUSSION

The petitioners make the following arguments:

Point I.

The SFRA is unconstitutional as applied to LPSD [Lakewood Public School District] because it does not assure sufficient funds for the district's public school students to achieve a constitutionally required T&E.

A. LPSD's unique demographics make the SFRA formula an inapt and insufficient mechanism for assuring that LPSD has adequate funding for its public school students.

B. Neither the SFRA funding formula nor the adequacy budget related to the SFRA formula contemplate a demographic situation such as Lakewood's and make adequate provision for LPSD's unique demographics.

Point II.

The addition of periodic uncertain, unpredictable and discretionary funding, whether in the form of so-called state advance aid, which is effectively a state loan to LPSD, or of a year-end addition to the state budget by a legislative footnote, cannot cure SFRA's constitutional defect inconsistent with a thorough and efficient system of public schools.

A. To meet constitutional T&E requirements, funding must be formulaic, certain and not discretionary, predictable and transparent to adequately enable a school district to provide its public school students with T&E.

i) Funding must be pursuant to a discernable plan that correlated funding to T&E

ii) Funding must be guaranteed and not discretionary

iii) Funding must be predictable in order for a district to plan ahead and for the district to know how much it should spend on T&E

iv) Funding must be transparent so that the public and Legislature understand the needs of the district.

B. To meet constitutional T&E requirements, funding must be adequate to enable LPSD to provide its public school students, many of them requiring

additional funding to address their at-risk status, with a meaningful opportunity to meet the NJ Student Learning Standards.

i) The uncertain discretionary funding of LPSD is inadequate to serve the educational needs of Lakewood's disadvantaged students.

ii) LPSD student outcomes fall far short of NJSLS standards.

C. The statute under which advance state aid is provided was not intended to apply to a situation such as LPSD's annually recurring fiscal shortfall.

i) The statutory advanced State aid provision and its substance suggest that advance State aid was an adjunct to the State monitors' role and a means to deal with short-term emergent circumstances brought on by fiscal mismanagement, not a mechanism for curing long-term structural problems with the SFRA funding formula.

ii) The Commissioner's annual certification pursuant to the statute does prove, however, that LPSD's regular SFRA funding is insufficient to provide its students with a T&E education.

D. Because advance state aid is a loan that must be repaid out of future state aid, it exacerbates LPSD's fiscal situation and burdens it with increasingly great obligations.

i) The Supreme Court of a sister state found that the state's use of loans to meet a district's ordinary operating expenses violated the though and efficient clause of its constitution.

ii) This problem is compounded by the fact that, after 2018-2019, LPSD will receive as state aid only transportation and

categorical aids and not equalization aid, thus resulting in total state aid at best holding constant in future years, if not decreasing, and making repayment of LPSD's burgeoning debt to the state increasingly difficult.

iii) Advance state aid for ordinary expenses violates the efficiency standard of T&E.

iv) Advance state aid is available only to districts with state monitors in place.

Point III.

The presence in LPSD of as many as three monitors continuously since 2014 assures that the district is spending available funds appropriately.

Point IV.

Even if, arguendo, advance state aid and other forms of uncertain discretionary funding could be deemed to satisfy part of the state's obligation to assure that T&E is adequately funded, the facts in evidence demonstrate that LPSD still lacks adequate funding.

A. Funding is inadequate to prepare students for their roles as citizen and competitors in the labor market.

B. Funding is inadequate to serve the special educational needs of Lakewood students.

The respondents make the following arguments:

Point I.

The SFRA has been found to be constitutional.

Point II.

Petitioners have not shown that Lakewood is failing to provide them with a thorough and efficient education.

Point III.

The financial condition in Lakewood is the result of factors outside of the SFRA

A. The district has a history of mismanaging funds and has made choices against the interest of the public school students.

B. Local choices in the municipality contribute to the current financial conditions in Lakewood.

C. There is legislation outside of the confines of the SFRA that has affected the district.

Participant Trachtenberg argues:

Point I.

The SFRA of 2008 fails to provide the Lakewood School District with adequate funds to enable it to provide its approximately 6,000 public school students, most of them low-income Latino and Black, with the constitutionally required thorough and efficient education.

Point II.

Assuming it does not, then a constitutionally acceptable way in which the State can provide the LSD with sufficient supplemental non-SFRA funding must be determined.

Point III.

The state's arguments fail because that ignore or obfuscate the State's singular constitutional responsibility for assuring all state students, especially those who are at risk, receive a thorough and efficient education.

Participant Lakewood Township Board of Education argues:

Point I.

The Lakewood Township Board of Education public school district is not adequately funded, and the current state funding formula does not allow the Lakewood Township Board of Education to provide a thorough and efficient education to its public school students. A permanent statutory remedy is required.

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Under the New Jersey Constitution, "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. art. VIII, § 4, ¶ 1. Historically, the Legislature has sought to satisfy this constitutional mandate by passing various school funding statutes and by delegating certain powers and duties to the State Department of Education, the Commissioner of Education, the State Board of Education, and local school boards. Robinson v. Cahill, 69 N.J. 449, 458, 461 (1976); Bd. of Educ. v. City Council of Elizabeth, 55 N.J. 501, 505-6 (1970); Bd. of Educ. of Twp. of E. Brunswick v. Twp. Council of E. Brunswick, 48 N.J. 94 (1966).

Over the years, the Supreme Court has assessed the constitutionality of those legislative efforts through a series of opinions and orders known as the Abbott v. Burke litigation. The overarching theme of those judicial decisions is that "more severely disadvantaged pupils require more resources for their education" and that the legislative and executive branches must devise "a funding formula that . . . provide[s] all children, including disadvantaged children in poorer urban districts [commonly referred to as Abbott districts], with an equal educational opportunity as measured by the Constitution's thorough and efficient clause" and "a set of educational program standards." Abbott v. Burke, 199 N.J. 140, 144 (2009) (Abbott XX) (citing Abbott v. Burke, 119 N.J. 287, 374, 384-86 (1990) (Abbott II)); Abbott v. Burke, 136 N.J. 444 (1994) (Abbott III). According to the Court, "[a]t its core, a constitutionally adequate education [is] an education that will

prepare public school children for a meaningful role in society, one that will enable them to compete effectively in the economy and to contribute and to participate as citizens and members of their communities." Abbott v. Burke, 149 N.J. 145, 166 (1997) (Abbott IV).

The State's current funding framework to provide New Jersey's public school children with a thorough and efficient education (T&E) is the School Funding Reform Act of 2008 (SFRA), N.J.S.A. 18A:7F-43 to -70, which was originally enacted in 2008, P.L. 2007, c. 260 (eff. January 13, 2008), and most recently amended in 2018, P.L. 2018, c. 67 (eff. July 24, 2018). In the SFRA, the Legislature made several pronouncements about every public school pupil's right to a constitutional education and the means by which that right may be realized. N.J.S.A. 18A:7F-44.

The SFRA recognized that "[t]he State, in addition to any constitutional mandates, has a moral obligation to ensure that New Jersey's children, wherever they reside, are provided the skills and knowledge necessary to succeed" and that "[a]ny school funding formula should provide the resources in a manner that optimizes the likelihood that children will receive an education that will make them productive members of society." N.J.S.A. 18A:7F-44(b). The SFRA also acknowledged that "[a]lthough the Supreme Court of New Jersey has held that prior school funding statutes did not establish a system of public education that was thorough and efficient" for Abbott districts, "the Court has consistently held that the Legislature has the responsibility to substantively define what constitutes a thorough and efficient system of education responsive to that constitutional requirement." N.J.S.A. 18A:7F-44(c).

The SFRA defines its funding formula as "an equitable and predictable way to distribute State aid that addresses the deficiencies found in past formulas as identified by the Supreme Court" by "accounting for the individual characteristics of school districts and the realities of their surroundings, including the need for additional resources to address the increased disadvantages created by high concentrations of children at-risk" and "provid[ing] adequate funding that is realistically geared to the core curriculum content standards (CCCS), thus linking those standards to the actual funding needed to deliver that content." N.J.S.A. 18A:7F-44(h) and (i).

The SFRA declared that "[e]very child in New Jersey must have an opportunity for an education based on academic standards that satisfy constitutional requirements regardless of where the child resides, and public funds allocated to this purpose must be expended to support schools that are thorough and efficient in delivering those educational standards." N.J.S.A. 18A:7F-44(d). Thus, "school districts must be assured the financial support necessary to provide those constitutionally compelled educational standards" and "[a]ny school funding formula should provide State aid for every school district based on the characteristics of the student population and up-to-date measures of the individual district's ability to pay." Ibid.

The SFRA included a "formula an expanded high-quality preschool program for all children who qualify for free and reduced price meals in all districts" because "[i]t is appropriate for the formula to acknowledge that at-risk children do not always receive the same educational exposure at an early age as their peers and to provide the additional resources necessary through high-quality preschool to prepare every child to learn and succeed." N.J.S.A. 18A:7F-44(k).

The SFRA directed the State Board of Education to "review and update the core curriculum content standards every five years . . . to ensure that all children are provided the educational opportunity needed to equip them for the role of citizen and labor market competitor," and stressed that the SFRA needed to "work in conjunction with the key school accountability measures that have been enacted in recent years to promote greater oversight, transparency, and efficiency in the delivery of educational services," including the New Jersey Quality Single Accountability Continuum, N.J.S.A. 18A:7A-10, and the School District Fiscal Accountability Act, N.J.S.A. 18A:7A-54 to -60. N.J.S.A. 18A:7F-46; N.J.S.A. 18A:7F-44(o).

In Abbott XX, 199 N.J. 140, the Supreme Court held that, through the SFRA, "[t]he legislative and executive branches have enacted a funding formula that is designed to achieve [T&E] for every child, regardless of where he or she lives" because the "SFRA is designed to provide school districts in this state, including the Abbott school districts, with adequate resources to provide the necessary educational programs consistent with state standards." Id. at 175, 147. In other words, the Court determined that "[t]he State [had]

constructed a fair and equitable means designed to fund the costs of [T&E], measured against delivery of the CCCS."[36] Id. at 172.

In that case, the Court analyzed the various parts of the funding formula. As the Court explained, the "SFRA allocates state resources to school districts, while also requiring certain levels of funding at the local level" through a "weighted school funding formula." Id. at 152. The formula starts with a "base per pupil amount," which is "the cost per elementary pupil of delivering the core curriculum content standards and extracurricular and cocurricular activities necessary for [T&E]." Ibid; N.J.S.A. 18A:7F-45. The formula then accounts for increased education costs associated with higher grade levels, and impoverished, limited-English proficient, and special education students. Abbott, 199 N.J. at 152.

The SFRA funding formula includes an Adequacy Budget, which "is based on the community's wealth and ability to provide funding through local resources;" equalization aid, which "is State-provided aid to support the Adequacy Budget by funding the difference between a district's Local Fair Share (LFS) and its Adequacy Budget," and, categorical aid, which covers certain special education costs. Id. at 153-155.

The Court explained that "[a] district's LFS is the amount it is required to contribute in support of the Adequacy Budget" through taxes and "is determined by adding a district's equalized property wealth and its equalized income wealth." Id. at 155. A district is generally limited in its ability to raise taxes from year to year, N.J.S.A. 18A:7F-38, but "[a] school district may submit to the voters at the annual school election, or on such other date as is set by regulation of the commissioner, a proposal or proposals to increase the adjusted tax levy by more than the allowable amount," N.J.S.A. 18A:7F-39(c).

And with respect to special education costs, "one-third of special education is funded on the basis of Categorical Aid, 'regardless of the community's wealth,' while the other two-thirds of the special education funding is wealth equalized." Id. at 156. In addition, the SFRA provides Extraordinary Aid by which "[t]he State reimburses ninety

[36] In a prior Abbott decision, the Court held that the CCCS were "a reasonable legislative definition of a constitutional thorough and efficient education." Abbott v. Burke, 149 N.J. 145, 168 (1997) (Abbott IV).

percent of the costs over $40,000" for in-district special education programs, while "the State reimburses the districts seventy-five percent of the costs exceeding $55,000" for private, out-of-district special education placements. Id. at 157.

The SFRA also includes Transportation Aid for a district's busing costs associated with public and nonpublic school children entitled to transportation services in accordance with N.J.S.A. 18A:39-1 (providing transportation for children who live remote from school) and N.J.S.A. 18A:46-23 (providing transportation for special education students). N.J.S.A. 18A:7F-57.

In sum, the Court has described the SFRA as "a weighted formula, of many parts and layers" that "was carefully constructed to account for the myriad needs and cost considerations relevant when devising a permanent formula to perennially provide school districts with predictable amounts of sufficient resources that should permit the provision of educational services sufficient to enable pupils of all types everywhere to master the CCCS." Abbott XXI, 206 N.J. 332, 351-52. However, the Court has cautioned that the "SFRA will remain constitutional only if the State is firmly committed to ensuring that the formula provides those resources necessary for the delivery of State education standards across the State." Abbott XX, 199 N.J. at 170.

The State standards by which T&E is measured are now known as the New Jersey Student Learning Standards (NJSLS), which are designed to prepare students for college, career, and life. N.J.S.A. 18A:7F-46; N.J.A.C. 6A:8-1.1 to -5.3. The NJSLS specify expectations in nine academic areas (English; math; arts; health and PE; science; world languages; technology; 21st century life and careers). N.J.A.C. 6A:8-1.1. School districts are required to "align their curriculum and instructional methodologies to assist all students in achieving the NJSLS and to prepare all students for college and career" and "[p]rogress toward meeting the NJSLS [is] measured by the Statewide assessment system at grades three through 12[.]" N.J.A.C. 6A:8-1.2(c) and (d).

The state regulations governing the NJSLS set forth requirements that districts must meet in terms of curriculum and instruction, the statewide assessment system, and graduation. N.J.A.C. 6A:8-3.1 to –5.3. First, school districts must "ensure that curriculum

and instruction are designed and delivered in such a way that all students are able to demonstrate the knowledge and skills specified by the NJSLS and shall ensure that appropriate instructional adaptations are designed and delivered for students with disabilities, for ELLs [English Language Learners], for students enrolled in alternative education programs, and for students who are gifted and talented." N.J.A.C. 6A:8-3.1(a).

Second, school districts "shall, according to a schedule prescribed by the Commissioner, administer the applicable Statewide assessments, including the following major components: the elementary assessment component for grades three through five; the middle school assessment component for grades six through eight, [and] the high school end-of-course PARCC assessments." N.J.A.C. 6A:8-4.1(c). These assessments test a student's achievement or proficiency in the areas of English, math, and/or science. Ibid.

The Department of Education "shall review the performance of schools and school districts by using a percent of students performing at the proficient level as one measure of AMO [annual measurable objectives] and incorporating a progress criterion indicative of systemic reform," N.J.A.C. 6A:8-4.4, and school districts "shall provide appropriate instruction to improve skills and knowledge for students performing below the established levels of student proficiency in any content area either on the Statewide or local assessments," N.J.A.C. 6A:8-4.3(c).

Finally, "[f]or a State-endorsed diploma, district boards of education shall develop, adopt, and implement local graduation requirements that prepare students for success in post-secondary degree programs, careers, and civic life in the 21st century[.]" N.J.A.C. 6A:8-5.1(a).

The Department of Education also has "rules to implement the New Jersey Quality Single Accountability Continuum (NJQSAC) system, as required by N.J.S.A. 18A:7A-3 et seq., for evaluating and monitoring all school districts in the State." N.J.A.C. 6A:30-1.1. Through NJQSAC, "school districts are evaluated in five key component areas of school district effectiveness -- instruction and program, personnel, fiscal management, operations, and governance -- to determine the extent to which school districts are

providing [T&E]." Ibid. Further, "[t]he standards and criteria by which school districts are evaluated will assess actual achievement, progress toward proficiency, local capacity to operate without State intervention, and the need for State support and assistance." Ibid.

If a school district "satisfies at least 80 percent of the weighted quality performance indicators in each of the five key components of school district effectiveness," the Commissioner shall designate the district as 'high performing' and the State Board, upon the Commissioner's recommendation, may "certify, for a period of three years, the school district as providing a thorough and efficient education." N.J.A.C. 6A:30-4.1. However, "[s]chool districts that satisfy less than 80 percent of the weighted quality performance indicators in one or more of the key components of school district effectiveness shall commence improvement activities[.]" N.J.A.C. 6A:30-5.2.

Another important component of the state education system's T&E mandate are regulatory and statutory fiscal accountability, efficiency, and budgeting procedures for school districts. First, state rules "assure the financial accountability of district boards of education through enhanced State monitoring, oversight, and authority, and [...] ensure [that] each district board of education adopts an annual budget that provides adequate resources to meet the State Constitution's mandate for a thorough and efficient system of free public schools for all children" and "ensure the efficient expenditure of budgeted funds in a manner consistent with a school district's approved annual budget." N.J.A.C. 6A:23-1.1.

In addition, and particularly relevant to this matter, is the School District Fiscal Accountability Act, N.J.S.A. 18A:7A-54 to-59. Under that act, "the Commissioner of Education shall have the authority to appoint a State monitor and additional staff, as necessary, to provide direct oversight of a board of education's business operations and personnel matters if: the school district receives an adverse or a disclaimer of opinion by its independent auditor in the annual audit required pursuant to N.J.S.18A:23-1" or other fiscal circumstances. N.J.S.A. 18A:7A-55(a). Once appointed, "[t]he State monitor shall provide oversight in the school district until the commissioner determines that all remedial actions required under the plan have been implemented and the necessary local capacity

and fiscal controls have been restored to school district operations." N.J.S.A. 18A:7A-55(e).

Finally, the Act makes possible the receipt of financial loans for school districts with a State fiscal monitor. Specifically, "[t]he Commissioner of Education shall recommend to the State Treasurer whether an advance State aid payment should be made to a school district for which a State monitor has been appointed." N.J.S.A. 18A:7A-56(a). The act states that "[t]he commissioner's recommendation shall be based on whether the payment is necessary to ensure the provision of a thorough and efficient education." Ibid.

If a school district receives such aid, "[t]he advance State aid payment shall be repaid by the school district through automatic reductions in the State aid provided to the school district in subsequent years" and "[t]he term of the repayment shall not exceed 10 years, but may be for a shorter term as determined by the State Treasurer." N.J.S.A. 18A:7A-56(b).

While the Court has a lengthy history of assessing the constitutionality of various school funding statutes as applied to poor, urban school districts, the Court has yet to address whether a particular school funding statute, as applied to other school districts, has failed to provide T&E. Specifically, as the Court has noted: "[w]hile substandard educational conditions – perhaps of constitutional dimension – may exist in districts other than those that have been designated as Abbott districts, this Court has never stipulated any remedy, nor even found a constitutional violation, for children in non-Abbott districts."[37] Abbott v. Burke, 206 N.J. 332, 371 (2011) (Abbott XXI).

This is precisely the issue raised by petitioners in this matter. They allege that the SFRA's funding formula is unconstitutional as applied to Lakewood, a non-Abbott district, such that Lakewood does not receive sufficient funding under the SFRA to provide its public school students with T&E because the SFRA does not take into account the

[37] Abbott districts are now referred to as "SDA districts."

extraordinary costs that Lakewood incurs to provide transportation and special education services to a large number of students attending private schools in the district.

The Court has instructed that "[w]hether a statute passes a constitutional challenge 'as-applied' to any individual school district at any particular time must be determined only in the factual context presented and in the light of circumstances as they appear." Abbott XX, 199 N.J. at 235 (citing Robinson, 69 N.J. at 455). The Court has also cautioned that "[i]t is well recognized that legislative enactments enjoy a presumption of validity," and that "[w]henever a challenge is raised to the constitutionality of a statute, there is a strong presumption that the statute is constitutional." Ibid (citations omitted).

To prevail in this case, petitioners have the burden of showing that (1) Lakewood's public school children are not receiving T&E and (2) the reason for the deprivation of their constitutional right to T&E is the SFRA. Specifically, whether the SFRA is unconstitutional as applied to Lakewood "turn[s] on proof that plaintiffs suffer educational inequities and these inequities derive, in significant part, from the funding provisions" of the SFRA. Abbott v. Burke (Abbott I), 100 N.J. 269, 296 (1985). As part of their proofs, petitioners must show that Lakewood "has done all it can do with statutorily available resources and improvement mechanisms, yet still cannot provide T&E because the statutory funding scheme generates insufficient monies for this purpose." Bacon v. Dep't of Educ., 2003 N.J. AGEN LEXIS 1195, *15 (Comm'r, Feb. 10, 2003).

Importantly, "the Court has repeatedly acknowledged and approved the administrative handling of educational controversies that arise in the context of constitutional and statutory litigation" because "ultimate constitutional issues are especially fact-sensitive and relate primarily to areas of educational specialization." Id. at 300.

As such, this matter, which implicates fact-sensitive constitutional issues in the educational context, is appropriately before the Commissioner of Education, who transmitted the controversy between petitioners and respondents to the OAL for a hearing. The OAL has been tasked with "conduct[ing] a thorough hearing" for the "development of a complete and informed record, which will reflect determinations of

appropriate administrative issues as well as the resolution of factual matters material to the ultimate constitutional issues." Id. at 303. And "in order to discharge this responsibility in a way that makes sense, the first-instance decision makers, the ALJ and the agency head, must fully address such constitutional issues raised as are necessary to the decision, and resolve them in principled fashion by their best lights, subject, of course, to judicial review. Jones v. Dep't of Cmnty. Affairs, 395 N.J. Super. 632, 636-37 (App.Div.2007) (citing Roadway Express, Inc. v. Kingsley, 37 N.J. 136, 14-42 (1962)).

I. Is Lakewood delivering T&E to its public school students?

In order to prevail on their claim that the SFRA is unconstitutional as applied to Lakewood because the SFRA provides insufficient funding for Lakewood to provide its students with T&E, petitioners must first show that Lakewood's public school students are not receiving T&E. For the following reasons, I **CONCLUDE** that petitioners have met their burden of showing that Lakewood's students are not receiving T&E.

As noted above, the State standards by which T&E is measured are the NJSLS, which are designed to prepare students for college, career, and life. School districts are required to "align their curriculum and instructional methodologies to assist all students in achieving the NJSLS and to prepare all students for college and career" and "[p]rogress toward meeting the NJSLS shall be measured by the Statewide assessment system at grades three through 12[.]" Thus, the NJSLS include requirements for curriculum and instruction, the statewide assessment system, and graduation.

Indeed, the Court has previously pronounced that whether a school district's children are receiving T&E can be measured by such educational outputs as "their test scores, their dropout rate, [and] their attendance at college[.]" Abbott II, 119 N.J. at 391. Other indicia of T&E include educational inputs such as "teacher-student ratios and the education and experience level of the professional staff, as well as facilities to accommodate appropriate class sizes, science labs, media centers and libraries, and the availability of advanced placement courses and programs for gifted students, art and music programs and quality physical education programs." Bacon v. Dep't of Educ., 2006 N.J. AGEN LEXIS 108, *62.

By most of these measures, the education received by Lakewood's students is constitutionally inadequate and they are not being sufficiently prepared for college, career, and life. First, while Lakewood's curriculum aligns with the NJSLS requirements for graduation, and the district offers courses in AP English and Spanish, and several classes in music, art, and computers, the district has cut programs for industrial arts and auto mechanics, and the only foreign language study offered in-district is Spanish. Moreover, the district offers general education preschool to four-year-olds, but not three-year-olds.

While these deficiencies alone do not suggest that Lakewood's students are not getting T&E, there are other factors indicative of a lack of T&E. Chief among those proofs are standardized test scores in the district. While there was testimony at hearing of improving test scores, the data show that Lakewood's test scores are woeful when considered in isolation and when compared to other districts.

For the 2014-2015 school year, only twenty-three percent of high school students met or exceeded expectations on the PARCC assessment for English, placing them in the twenty-third percentile in the State, while only five percent of high school students met or exceeded expectations on the PARCC assessment for Math. On the Biology assessment, only thirty-two percent of high school students were proficient, while sixty-eight percent were partially proficient.

On the SAT, only six percent of students scored above the benchmark of 1550, placing Lakewood High School in the thirteenth percentile in the State and well below the Statewide target of forty percent. And a mere twelve percent of students scored a three on an AP test or a four on an IB test, while the State average was seventy-two percent.

For the 2015-2016 school year, twenty-three percent of high school students met or exceeded expectations on English assessments, or the twenty-third percentile in the State, while seven percent of high school students met or exceeded expectations on Math assessments, or the thirteenth percentile in the State. And on the Biology assessment,

only twenty-two percent were proficient, compared with a forty-one percent State average.

On the SAT, twenty-three percent met the College Readiness Benchmarks on the reading and writing portion, compared with seventy-one percent Statewide, and on the math section, eleven percent met the benchmarks, compared with fifty-three percent Statewide.

In 2016-2017, only twenty-five percent of students met or exceeded expectations on state English assessments, and only eighteen percent met or exceeded expectations on state Math assessments. This means that three-quarters or more of Lakewood's students did not meet expectations on English and Math assessments. And in 2017-2018, the scores improved only slightly: twenty-eight percent of students met or exceeded expectations on state English assessments, and twenty percent met or exceeded expectations on state Math assessments. Finally, in 2018-2019, some of the scores continued to improve, but still fell well below State averages. Thirty-three percent of students met or exceeded expectations on state English assessments, and only twenty-one percent met or exceeded expectations on state Math assessments.

Other T&E measurements are equally troubling. The district's chronic absenteeism rates were well above or close to the State average during the 2016-2017, 2017-2018, and 2018-2019 school years. In 2014-2015 and 2015-2016, the district's dropout rates were much higher than the Statewide targets for those years.

Lakewood's graduation rate improved somewhat from close to 75% in 2014-2015, 2015-2016, and 2016-2017 to 82% in 2017-2018 and 81% for 2018-2019, yet still fell well under the State average of about 90%. Lakewood also suffers from a low rate of college enrollment: 44% versus a State average of 78% in 2014-2015; 37% versus a State average of 77% in 2015-2016; 44% against a State average of 76% in 2016-2017; 41% versus 78% in 2017-2018; and, 40% versus 78% in 2018-2019. And the district's students fared no better in terms of AP enrollment, with rates of 17% and 21% in 2017-2018 and 2018-2019, for example, as opposed to State averages of 35% during those same years.

Finally, under another measurement of whether a school district is providing T&E – NJQSAC – for the 2016-2017 school year, Lakewood scored at 54% in the category of instruction and program, which measures such things as student performance and progress on state assessments, graduation rates, and alignment of curriculum to state standards, well below the benchmark of 80%.

Thus, when viewed alone or when compared with other districts, the educational output data show that Lakewood's students are receiving an education that falls short of T&E.

In a district in which 100% of the student body is eligible for free or reduced price lunch based on household income and which has a high percentage of ESL and LEP students, Lakewood undoubtedly faces obstacles in its attempt to deliver T&E to its pupils. However, there is evidence to suggest that Lakewood is not providing certain educational inputs to help the district meet its constitutional obligation to its students.

In terms of teachers, teacher turnover is significant in Lakewood; the average teacher in Lakewood has between only four and five years of experience; Lakewood must spend significant money on teacher development and training. There is also a lack of remediation/intervention specialists in the district to give struggling students extra educational support.

Lakewood also struggles in terms of per pupil classroom instruction spending and classroom salaries. For example, Lakewood spent $7,427 per pupil on classroom instruction for 2016-2017, which ranked as the second lowest amount among the ninety-eight school K-12 districts with more than 3,500 pupils. And, for the same school year, Lakewood spent $6,906 per pupil on classroom salaries, which also ranked as the second lowest among comparably-sized school districts.

Finally, Lakewood lacks a comprehensive preschool program that includes general education preschool for three-year-old children, and instead only offers general education preschool for four-year-olds and special education preschool for three- and four-year-olds. However, as the DOE noted in its Lakewood Needs Assessment more than a

decade ago, a "successful strategy for improving student performance is to provide a high-quality preschool program as required by the SFRA."

Based on the foregoing, I **CONCLUDE** petitioners have shown by a preponderance of the credible evidence that Lakewood's students are not receiving a thorough and efficient education as required by the New Jersey Constitution. The statistics sadly indicate that Lakewood's students are not prepared for college, career, or life due to a constitutionally inadequate education. In other words, petitioners have offered sufficient "proof that [Lakewood's students] suffer educational inequities."

II. Is the SFRA unconstitutional as applied to Lakewood?

However, to succeed on their claim that the reason Lakewood cannot provide T&E is the SFRA, such that the SFRA is unconstitutional as applied to Lakewood, petitioners must also prove that the educational "inequities derive, in significant part, from the funding provisions" of the SFRA. This is a heavy burden because "it is well recognized that legislative enactments enjoy a presumption of validity" and "[w]henever a challenge is raised to the constitutionality of a statute, there is a strong presumption that the statute is constitutional." For the reasons that follow, I **CONCLUDE** that petitioners have failed to carry their burden.

Petitioners contend that the SFRA's funding formula is unconstitutional as applied to Lakewood Township's 6,000+ public school students, such that Lakewood does not receive sufficient funding under the SFRA to provide its public school students with T&E because the SFRA does not take into account the extraordinary costs that Lakewood incurs to provide transportation and special education services to a large number of nonpublic school students, who total more than 30,000.[38]

[38] N.J.S.A. 18A:39-1 requires Lakewood to provide transportation at public expense for public and nonpublic students who live remote from school; Lakewood is also "responsible for providing a system of free, appropriate special education and related services to students with disabilities age three through 21," services which must "[b]e provided at public expense, under public supervision, and with no charge to the parent." N.J.A.C. 6A:1-1.1; N.J.S.A. 18A:46-1 to -55.

In their second amended petition, petitioners submit that the large sum Lakewood spends on mandatory transportation and special education for private school students "consume[s] about 40% of the [district's] budget" and means that the money then available for public school students is "substantially less than SFRA's adequacy budget" for Lakewood. Petitioners allege that "[t]he Commissioner of Education and the State Treasurer have formally recognized [between 2015 and 2018] that SFRA funding is inadequate to provide [Lakewood] public school students with a T&E education by providing, in dramatically increasing amounts, 'advance state aid' or 'emergency loans.'"

However, petitioners maintain that continued receipt of these loans is not only unsustainable, but also unpredictable, and that due to the inexorable rise of nonpublic school students and the associated transportation and special education costs, the district needs sufficient and predictable funding through the SFRA to provide the public school students with T&E. As such, petitioners urge that "the Commissioner recommends that this matter be remedied by the Legislature."

In response, respondents contend that Lakewood's financial difficulties are not the result of the SFRA, but instead due to other reasons. These other reasons, according to respondents, include (1) Lakewood's history of fiscal mismanagement (2) community choices (3) and legislation other than the SFRA.

These reasons proffered by respondents shall be considered in turn and, together with other factors to be discussed, lead to the conclusion that the SFRA is not unconstitutional as applied to Lakewood because the lack of T&E in Lakewood is not due, in significant part, to the SFRA. Put another way, petitioners have failed to prove that, even if Lakewood had taken certain actions within its powers and discretion, the SFRA would still not provide Lakewood with adequate funding to deliver T&E.

Fiscal mismanagement by Lakewood

Respondents persuasively argue that a significant reason for additional unavailable funds for the provision of T&E is choices Lakewood made with respect to the tax levy authorized under the SFRA. Respondents note that, while there is a tax levy cap,

Lakewood chose not to raise the levy to the cap for several years. In particular, "from 2011-2014, as the non-public student population was rapidly increasing in the Township, the District decided to keep the levy stagnant." And although the state monitor, once installed in 2014, required Lakewood to increase the levy, respondents correctly assert that the decision not to increase the levy during the previous years "means that the District is now not taxing up to its local fair share" and that "not only was the District not generating money that it could have been during that time period, but that any additional revenue from increasing the levy would have compounded." This is additional revenue that could have gone to support Lakewood's obligation to provide and fund T&E to its public school students.

Community choices

Respondents also point to other reasons for Lakewood's financial struggles separate and apart from the SFRA funding formula, including "local choices" such as "zoning for private schools; expansive new construction allowing for an influx of new residents; determinations to send children to non-public schools that mandate transportation due to distance; and the community's determination not to pass referendums for additional funding pursuant to N.J.S.A. 18A:22-40 or a second question [under N.J.S.A. 18A:7F-39]."

While municipal and community decisions regarding zoning, new construction, and selection of private schools may play roles in Lakewood's extraordinary transportation and special education costs, respondents did not provide expansive evidence on these subjects, and thus no findings of fact were made regarding those issues.

However, both respondents and petitioners did present certain evidence regarding Lakewood's efforts, or lack thereof, to raise taxes as permitted under N.J.S.A. 18A:22-40 and N.J.S.A. 18A:7F-39. Under N.J.S.A. 18A:22-40, a school district may "raise additional sums of money, over and above the amount fixed and determined in the last annual school budget, by special district tax, for general fund expenses," and under N.J.S.A. 18A:7F-39, a school district "may submit to the voters at the annual school election, or on such other date as is set by regulation of the commissioner, a proposal or

proposals to increase the adjusted tax levy by more than the allowable amount authorized pursuant to [N.J.S.A. 18A:7F-38]" and, if approved by the electorate, may be used to finance non-T&E programs or services.

The only instance in which Lakewood availed itself of its powers and discretion under N.J.S.A. 18A:22-40 and N.J.S.A. 18A:7F-39 between school years 2014-2015 and 2018-2019 was in 2016, when Lakewood put to a public vote a referendum to increase the school tax levy to raise more than $6M to help pay for transportation costs. While that measure was defeated by Lakewood Township voters by a margin of 99% to 1%, N.J.S.A. 18A:22-40 and N.J.S.A. 18A:7F-39 at least present opportunities for Lakewood to ameliorate its financial difficulties.

Other legislation

In addition to N.J.S.A. 18A:22-40 and N.J.S.A. 18A:7F-39, respondents point out that there is other legislation outside of the SFRA that has affected Lakewood financially. N.J.S.A. 18A:7F-38 places a tax levy cap on school districts by preventing a school district from seeking "an increase in its adjusted tax levy that exceeds . . . tax levy growth limitation calculated as follows: the sum of the prebudget year adjusted tax levy and the adjustment for increases in enrollment multiplied by 2.0 percent, and adjustments for an increase in health care costs, increases in amounts for certain normal and accrued liability pension contributions." That restriction may be overridden through voter approval under N.J.S.A. 18A:7F-39, as discussed above.

And the annual Appropriations Act also affects the amount of money Lakewood receives through the SFRA. Under the Appropriations Clause of the New Jersey Constitution, "[n]o money shall be drawn from the State treasury but for appropriations made by law." N.J. Const. art. VIII, § 2, ¶ 2. Pursuant to this constitutional clause, "the power and authority to appropriate funds is vested in the Legislature," Burgos v. State, 222 N.J. 175, 206 (2015), and "[o]ur Constitution firmly interdicts the expenditure of state monies through separate statutes not otherwise related to or integrated with the general appropriation act governing the state budget for a given fiscal year." City of Camden v. Byrne, 82 N.J. 133, 162 (1980).

Thus, although the Governor makes budget recommendations to the Legislature, and the SFRA requires that, within two days of the Governor's budget message to the Legislature, the Commissioner "shall notify each district of the maximum amount of aid payable to the district in the succeeding school year . . . and shall notify each district of the district's adequacy budget for the succeeding school year," the amount of aid a district actually receives is dictated by the Legislature's annual Appropriations Act. N.J.S.A. 52:27B-20; N.J.S.A. 18A:7F-5(a). As a result, for the 2018-2019 school year, for example, Lakewood would have received roughly $13M in transportation aid if fully funded, but only received $3M through the Appropriations Act; and for the same year, Lakewood's special education categorical aid was supposed to be $5M, but the Legislature instead appropriated $3M in such aid.

All of the above supports the conclusion that petitioners have not shown that the SFRA is solely or significantly to blame for Lakewood's inability to provide its public school students with T&E. And there are other reasons, separate from the SFRA, that further support this conclusion.

These reasons include a lack of a comprehensive preschool program and Lakewood's transportation and special education spending, issues that were first identified and highlighted more than a decade ago in the Lakewood Needs Assessment issued by DOE. The purpose of the needs assessment was to "assess[] the adequacy of the educational inputs and programming currently being provided" and to "identify the unique educational needs of the students in those districts requiring additional programs to address them" as "a prerequisite to ensuring that adequate resources, including fiscal resources, are provided and appropriate accountability for their use is guaranteed."

Then, as now, a large portion of Lakewood's budget was devoted to transportation and special education costs. On transportation costs, the Department stated in the needs assessment that "[t]he district is aware that the high cost of transportation, due to increased numbers of nonpublic students, staggered start times and its courtesy busing policy [under which the district opted to spend during the 2008-2009 school year $4M on busing private school students who did not live remote from their schools], is a significant

financial drain." The Department recommended that Lakewood reconsider its courtesy busing policy to cut its transportation costs.

In the many years since that assessment, not much has changed. To be sure, Lakewood has taken some steps to reduce some of its transportation costs. For instance, the record shows that Lakewood stopped providing courtesy busing at its own expense in 2016, several years after the Department issued the needs assessment. Also, in response to the 2014 State audit recommendations for reducing transportation costs, Lakewood assured that it would be "piloting a staggered nonpublic school schedule for 7 of the largest nonpublic schools during the 2014-2015 school year based on the premise that all nonpublic schools will go to a staggered school schedule in the 2015-2016 school year, which is expected to greatly reduce transportation costs."[39] The Legislature also provided help to the district through the LSTA pilot program, N.J.S.A. 18A:39-1d, through which the Legislature subsidized the busing of remote nonpublic school children in Lakewood for school years 2016-2017, 2017-2018, and 2018-2019.

Despite these measures, Lakewood's transportation costs have continued to increase annually, from $23M in 2014-2015 to $31M in 2018-2019. Yet there is an absence of evidence in the record to indicate that these rising costs are totally attributable to the rising number of nonpublic school students, and that Lakewood has done everything it can to rein in its transportation costs in order to free up more funds for T&E for its public school students.

As with its transportation costs, Lakewood's special education costs have continued to consume a huge portion of the district's budget in the years since the needs assessment. Then, as now, Lakewood has a "large budget expenditure is for out-of-district special education placements, which includes transportation for those students." In the needs assessment, the Department urged Lakewood to "continue to develop strategies to educate more of its special education students in-district." However, the record in this matter is short on evidence of the steps Lakewood has actually taken to save money by educating more of its special education students in a district-run program.

[39] It is unclear from the record whether all nonpublic schools actually staggered their schedules for the 2015-2016 school year, or any other school year.

The record shows that in 2018-2019, for example, Lakewood sent 343 special education pupils to private school placements at a total cost of $33M in tuition. That is an average of nearly $100,000 in tuition per student. Petitioners presented scant evidence of the district's efforts to educate more of these children in-district, which could save Lakewood substantial sums and result in more aid. Indeed, the SFRA provides Extraordinary Aid by which "[t]he State reimburses ninety percent of the costs over $40,000" for in-district special education programs, while "the State reimburses the districts seventy-five percent of the costs exceeding $55,000" for private, out-of-district special education placements. That is a substantial difference.

Petitioners may argue that these 343 students could not possibly be educated in-district due to the nature of their disabilities. Even if true, under the SFRA:

> A school district may apply to the commissioner to receive additional special education categorical aid if the district has an unusually high rate of low-incidence disabilities, such as autism, deaf/blindness, severe cognitive impairment, and medically fragile. In applying for the aid the district shall: demonstrate the impact of the unusually high rate of low-incidence disabilities on the school district budget and the extent to which the costs to the district are not sufficiently addressed through special education aid and extraordinary special education aid; and provide details of all special education expenditures, including details on the use of federal funds to support those expenditures.
>
> [N.J.S.A. 18A:7F-55(g).]

Petitioners did not present any evidence that Lakewood was ineligible for or tried to avail itself of this statutory option for additional special education aid.

In their amended petition, petitioners themselves suggested another possible avenue for Lakewood to bolster its in-district program by asking the Commissioner to "fully finance the building of an in-district facility for students with extraordinary special education needs pursuant to N.J.S.A. 18A:7G-5(k)" in order to cut down on special

education costs associated with private placements.[40] Yet there is no evidence Lakewood has applied to the Commissioner for approval of any such project.

Finally, aside from insufficient evidence of adequate efforts by Lakewood to either raise additional revenue or reduce transportation and special education spending in order to provide T&E to its children, another way in which Lakewood could increase its chances at delivering T&E is through a comprehensive preschool program for at-risk children. As the Department suggested in its Needs Assessment one "successful strategy for improving student performance is to provide a high quality preschool program as required by the SFRA." Certainly, the Legislature recognized through the SFRA that "at-risk children do not always receive the same educational exposure at an early age as their peers" and sought to provide "additional resources necessary through high-quality preschool to prepare every child to learn and succeed." Nonetheless, Lakewood's superintendent testified at hearing that the district offers preschool to three- and four-year-old special education students, but only offers general education preschool to four-year-old, and not three-year-old, children. Petitioners have also not provided any evidence that Lakewood has attempted to or is ineligible for any State financing under N.J.S.A. 18A:7G-5 for a preschool facility to accommodate more at-risk, non-special education children.

In light of all these reasons for Lakewood's lack of additional revenue or additional savings that could buttress the district's efforts to deliver T&E, reasons separate from the SFRA funding formula as applied to Lakewood, I **CONCLUDE** that petitioners have failed to carry their heavy burden to show that the SFRA is the substantial or a significant reason Lakewood cannot provide T&E such that the SFRA is unconstitutional as applied to Lakewood.

However, the fact remains that petitioners have shown that, for the years at issue, Lakewood's children did not receive T&E, and that deprivation cannot go unremedied. For their part, respondents assert that the Commissioner has gone to great lengths to assist Lakewood in its obligation to deliver T&E, including the installation of a State

[40] This provision allows State financial support for certain school facilities projects.

monitor to help with district finances and through the many millions of dollars in advance State aid that Lakewood received between 2015 and 2018. Nonetheless, these measures have not ensured that Lakewood's students receive T&E. Moreover, Lakewood's continued receipt of advance state aid is unsustainable and only serves to exacerbate Lakewood's financial difficulties by requiring Lakewood to repay these loans with future state aid.

As discussed above, there are many steps Lakewood could potentially take to help itself in its quest to provide T&E: develop a comprehensive preschool program for at-risk children; find ways to cut transportation costs so more money may be devoted to educating public school students; improve and expand the in-district special education program to reduce expensive private school placements. Unfortunately, Lakewood has either been unwilling or unable, on its own, to take all necessary steps to deliver T&E to the public school populace. Lakewood needs more help.

That is why, as in Bacon v. Dep't of Educ., 2006 N.J. AGEN LEXIS 108, in which the State Board of Education recognized that "the mandate of the New Jersey Constitution and [the State Board and Commissioner's] statutory responsibility for the general supervision and control of public education in this state require that we exercise our authority . . . to ensure that the educational deficits shown by the record . . . are addressed" through a needs assessment, I hereby **CONCLUDE** and **RECOMMEND** to the Commissioner that she conduct another needs assessment for Lakewood similar to the one conducted under the auspices of Bacon.

The purpose and goal of a new needs assessment would be the same as the needs assessment conducted over a decade ago: "an assessment of the educational needs and the identification of approaches that will successfully address those needs is a prerequisite to ensuring that adequate resources, including fiscal resources, are provided and appropriate accountability for their use is guaranteed." Through a needs assessment, the Commissioner would be able to deploy from within the Department of Education policy experts in the areas of school transportation, special education, and preschool education who could assist Lakewood in identifying approaches and strategies that need to be implemented to ensure that Lakewood can maximize its resources in order

to deliver the thorough and efficient education to which Lakewood's public school students are constitutional entitled.[41]

ORDER

The petitioners' application to declare that Lakewood cannot provide a though and efficient education to its public school students is **GRANTED**; the petitioner's application to declare the SFRA unconstitutional as applied to Lakewood is **DENIED**. However, based on the record presented, it is hereby **RECOMMENDED** to the Commissioner that a current Needs Assessment regarding the ability of Lakewood to deliver a thorough and efficient education to its public school students be undertaken with appropriate recommendations to the district.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

[41] The petitioners seek a legislative remedy to be proposed by the Commissioner. The Needs Assessment can assist in that regard.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 1, 2021
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ (Ret., on recall)

Date Received at Agency: _____

Date Mailed to Parties: _____

SMS/CB

APPENDIX

WITNESSES

For petitioner:

Dr. Ross Haber
Laura Winters
Robert Finger
Malka Spitz-Stein
Marcy Marshall
Dr. Danielle Farrie
David Shafter
Michael Azzara
Melvin Wyns

For respondent:

Kevin Dehmer
Christopher Soleau
Catherine Anthony
Raymond J. Zirilli, Jr.
Robert Ortley
Glenn Forney

EXHIBITS

For petitioner:

Exhibit 1	Total Classroom Spending taxpayer guide to educational spending DOE website
Exhibit 1-1	All districts
Exhibit 2	FY2018 Susan Ecks Low-Income Urban and Neighboring Districts
Exhibit 2-1	FY-15 to FY-17

Exhibit 2-2	Sources
Exhibit 2-3	Sources for FY-18
Exhibit 2-4	Key
Exhibit 3	SFRA numbers for 2017-2018
Exhibit 4	Lakewood Budget 2016-2017
Exhibit 5	Lakewood Budget 2017-2018
Exhibit 6	Request for Admissions
Exhibit 6-1	Census Information
Exhibit 6-2	Compilation of Peer Schools School Report Cards 3013-14
Exhibit 6-3	HSPA and GEPA Scores
Exhibit 6-4	District graduation rate and list of peer schools (All Abbott)
Exhibit 7	Census data
Exhibit 7-1	Per capita income and rank
Exhibit 7-2	September 2017 Labor force (Lakewood p. 1276)
Exhibit 7-3	2016 Labor (Lakewood p. 1269)
Exhibit 7-4	source census data
Exhibit 8	Birth Rate Lakewood and Newark
Exhibit 9	Master Plan Demographic page 3 population 220,000 by 2030
Exhibit 10	Letter of Township Manager
Exhibit 10-1	Taxpayer Guide to Educational Spending Low-Income Urban and Neighboring Districts
Exhibit 10-2	followed by all the districts printed out
Exhibit 11	Non-T & E expenses Low-Income Urban and Neighboring Districts followed by pages from each districts' budget
Exhibit 12	Lakewood Graduation Rates followed by DOE table
Exhibit 13	Lakewood Title I allocation public/nonpublic
Exhibit 13-1	2017-18 public/nonpublic (significant shift)
Exhibit 13-2	2016-17 public/nonpublic
Exhibit 13-3	other years' public/nonpublic
Exhibit 14	2017-18 Students with disabilities and Low-income public/nonpublic
Exhibit 14-1	other years Students with disabilities and Low-income public/nonpublic
Exhibit 15	CD Mike Azzara

Exhibit 15-1	Certification of Hassenfeld
Exhibit 16	NJ Monthly Rankings
Exhibit 17	Underfunding
Exhibit 17-1	Drain on the Budget
Exhibit 18	Delete
Exhibit 19	Lakewood CDP
Exhibit 20	Haber CV
Exhibit 21	Haber Report
Exhibit 22	Robinson report
Exhibit 23	BA Report
Exhibit 24	Abbot Designation
Exhibit 25	CD of FY15 to FY18 Notice to Districts State Aid
Exhibit 26	Nonpublic Transportation Costs
Exhibit 27	Superintendent Report
Exhibit 28	NJISAI Report
Exhibit 29	State Graduation Rate
Exhibit 30	State PARCC Scores
Exhibit 31	1994 Letter Superintendent/Commissioner cc Azzara
Exhibit 32	Superintendent's Letters
Exhibit 33	Addendum to Census data
Exhibit 34	Dr. Farrie's Report
Exhibit 35	2015 SPRA Lakewood
Exhibit 36	2016 SFRA Lakewood
Exhibit 37	Title I LHS
Exhibit 38	NJ LHS School Performance Report
Exhibit 39	Median Age
Exhibit 40	Lakewood Revenue Gap updated FY18
Exhibit 41	Municipal Overburden
Exhibit 42	16taxes.xls
Exhibit 43	Urban and Surrounding Districts Property Taxes
Exhibit 44A	Focus and Priority Schools
Exhibit 45	Toms River Supervisors and Assistant Superintendents
Exhibit 46	Brick Supervisors and Assistant Superintendents

Exhibit 47	Jackson Supervisors and Assistant Superintendents
Exhibit 48	Toms River Personnel Agenda June 22, 2018
Exhibit 49	Jackson Agenda May 16, 2017
Exhibit 50	Brick Agenda June 1, 2018
Exhibit 51	Lakewood Agenda August 30, 2017
Exhibit 52	Supervisors pp.35-36 Lakewood Agenda August 30, 2017
Exhibit 53	page 19, June 1, 2011 Agenda abolishing auto shop
Exhibit 54	page 12, Agenda May 9, 2005 abolishing Subject Supervisors
Exhibit 55	page 1, Two assistant superintendents September 27, 2004
Exhibit 56	2006-07, Nonpublic/Public Population
Exhibit 57	Staff Letter February 18, 2018
Exhibit 58	February 5, 2018 letter to Commissioner
Exhibit 59	February 15, 2018 Letter to Commissioner
Exhibit 60	Certification of Dr. Farrie
Exhibit 61	Certification of Mr. Henshaw
Exhibit 62	OPRA February 18, 2018
Exhibit 63	Statewide PARCC scores
Exhibit 64	Individual districts PARCC spreadsheet
Exhibit 65	Lakewood, neighboring districts and DFG A districts PARCC scores
Exhibit 66	Original March 15, 2018 State Aid Printouts
Exhibit 67	2018-19 User Friendly Budget
Exhibit 68	May 7, 2018 State Aid Advance Approval Letter
Exhibit 69	July 13, 2018 Revised State Aid Printouts
Exhibit 70	Revised Aid Guidance Document
Exhibit 71	Certified Agenda-specifically pages 6 and 7
Exhibit 72	2017-18 Extraordinary Aid Approval
Exhibit 73	Emergency Aid Resolution
Exhibit 74	Three State Aid Advance Letters
Exhibit 75	Melvin Wyns CV
Exhibit 76	Melvin Wyns Expert Report
Exhibit 77	Lakewood Tables
Exhibit 78	2017 Equalization Values
Exhibit 79	2018 Equalization Values

Exhibit 80	Lakewood 2008-09 Budget Revenues
Exhibit 81	Commissioner Letter October 26, 2018

For respondent:

R-1	2018-2019 Projected State School Aid Notice
R-2	2018-2019 Projected State School Aid Notice-Revise, Aid Adjustment Pursuant to FY19 Appropriations Act
R-3	Tax Levy History FY2011-FY2018
R-4	2016-2017 User Friendly Budget
R-5	State Total and Lakewood Extraordinary Aid (Exaid) Allocations, FY2012-FY2017
R-6	Summary of Lakewood 12/13 Enrollment
R-7	Chapter 192/193 Non-Public School Aid for Lakewood vs. State, FY2009-FY2017
R-8	Other Non-Public School Aid for Lakewood, FY2015-FY2017
R-9	Total Public and Non-Public Aid from District Aid Notices (excluding facilities), FY2015-2017
R-10	Equalized Property Valuation for Lakewood, FY2007-FY2018
R-11	SSA Summary
R-12	Equalized Property Valuation for Lakewood, FY2011-FY2018
R-13	Tax Levy and Local Fair Share History, FY2011-FY2018
R-14	Equalized School Tax Rate History for K-12 Districts with Between 5,700 and 6,300 Students as of 2017
R-15	New Jersey State Legislature, Office of Legislative Services, Office of State Auditor, Township of Lakewood School District Audit Covering Time Period July 1, 2011-December 31, 2013 with Lakewood School District Response
R-16	Summary of Lakewood Public School District Special Education Settlement Agreements for Disenrolled Students
R-17	Formula for Success
R-18	Summary of Lakewood Non-Public Transportation
R-19	Easel Notes 1
R-20	Transportation Analysis, Lakewood School District FY2013-FY2017

R-21	[Not offered]
R-22	Office of Fiscal Accountability and Compliance (OFAC) Review of Application for State School Aid (ASSA) and District Report of Transported Resident Students (DRTRS) as of October 2011, dated May 19, 2014
R-23	Letter from Robert Ortley, OFAC, to Isaac Zlatkin, Board President, Lakewood Township Board of Education, regarding Corrective Action Plan for May 19, 2014 audit of ASSA and DRTRS, with attachments, dated August 29, 2014
R-24	OFAC Review of Lakewood Board of Education's Application for Extraordinary Aid (EXAID) for Special Education Costs, for FY2011-2012, dated August 15, 2014
R-25	OFAC Review of Chapter 193 Non-Public Auxiliary Services Aid, for FY2011-2012, dated February 12, 2016
R-26	June 16, 2015 Memo from David Hespe, Commissioner of Education to Andrew P. Sidamon-Bristoff, State Treasurer regarding State Aid Advance for Lakewood School District (P-74)
R-27	June 23, 2016 Memo from David Hespe, Commissioner of Education to Form M. Scudder, Acting State Treasurer regarding State Aid Advance for Lakewood School District (P-74)
R-28	November 9, 2017 Memo from Kimberly Harrington, Commissioner of Education to Ford M. Scudder, State Treasurer regarding State Aid Advance for Lakewood School District (P-74)
R-29	Letter from Glenn Forney, Deputy Assistant Commissioner, Division of Finance, to Laura A. Winters, Superintendent Lakewood Township School District, regarding Additional State Aid, dated May 7, 2018 (P-68)

160-21

New Jersey Commissioner of Education

Final Decision

J.B., on behalf of minor child, R.B.,

Petitioner,

v.

Board of Education of the Bergen County Vocational Technical School District, Bergen County,

Respondent.

Synopsis

In this matter on remand, *pro se* petitioner filed an appeal in July 2019 on behalf of R.B., alleging that his daughter's religious practices prevented her from competing academically with her classmates and that the respondent Board failed to make accommodations for those religious practices, in violation of Board policy. Further, petitioner alleged his daughter's guidance counselor made a statement to R.B. that constituted a violation of the Anti-Bullying Bill of Rights Act (ABRA), and that the respondent Board failed to investigate these allegations, in violation of the Act. The Board filed a motion to dismiss in lieu of an answer. Following transmittal of the matter to the OAL, an Initial Decision was issued in November 2019, dismissing the petition as untimely pursuant to *N.J.A.C.* 6A:3-1.3(i). In December 2019, the Commissioner determined that the record did not contain sufficient information to render a decision, and the matter was remanded to the OAL for supplementation of the record.

On remand, the ALJ found, *inter alia*, that: there are no genuine issues of material fact here, and the matter is ripe for summary decision; R.B. graduated in 2018 and is now a full-time college student; the incidents at issue here occurred during the 2016-17 school year; petitioner submitted complaints in October 2017 regarding R.B.'s grades which were based on alleged conflicts with religious practices and lack of religious accommodation, and were not HIB complaints; the Board granted in part and denied in part the grade appeals in a November 2017 final decision; in July 2018, petitioner attempted to recast his grade appeals as HIB complaints, claiming that he had referenced harassment in the grade appeals; petitioner alleged that R.B.'s guidance counselor had harassed her when he asked, "What's more important to you, your religion or your schoolwork?"; the Superintendent however informed petitioner by letter dated August 6, 2018 that the complaint of harassment against the guidance counselor was found not to be an HIB complaint; petitioner's appeal was not filed until July 16, 2019. The ALJ concluded that the petition was untimely pursuant to *N.J.A.C.* 6A:3-1.3(i); accordingly, the Board's motion for summary decision was granted and the petition was dismissed.

Upon review, the Commissioner, *inter alia,* concurred with the findings and conclusions of the ALJ in this matter, and found petitioner's exceptions to be unpersuasive. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

150-21

OAL Dkt. No. EDU 18002-19
(EDU 10790-19 ON REMAND)
Agency Dkt. No. 169-7/19

New Jersey Commissioner of Education

Final Decision

J.B., on behalf of minor child, R.B.,

Petitioner,

v.

Board of Education of the Bergen County Vocational Technical School District, Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the petitioner pursuant to *N.J.A.C.* 1:1-18.4. The Board's reply was untimely and will not be considered.

In July 2019, petitioning parent filed an appeal alleging that his daughter's religious practices prevented her from competing academically with her classmates and that the respondent Board failed to make accommodations for those religious practices, in violation of Board policy. Further, petitioner alleged his daughter's guidance counselor made a statement to R.B. that constituted a violation of the Anti-Bullying Bill of Rights Act (ABRA), and that the respondent Board failed to investigate these allegations, in violation of the Act. Following transmittal of the matter to the OAL, an Initial Decision was issued in November 2019, dismissing the petition as untimely pursuant to *N.J.A.C.* 6A:3-1.3(i). In December 2019, the Commissioner determined that the record did not contain sufficient information to render a decision, and the matter was remanded to the OAL for supplementation of the record.

On remand, the Administrative Law Judge (ALJ) found that the two complaints petitioner submitted to the district in October 2017 were appeals regarding his daughter's grades – based on alleged conflicts with religious practices and a lack of religious accommodations – and not HIB complaints. The Board issued a final decision on the grade appeals on November 10, 2017. The ALJ found that eight months later, in July 2018, petitioner attempted to recast his grade appeals to the Board as HIB complaints, claiming he had referenced harassment in the grade appeals. Petitioner alleged that R.B.'s guidance counselor had harassed her the prior year when he asked, "What's more important to you, your religion or your schoolwork?" By letter dated August 6, 2018, the Superintendent informed petitioner that the complaint of harassment against the guidance counselor was determined not to be an HIB complaint, but the counselor was nevertheless removed from working with R.B. On August 20, 2018, the Superintendent reiterated that the complaint regarding the guidance counselor was determined not to be an HIB complaint; rather, it was investigated in accordance with the school's affirmative action policies and procedures.

The ALJ found that the August 6, 2018 letter was notice of the final action regarding the HIB complaint. The ALJ concluded that, as the petition challenging the district's handling of the HIB complaint was not filed until July 2019, it was filed outside the 90-day limitations period set forth in *N.J.A.C.* 6A:3-1.3(i). The ALJ also found that petitioner's correspondence with district officials following this final notice – including the Board attorney's April 16, 2019 letter stating that petitioner's complaints were not subject to HIB policies as they were never reported as such – did not toll the statute of limitations. As such, the ALJ dismissed the petition as out of time.

In his exceptions, petitioner argues that the Board's final determination was the April 16, 2019 letter following his Board hearing, and not the August 6, 2018 letter from the Superintendent. Petitioner maintains that his petition was not out of time because he was required to pursue all avenues before appealing. Petitioner contends that it would have been premature to file a

petition before he met with the superintendent and the Board. Petitioner also argues that it is unfair that he is being held to strict deadlines when the Board could file a late motion for summary decision. Additionally, petitioner maintains that summary decision was improper as there are genuine issues of disputed fact – such as whether the guidance counselor's statement constitutes harassment and whether a reasonable accommodation was provided – and that the Board never responded to discovery requests. As such, petitioner urges the Commissioner to reject the Initial Decision.

Upon review of the record in this matter, the Commissioner agrees with the ALJ that this matter should be dismissed as untimely as it was filed outside the 90-day limitations period set forth in *N.J.A.C.* 6A:3-1.3(i). First, the Commissioner finds that the complaints filed by petitioner in October 2017 were grade appeals, and not HIB complaints. Despite the use of the word harassment, the subject matter of those complaints was a challenge to R.B.'s grades and the argument that she was not provided with an accommodation for schoolwork due to her religion. Petitioner referred to those complaints as grade appeals, not HIB complaints, and the final determination on those grade appeals was on November 10, 2017, which petitioner did not challenge. Accordingly, to the extent that petitioner makes any arguments regarding religious accommodations or R.B.'s grades, such arguments are out of time.

Petitioner contacted the school eight months later – in July 2018, after R.B. had graduated and turned 18 years old[1] – to protest that his harassment complaint against the guidance counselor was not investigated in accordance with school policy. The Commissioner finds that the Superintendent's responses on August 6 and August 20, 2018 informed petitioner that the complaints against the guidance counselor were not investigated as HIB but rather were investigated in accordance with affirmative action policies and procedures. Accordingly, petitioner received final notice in August 2018 that any potential HIB complaint petitioner purports to have submitted was not investigated as such. Subsequent communications with the Superintendent or the Board attorney –

[1] Petitioner turned 18 on January 16, 2018.

which reiterated the district's position on how petitioner's complaint regarding the guidance counselor had been handled – did not toll the statute of limitations because petitioner had already received notice of a decision. Nevertheless, the Commissioner further finds that this petition, which was filed more than a year after R.B. graduated, would be hers to pursue – and not petitioner's – as R.B. had reached the age of majority by the time of the filing. *See N.J.A.C.* 6A:3-1.3(a)(2).

The Commissioner does not find petitioner's exceptions to be persuasive. As explained above, a petition would not have been premature following the Superintendent's August 2018 notice (provided it was filed by the appropriate petitioner) because that was the date of the final determination. To the extent that petitioner finds the 90-day deadline to be unfair, the Commissioner notes that filing deadlines are established by *N.J.A.C.* 6A:3-1.3(i) and apply uniformly to all petitioners.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 19, 2021
Date of Mailing: July 20, 2021

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 18002-19

AGENCY DKT. NO. 169-7/19

(ON REMAND EDU 10790-19)

J.B. ON BEHALF OF MINOR CHILD R.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS IN THE COUNTY OF BERGEN,

Respondent.

J.B., petitioner, pro se

William C. Soukas, Esq., for respondent (Nowell, P.A., attorneys)

Record Closed: March 26, 2021 Decided: April 19, 2021

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

On August 6, 2018, respondent notified petitioner that it did not investigate his grade appeals as harassment complaints under the New Jersey Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13, et seq. (ABRA). On July 16, 2019, petitioner appealed the handling of his complaints. Did petitioner file his appeal timely? No. Under N.J.A.C.

6A:3-1.3(i), a petitioner shall file a petition no later than 90 days from the date of receipt of final action about the subject of the case.

PROCEDURAL HISTORY

On July 16, 2019, petitioner, J.B., filed a petition with the Department of Education, Office of Controversies and Disputes, on behalf of his daughter, R.B., against respondent, the Board of Education of the Vocational Schools in the County of Bergen. In his petition of appeal, petitioner alleges that his daughter's religious practices prevented her from competing academically with her classmates, and that respondent failed to make religious accommodations for those practices in violation of Board policy. In addition, petitioner alleges at least two specific instances in which an accommodation was not made for those two assignments. Moreover, petitioner alleges that a response to his entreaties by his daughter's guidance counselor, a Mr. Natelli, constitutes a violation of the ABRA, which petitioner further alleges respondent failed to investigate in violation of the Act.

On August 5, 2019, respondent filed a motion to dismiss instead of an answer under N.J.A.C. 6A:3-1.5.

On August 7, 2019, the Office of Controversies and Disputes transmitted the case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On November 12, 2019, I granted the motion to dismiss.

On December 17, 2019, the Commissioner of Education remanded the case for further fact finding.

On January 25, 2021, respondent filed a motion for summary decision; on February 5, 2021, petitioner filed his opposition; and on March 26, 2021, respondent filed its reply.

Significantly, respondent filed its motion with supporting affidavits from which further facts could be found, whereas petitioner filed his opposition with no affidavits from which genuine issues of fact could be shown.

FINDINGS OF FACT

Given the papers submitted in support of and in opposition to the motion for summary decision, I **FIND** the following as **FACT** for purposes of this motion only:

I.

A. Petitioner filed grade appeals on October 11, 2017.

On October 11, 2017, petitioner wrote a letter to respondent. It was addressed to the supervisor of academics, Michelle Pinke. In his letter, petitioner appeals a grade his daughter received in a science class from the previous school year. In the reference line, petitioner wrote, "Grade Appeal—Letter of Request—Protein Profiler Lab and Related Biotech Binder." Ostensibly, the reason for the appeal was alleged conflicts with religious practices: "Last year [my daughter] was unable to complete all school assignments for reasons that . . . relate to religious practices . . . ."

When petitioner specified, however, he also noted other conflicts: "[My daughter] missed [a] few labs in Biotech during the last semester due to conflicts between class schedule and junior meeting (March 29), PARCC exam (April 19), Jewish holidays (May 31 & June 1), and CEE college trip (June 13–15). [My daughter] managed to complete most labs, with the exception of the protein profiler lab. Since one lab was missing, the binder could not be completed." Thus, of the seven conflicts, only two were related to religious practices.

In an attachment to the letter, entitled "Conflict Between School Work and Religious Practices," petitioner wrote about other potential conflicts between his family's religious practices and respondent's school policies. Petitioner's letter is nearly two

pages long; his attachment is fully two pages long. Buried in the second page of the two-page attachment in the body of the document is the word "harassment." That is the only appearance of the word in these four pages; it is not set out in any of the headings or in any of the subject lines.

In the attachment, petitioner explains how his daughter is an Orthodox Jew who observes the Sabbath, which means she refrains from doing any schoolwork from Friday evening until Saturday evening. His argument is that this puts his daughter at a "significant disadvantage" compared to other students. He adds that she must also miss about ten school days for numerous Jewish holidays. Under the heading, "Other Jewish Students in [Bergen County Academies]," petitioner concludes that his daughter's religious practices should have been accommodated.

Meanwhile, under the subheading, "Counseling and Guidance at School," petitioner alleged that a guidance counselor, a Mr. Natelli, responded to his entreaties with the remark, "What's more important to you, your religion or your schoolwork?" This is what petitioner characterizes as harassment: "We believe that this statement by Mr. Natelli constitutes harassment." Thus, it is this word and this characterization that petitioner would later argue brings this case under the ambit of the ABRA.

On the same date, petitioner wrote another letter to respondent. It was also addressed to Pinke. In this letter, petitioner appeals another grade his daughter received in another class from the previous school year. This letter is nearly identical to the first. In the reference line, petitioner wrote, "Grade Appeal—Letter of Request—Anatomy and Physiology—Digestive Lab Assignment." Again, the reason for the appeal was alleged conflicts with religious practices: "Last year [my daughter] was unable to complete all school assignments for reasons that . . . relate to religious practices . . . ." This time, petitioner notes that his daughter handed in her binder to her guidance counselor during the last week of school, but for some reason her science teacher never graded it.

Petitioner's letter is just one page long; it does not mention the word "harassment"; and his attachment is the same document he attached to his previous letter.

Thus, no genuine issue of material fact exists that petitioner's October 11, 2017, letters were grade appeals based on alleged conflicts with religious practices and a perceived lack of religious accommodations by the high school during the previous school year.

B. Petitioner received notice of final action about the grade appeals on November 10, 2017.

On November 10, 2017, Pinke emailed petitioner granting in part and denying in part the grade appeals. In particular, Pinke wrote that the grade appeal for Anatomy and Physiology was denied, but that the grade appeal for Biotech was granted in part and denied in part. More specifically, the Protein Profiler Lab would be allowed to be made up with the lab report considered timely, but the rest of the notebook would still be considered late. Her email is reproduced below in its entirety:

> Dear [Mr. B.],
>
> The committee met to review the two grade appeals that you submitted on behalf of your daughter, [R.M.].
>
> For the grade appeal for Anatomy and Physiology, the committee concludes that the student had adequate time to complete and hand in the lab notebook and no additional time should be granted. The assignment was due in May and the student attempted to submit it on June 20, which was four days after the end of the trimester and one day after final grades were due for the trimester.
>
> For Biotech, there were two issues in question. The first issue is that the student's lab notebook was submitted late. The second issue is that the student missed the Protein Profiler Lab due to an absence for a field trip and then missed the make up for the lab because she met with her guidance counselor.
>
> Regarding issue one, the lateness of the lab notebook, the committee concludes that the lab notebook could have been submitted on time without the Protein Profiler Lab.
>
> Regarding issue two, the missing Protein Profiler Lab, the committee concludes that the lab notebook requires opening

> perishable reagents, which are costly. Therefore, this lab can only be done when the whole class is doing the lab. The committee concludes that the student should have one, and only one, opportunity to make up the lab on December 6, 2017, which is the next time the lab will be done in a class setting. The lab report should be completed and submitted to Mrs. Scott by December 13, 2017. The lab should not be graded late; however, the rest of the notebook is still considered late. If the lab is not submitted by December 13, 2017, the lab report should not be accepted for credit.
>
> Please let me know if you have any further questions.
>
> Thank you,
> Michelle Pinke
> Supervisor of Academics
> Bergen County Academies
>
> [Ex. E to the Certification of William Soukas, Esq., dated January 25, 2021.]

Even if Pinke was mistaken about the nature or subject of the October 11, 2017, letters, Pinke's November 10, 2017, email makes clear that she interpreted the October 11, 2017, letters as grade appeals, not as harassment complaints, and that she had concluded the matter on behalf of respondent as of November 10, 2017.

Thus, no genuine issue of material fact exists that November 10, 2017, is the date petitioner received notice of final action about his grade appeals.

C. Before petitioner filed his grade appeals, he asked respondent for advice about how to file them, and before he received notice of final action, he asked respondent about their status.

On October 4, 2017, before petitioner filed his grade appeals with Pinke, petitioner emailed Pinke to ask her about the process for grade appeals, and in response, on October 4, 2017, Pinke provided petitioner with the Board policy on grade appeals. She also advised petitioner to file his grade appeals with her by October 9, 2017. On October 8, 2017, the day before the deadline, petitioner emailed Pinke that he and his wife had previously informed respondent of their desire to file grade appeals, and that they wanted

more time to file them. Accordingly, on October 9, 2017, Pinke granted petitioner an extension to file his grade appeals.

On November 8, 2017, before petitioner received notice of final action about his grade appeals, petitioner asked Pinke, by his own admission, about the status of his grade appeals:

> Dear Mrs. Pinke,
>
> I'm following up to know the status of the grade appeals we filed.
>
> [R.B.] is in the process of applying to colleges and the result of the grade appeals impact[s] the college application process.
>
> The 30 days for making a determination will end this week, and considering that school is closed tomorrow and Friday, we would like to know the determination as soon as possible.
>
> Thank you for your cooperation.
>
> [J.B.]
>
> [Ex. E to the Certification of William Soukas, Esq., dated January 25, 2021.]

Thus, no genuine issue of material fact exists that petitioner intended to file, and respondent expected to receive, grade appeals, not harassment complaints, by October 13, 2017, and even if respondent was mistaken about the nature or subject of the October 11, 2017, letters, Pinke's November 10, 2017, email makes clear that she interpreted the October 11, 2017, letters as grade appeals, and that she had concluded the matter on behalf of respondent as of November 10, 2017.

II.

A. Petitioner recasts his grade appeals as discrimination and harassment complaints on July 5, 2018.

Nearly eight months later, 237 days to be precise, on July 5, 2018, petitioner wrote another letter to respondent. In his letter, petitioner renewed his grade appeals but recast them as "discrimination and harassment complaints." To wit, in the reference line, petitioner renamed his grade appeals, "Religious Discrimination and Harassment Complaints." Petitioner also delineated that the school "discriminated" against his daughter on the basis of her religion; that the school "did not provide her with a fair opportunity to succeed"; that her guidance counselor "harassed" her; and that his "harassment complaint" was not investigated and processed according to school policy. Moreover, petitioner included the attachment from his grade appeals, but renamed it "Complaints for Religious Discrimination and Harassment," and he added in the body what he thought the guidance counselor had said ("What's more important to you, your religion or your schoolwork?") and his belief that it constituted not only "harassment," but also "intimidation."

In addition, petitioner wrote in this letter that he had complained about the results of the grade appeals and the lack of religious accommodations a month earlier to the school principal, Russell Davis, who replaced the guidance counselor, Mr. Natelli, but allegedly responded, "If this school does not fit you, you have the choice to go to a different school," which petitioner deemed unacceptable:

> In June 2017, we met with Mr. Russell Davis, the principal at BCA. We complain[ed] about the harassment by [R.B.'s] guidance counselor. Mr. Davis agreed to replace [R.B.'s] guidance counselor; however, he did not condemn or criticize the statement made by Mr. Natelli. Mr. Davis explained to us the school provides no accommodation for religious observances.
>
> We explained that the situation our daughter was put into by the school does not allow her to practice her religion and complete her school work. Mr. Russell's response was: "If

> this school does not fit you, you have the choice to go to a different school."
>
> This statement by the principal is unacceptable.
>
> [Ex. F to the Certification of William Soukas, Esq., dated January 25, 2021.]

Petitioner continued in his letter that he disagreed with Russell's value judgment and with the school's policy regarding religious accommodations:

> We felt after this meeting with the principal that the school indeed expect[ed] that we choose to between our religion or go to a different school. It seems that Mr. Natelli's statement was not just a poor wording incident, but it actually represents the school policy. We were horrified.
>
> We also believe that, as a matter of policy, the school should accommodate students in situations when their abilities to perform [are] limited due to reasons beyond their control. Whether the limited ability is due to medical disability or due to religious observance, or other protected right, the school must make adjustments and concessions to accommodate the student and give him/her a fair and equal opportunity to succeed in school.
>
> [Ex. F to the Certification of William Soukas, Esq., dated January 25, 2021.]

Finally, petitioner cited the denial of his grade appeals as examples of this lack of religious accommodation:

> [R.B.] was unable to complete some work assignments and was later in submitting several other school assignments. For example, on one assignment, [R.B.] submitted the work late by two days and her grade was reduced by 30%. We filed a grade appeal and explained the specific situation of [R.B.], however the grade appeal committee did not put any weight for our considerations and the 30% reduction remained.
>
> On a different assignment, [R.B.] submitted her work later by two or three days, however the teacher refused to grade her work due to the lateness and the grade for that assignment was zero. We filed a grade appeal and explained the specific situation of [R.B.], however the grade appeal committee did

> not put any weight for our considerations and the grade remained at zero.
>
> [Ex. F to the Certification of William Soukas, Esq., dated January 25, 2021.]

Thus, no genuine issue of material fact exists that petitioner had not lodged a new complaint or complaints about "discrimination" or "harassment" or "intimidation" on July 5, 2018. He had simply renewed his grade appeals based on alleged conflicts with religious practices and a perceived lack of religious accommodations by the high school during the previous school year. In addition, petitioner had simply expressed his disappointment in and disagreement with the final action. Finally, petitioner voiced his objection to what he understood was school policy regarding religious accommodations.

B. Petitioner received notice of final action about the so-called discrimination and harassment complaints on August 6, 2018.

On August 6, 2018, the superintendent, Howard Lerner, responded. In his letter, Lerner explained what steps the school district had taken concerning the grade appeals, including the so-called discrimination and harassment complaints. Lerner stated that discrimination and harassment based on religion is strictly prohibited in the school district, that the school district promptly investigated the complaint, and that it removed Mr. Natelli as R.B.'s guidance counselor. More significantly for purposes of this motion, Lerner explained that the grade appeals were not considered as complaints for harassment, intimidation, or bullying (HIB), because they were more properly understood as grade appeals based on religious accommodations.

Lerner continued that he believed the school district was responsive to petitioner's concerns; that it was not true that the school district does not accommodate religious practices, because it does provide religious accommodations; and that it did so in this case. To be sure, Lerner noted that the school district provided R.B. with the opportunity to make up schoolwork during the summer of 2017, the opportunity to retake the Biotech class during the following school year, and the opportunity to spend up to fifteen hours a week in school to complete her schoolwork. If any doubt had still existed about the nature

or subject matter of petitioner's grade appeals, respondent had made its position even clearer, and in doing so, restated its final action.

Thus, no genuine issue of material fact exists that August 6, 2018, is the date petitioner received notice of final action about his so-called discrimination and harassment complaints.

C. Petitioner did not appeal the final action within the next 90 days.

On August 9, 2018, petitioner wrote another letter to Lerner. In this letter, under his subheading, "Accommodations in School on the Basis of Religious Observance," petitioner wrote that he wanted to understand better the school policy concerning religious accommodations, and under his subheading, "Handling of the Harassment Complaint," petitioner wrote that he wanted to know better how his complaint was processed. Although his daughter had already graduated from the high school and was about to enter the University of Pittsburgh for college in the fall, petitioner still wanted to continue the dialogue.

On August 20, 2018, Lerner responded to petitioner once more. In his letter, Lerner explained that whether accommodations are reasonable and proper for any given student is a fact-sensitive inquiry and is determined on a case-by-case basis. In addition, Lerner explained that petitioner's so-called discrimination and harassment complaints were investigated and processed according to the school's policy concerning affirmative action. Parenthetically, one of the purposes of the affirmative-action program is "to identify and eliminate discriminatory practices and other barriers to achieving equality and equity in educational programs." District Policy, 1140, Affirmative Action Program, August 2016. Ultimately, petitioner filed his appeal with the Commissioner of Education on July 10, 2019.

So, even if this later letter is considered final action by the school district—because Lerner further explained that petitioner's grade appeals were processed as discrimination complaints under the district's affirmative-action program—no genuine of material fact

exists that petitioner still failed to appeal that final action by the school district within the next 90 days.

Accordingly, the final section that follows merely chronicles the future dialogue between the parties.

III.

A. Petitioner continues to disagree with respondent and continues to fail to file an appeal with the Commissioner of Education.

On September 4, 2018, petitioner wrote to Lerner yet again. In his letter, petitioner repeated that he disagreed with the religious accommodations the high school provided his daughter the previous school year and with how the high school processed his so-called discrimination and harassment complaints. This letter is seven pages long. The first four and one-half pages concern his disagreement with the accommodations and why he thought they were insufficient. The final three pages concern his disagreement with the way his grade appeals were processed and why he thought they should have been processed as harassment complaints.

In fact, petitioner asserts for the first time that he filed such a discrimination and harassment complaint at a meeting on June 15, 2017.

Whether or not petitioner filed such a discrimination and harassment complaint on June 15, 2017, does not matter, because petitioner received the final action about the grade appeals on November 10, 2017, and the final action about the so-called discrimination and harassment complaints on August 6, 2018.

The legal effect of these dates notwithstanding, what is clearer is what petitioner ultimately seeks from his entreaties: disciplinary action against Mr. Natelli, a condemnation from the school or an apology from Mr. Natelli, and an investigation by the school district under the ABRA.

B. Respondent demurs that the parties will have to agree to disagree.

On September 14, 2018, Lerner responded that the parties would have to agree to disagree about the final action that respondent took about the grade appeals and the so-called discrimination and harassment complaints, but that these appeals gave respondent pause to reflect on its policy for the future:

> Dear Mr. [B.],
>
> Thank you for your 9/4/18 email. As I have explained before, I believe BCA provided or offered reasonable accommodations to your daughter for her religious observance during her time there, as required by Board Policy. It appears that your expectations and the district's understanding of its role in accommodating individual students are unlikely to align.
>
> I regret that you feel your dialogue with the school and with district administration has not addressed your concerns. Please know, however, that your engagement with the school and with me has been the catalyst for valuable in-house reflection and discussion about this issue.
>
> I am glad that your daughter is attending such an esteemed university for her undergraduate education, and I wish her much success.
>
> Sincerely,
>
> Howard Lerner, Ed.D.
> Superintendent
> Bergen County Technical Schools
>
> [Ex. K to the Certification of William Soukas, Esq., dated January 25, 2021.]

C. Petitioner recasts his grade appeals as HIB complaints.

On November 13, 2018, petitioner restarted the dialogue once again. In an email to the school district's business administrator, John Susino, petitioner, incredulously, again asks for the status of his so-called discrimination and harassment complaints. In doing so, petitioner recast his grade appeals, which he had previously recast as

discrimination and harassment complaints, as "HIB complaints." The following day, on November 14, 2018, Susino restated that respondent had processed the grade appeals as discrimination complaints:

> Dear Mr. [B.],
>
> I have received your November 13, 2018, email requesting information as to when the HIB complaint involving your daughter was reported by Dr. Lerner to the Board of Education.
>
> It is my understanding that your complaint was not originally reported as an HIB matter to school administration. As I believe Dr. Lerner previously advised you, the complaint was investigated as a discrimination matter. Therefore, your daughter's matter was handled by school administration and is not required by law to be formally reported to the Board of Education.
>
> It is also my understanding that you are meeting with Dr. Lerner on December 10, 2018, to further discuss this matter.
>
> Sincerely,
>
> John Susino
> Business Administrator/Board Secretary
> Bergen County Technical and Special Services School Districts
>
> [Ex. M to the Certification of William Soukas, Esq., dated January 25, 2021.]

Immediately thereafter, on November 15, 2018, in a reply email to Susino, petitioner reasserted that his grade appeals from the previous year were not just grade appeals but also harassment complaints, and on December 10, 2018, respondent agreed to perform an administrative review as a courtesy, not according to any Board policy. To be sure, this was not a new inquiry by petitioner, and it was not a new investigation by respondent. It was an administrative review as a courtesy, and Lerner agreed to provide a response by early February 2019.

As promised, the administrative review was completed by early February 2019, which Lerner memorialized in a letter dated February 5, 2019. In his letter, Lerner wrote that after his meeting with petitioner, he assigned the head of the school district's Human Resources Department, Gary Hall, to interview staff and provide a full report. Lerner wrote that Hall interviewed ten staff members, had conversations with school administrators, and reported his findings. Based on that investigation, together with the information petitioner had provided, Lerner determined the following:

First, Lerner wrote that during R.B.'s junior year, when she was having academic difficulties in some of her classes, R.B. never asked any of her teachers to adjust her coursework or her deadlines for religious observance.

Second, Lerner wrote that the teachers in the three classes in which R.B. seemed to have particular difficulty made repeated and reasonable efforts to help R.B. keep up and catch up with her classwork.

Third, Lerner wrote that R.B.'s guidance counselor, Mr. Natelli, did not say or suggest that R.B. had to choose whether school or religion was more important to her, and that R.B. must have misunderstood what Natelli had said and what he had meant during their conversation about time management.

Fourth, Lerner wrote that he did not agree with petitioner's assertion that R.B. was unable to meet expectations, because she was able to meet expectations in all her other classes during her entire four years at the high school.

Fifth, Lerner wrote that petitioner's request for additional time at the end of R.B.'s junior year for her to complete unfinished work was properly understood as just that, a request for additional time to complete unfinished work, and not as a complaint of discrimination or harassment, intimidation, or bullying.

Sixth, Lerner wrote that petitioner's assertion that the school district has no policy for religious accommodation is a misunderstanding of what the school administration had

communicated to him. Lerner was specific. Indeed, Lerner noted that not only did the school district have such a policy, but that R.B. benefited from it:

> The Board does, in fact, have a policy . . . . I believe that the dialogue BCA administration had with you . . . illustrat[ed] how [R.B.] was offered flexibility by the teachers of the courses she struggled with throughout her junior year and then opened the door to additional flexibility for [R.B.] to complete additional missing work during the summer.
>
> [Ex. M to the Certification of William Soukas, Esq., dated January 25, 2021.]

Finally, Lerner wrote that he could not and would not change R.B.'s high-school transcript or her final grades because it would be inaccurate and misleading.

On February 21, 2019, petitioner emailed Susino that he was disappointed with the outcome of the administrative review, and that he wanted to renew his complaints before the Board. Significantly, petitioner wrote that he wanted to renew his complaints as detailed in his letter to Lerner from September 4, 2018, more than five months earlier. In addition, petitioner attached a letter detailing his disagreement with the outcome of the administrative review. On February 26, 2019, Susino emailed petitioner that the next Board meeting was scheduled for March 26, 2019.

On March 26, 2019, petitioner attended the Board meeting and addressed the Board at the end of the meeting during its public session.

After the meeting, on that same date, petitioner emailed Susino, stating that he was unable to complete his presentation, and asked to present his complaint to the "Chairman of the Board Committee."

On April 16, 2019, counsel for respondent wrote a letter to petitioner. In his letter, counsel explained that the Board had considered his position concerning his complaints about his daughter's grades, her counselor, and the administrative investigation, and that the Board had determined that the school's handling of his complaints was "prompt,

thorough, and responsive, in all respects." Counsel further explained that petitioner's request to make a presentation before the "Chairman of the Board Committee" was denied for many reasons. First, counsel explained that the complaint against Natelli was not subject to the school policy concerning harassment, intimidation, and bullying because it was never reported as such.

Second, counsel explained that a presentation to the "Chairman of the Board Committee" is not a recognized procedure.

Third, counsel explained that further review was not warranted because of the most recent administrative investigation, which was provided as a courtesy by the superintendent, not under any Board policy:

> Please be advised that your request for further Board review of the same complaints you have already brought to the Board does not appear to be warranted in light of the administrative and Board-level reviews of the situation that have already been conducted. As a courtesy to you and in light of your continuing concerns, the Board consented to consider your complaints relating to the recent administrative investigation authorized by Dr. Lerner. The Board has now considered your complaints and found that they were addressed properly by school administration. As such, no need exists for further Board review of these matters.
>
> [Ex. M to the Certification of William Soukas, Esq., dated January 25, 2021.]

Fourth, counsel explained that since R.B. had already graduated from high school and had attained the age of majority, the Board did not believe that petitioner had standing to pursue the matter.

Finally, counsel explained once more that the superintendent had held an extensive meeting with petitioner and authorized, not in keeping with any Board policy but as a courtesy, an administrative investigation of his complaints, which resulted in the determination that the Board had handled his complaints properly.

On July 16, 2019, petitioner finally filed his appeal with the Commissioner of Education.

CONCLUSIONS OF LAW

A party may move for summary decision upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). Summary decision may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that no genuine issue of material fact exists, and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). When motions for summary decision are made and supported, an adverse party, to prevail, must respond by affidavit setting forth specific facts showing that genuine issues of fact exist which can only be determined in an evidentiary proceeding. Ibid.

In this case, petitioner did not respond by affidavit setting forth specific facts showing that genuine issues of fact exist which can only be determined in an evidentiary proceeding. This failure notwithstanding, the record is clear. No genuine issue of material fact exists that petitioner received notice of final action on November 10, 2017, concerning his grade appeals, which were processed under Board policy concerning grade appeals, and notice of final action on August 6, 2018, concerning his so-called discrimination and harassment complaints, which were processed under Board policy concerning affirmative action. Since no genuine issue of material fact exists concerning these dates of receipt, respondent is entitled to prevail as a matter of law for the reasons stated below.

Under N.J.A.C. 6A:3-1.3(i), a petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency that is the subject of the case. As case law makes clear, such a time limitation confers due process, is both meaningful and reasonable, and provides finality in education matters. Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 583–88 (1993). As such, this time limitation has long withstood challenge. See, e.g., Nissman v. Bd. of Educ. of Long Beach Island, 272 N.J. Super. 373, 381–82 (App. Div.), certif. denied, 137 N.J. 315 (1994) (where the court stated that the time limitation is not inherently arbitrary or capricious, and to rule otherwise would deprive

district boards of education the security of the rule). Moreover, negotiations do not toll this time limitation. See, e.g., Giannetta et al. v. Bd. of Educ. of Egg Harbor, No. #147-05, Comm'r Decision (April 25, 2005), https://www.nj.gov/education/legal/commissioner/ (where the Commissioner of Education explicitly stated, citing Kaprow, 131 N.J. at 588, that attempts to resolve a claim through negotiation with a board of education do not negate receipt of adequate notice or toll the running of the time limitation).

In this case, the incidents that petitioner argues violate Board policy and State law occurred during the 2016–17 school year. Petitioner complained about them after the close of the 2016–17 school year, and the date of receipt of final action was November 10, 2017, at the earliest, and August 6, 2018, at the latest, all of which place the current petition, which was filed on July 12, 2019, well outside the proscribed 90 days for filing such appeals. As I found above, the final action by the Board regarding the grade appeals was received on November 10, 2017, and any other decision that could have been construed as some final action about separate harassment complaints could only be said to have been received on August 6, 2018, when Lerner explained that the complaints were more properly processed as complaints about religious accommodation, or even on August 20, 2018, when Lerner further explained that they were processed as discrimination complaints under the district's policy concerning affirmative action. To underscore, these grade appeals were not HIB complaints.

Petitioner is sophisticated, and his filings are extensive. If petitioner had truly intended to file his grade appeals as HIB complaints, he would have done so, but petitioner intended to file grade appeals based on alleged conflicts with religious practices and a perceived lack of religious accommodations by the high school during the previous school year. More pointedly, if petitioner truly believed that Natelli harassed, intimidated, or bullied his daughter in violation of the ABRA, then petitioner would have filed not only his HIB complaints with respondent, but also his appeal for the failure of respondent to have investigated them under the ABRA in a timely manner. In short, petitioner did not do so because he was pursuing grade appeals, not harassment complaints, which he later recast as HIB complaints after his grade appeals were denied.

For me to conclude otherwise would mean that anytime a parent or student questions a final determination, the finality of that determination is somehow negated, and the statute of limitations is somehow reset. Such a conclusion would contravene not only case law but also common sense. It would also chill dialogue between students and schools and between parents and administrations.

This is not to say that petitioner was unreasonable in refusing to accept the outcome of his grade appeals or the way his grade appeals or so-called harassment complaints were processed; rather, it is his failure to appeal their final actions within the statute of limitations that was unreasonable.

As a result, I **CONCLUDE** that the petition of appeal in this case is outside the statute of limitations, that the motion for summary decision should be granted, and that this case should be dismissed.

Since I have concluded that this case is outside the statute of limitations and should be dismissed, I need not address the issues of standing or mootness, which respondent argues as additional reasons to dismiss this case.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the motion for summary decision is **GRANTED** and that this case is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days, and unless such time limit is otherwise extended, this recommended decision shall become a final decision under N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 19, 2021
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: April 19, 2021

Date Mailed to Parties: April 19, 2021

dr

151-21

151-21

New Jersey Commissioner of Education

Final Decision

Shira Lieberman,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

Synopsis

In October 2019, petitioner appealed the June 2016 determination of the respondent State Board of Examiners (SBE) that she had not met the requirements for issuance of a school administrator's certificate of eligibility (CE). Petitioner contended that she had met the requirements for the school administrator CE, or their equivalent; further, petitioner brought up the issue of her application for a principal CE in 2019, which occurred subsequent to the filing of the instant petition and was denied. The SBE filed a motion to dismiss in lieu of an answer.

The ALJ found, *inter alia*, that: there are no issues of material fact in this case, and the matter is ripe for summary decision; pursuant to *N.J.A.C.* 6A:3-1.3(i), petitioner's appeal is time-barred as it was filed well out of the 90-day time limit, and circumstances do not warrant relaxation of the rule; regarding the principal CE denial, that issue was not properly pending before the OAL and could not be addressed. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition. However, because there was confusion regarding whether the principal certificate denial was "incorporated into" the existing appeal of the school administrator denial, the ALJ recommended that the petitioner should be permitted to file a petition of appeal regarding the principal certificate denial within 90 days of the date of the Initial Decision.

The Commissioner concurred with the ALJ that the petition of appeal regarding the administrator certificate denial is time-barred by *N.J.A.C.* 6A:3-1.3(i); additionally, the Commissioner agreed that the principal certificate denial was not properly pending before the OAL, as the matter transmitted to the OAL was limited to the administrator certificate denial; no petition was ever filed regarding the principal certificate denial, nor was the original petition of appeal amended to include that issue; and because the ALJ did not have jurisdiction over the principal certificate denial, she lacked the authority to order any relief regarding that denial. The Commissioner concluded that the ALJ's recommendation that petitioner be permitted to file a petition of appeal regarding the principal certificate denial was not appropriate. Accordingly, the Initial Decision of the OAL was adopted with modification, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

151-21

OAL Dkt. No. EDU 15924-19
Agency Dkt. No. 272-10/19

New Jersey Commissioner of Education

Final Decision

Shira Lieberman,

Petitioner,

v.

New Jersey Department of Education,
Office of Certification and Induction,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.[1]

Petitioner applied for a school administrator certificate of eligibility in 2015. Her application was denied by the State Board of Examiners (Board) on June 9, 2016 (administrator certificate denial). In October 2019, petitioner filed a petition of appeal regarding the administrator certificate denial. Following transmittal of the matter to the Office of Administrative Law (OAL), petitioner applied for a principal certificate of eligibility, and the Board denied her application on May 14, 2020 (principal certificate denial). Petitioner did not file a petition of appeal regarding the principal certificate denial. The ALJ ruled that summary decision was appropriate and the petition of appeal challenging the administrator certificate denial was barred by *N.J.A.C.* 6A:3-1.3(i), because it was filed well outside of the 90-day time

[1] Petitioner did not file a reply to respondent's exceptions.

limit, and the circumstances did not warrant relaxation of the rule. The ALJ also held that the principal certificate denial was not properly pending before the OAL and could not be addressed. Notwithstanding this conclusion, the ALJ recommended that because there was confusion regarding whether the principal certificate denial was "incorporated into" the existing appeal of the school administrator denial, petitioner should be permitted to file a petition of appeal regarding the principal certificate denial within 90 days of the date of the Initial Decision.

In its exceptions, the Board argues that the OAL had no jurisdiction over the principal certificate denial and, therefore, the recommendation allowing petitioner to file a new appeal challenging that denial was improper. The Board also contends that *N.J.A.C.* 6A:3-1.3(i) should be strictly applied to bar any new petition of appeal, because it has been more than 90 days since the date of the principal certificate denial.

Upon review, the Commissioner concurs with the ALJ that the petition of appeal regarding the administrator certificate denial is time-barred by *N.J.A.C.* 6A:3-1.3(i), for the reasons detailed in the Initial Decision. The Commissioner also agrees with the ALJ that the principal certificate denial was not properly pending before the OAL. The matter transmitted to the OAL was limited to the administrator certificate denial. No petition of appeal was ever filed regarding the principal certificate denial, nor was the original petition of appeal amended to include the principal certificate denial.[2] Because the ALJ did not have jurisdiction over the principal certificate denial, she lacked the authority to order any relief regarding that denial, and

[2] While the ALJ found that there was confusion regarding whether the principal certificate denial was "incorporated into" the existing appeal of the administrator certificate denial, there is no basis for this finding. The Board's May 14, 2020 decision, which referenced the administrator certificate denial, did so only in reviewing the history of the various proceedings before the Board, and it did not in any way suggest that the matters were consolidated or should otherwise be heard together at the OAL. Moreover, petitioner has been represented throughout the proceedings by counsel, who should have been aware that a petition of appeal that comports with *N.J.A.*C 6A:3 is required to challenge any action by the Board, and that matters are not transmitted to the OAL in the absence of appropriate pleadings.

the Commissioner concludes that the recommendation that petitioner be permitted to file a petition of appeal regarding the principal certificate denial was inappropriate.[3]

Accordingly, the Initial Decision is adopted as the final decision in this matter, as modified herein. Respondent's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[4]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 19, 2021
Date of Mailing: July 20, 2021

[3] For this same reason, the Commissioner declines to rule on the timeliness of any petition of appeal regarding the principal certificate denial. The Commissioner notes that petitioner has filed such a petition of appeal, which has been assigned Agency Dkt. No. 89-6/21 and is currently under review. Any issues of timeliness that the Board wishes to raise in that matter will be addressed in the Commissioner's decision therein.

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 15924-19
AGENCY DKT. 272-10/19

SHIRA LIEBERMAN,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF CERTIFICATION AND INDUCTION,
Respondent.

Michael I. Inzelbuch, Esq., appearing for petitioner

Aimee Blenner, Deputy Attorney General, appearing for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: October 14, 2020 Decided: April 26, 2021

BEFORE **SUSAN M. SCAROLA**, ALJ (Ret., on recall):

STATEMENT OF THE CASE

The petitioner, Shira Lieberman, appeals the 2015 denial of her application for a school administrator's Certificate of Eligibility (CE) by the respondent, the New Jersey

State Board of Examiners (Board), alleging that she has the necessary qualifications for the certificate, or has met their equivalency.

She also raises the issue of the denial of an application for a principal's CE by the Board in 2020, subsequent to the filing of this appeal.

PROCEDURAL HISTORY

On March 13, 2015, the petitioner applied for a school administrator's CE. After contacting the petitioner to obtain additional supporting documents for her application, the Board denied the application on June 9, 2016. This application consequently expired on March 6, 2017.

On October 3, 2019, the petitioner sent a demand requesting the production of documents, seeking information regarding her 2015 application. On or about October 11, 2019, the petitioner appealed. On October 31, 2019, in lieu of an answer, the Board moved to dismiss the appeal because no action for school administrator was then pending; the appeal failed to state a claim on which relief could be granted; and the appeal had been filed well out of time. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on November 12, 2019. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The petitioner contends that after her appeal was filed, the parties agreed in December 2019 that she could apply for a principal's CE. This application was first deemed incomplete on or about February 7, 2020. After a "credentials review" committee convened on February 28, 2020, the Board denied the petitioner's application for a principal's certificate on May 14, 2020.[1]

The decision of the Board issued on May 19, 2020, contains the following language in a footnote:

[1] No record of an appeal from that determination has been received, although the petitioner argues it should be included in this appeal.

> [The petitioner] initially sought to appeal both the denial of a school administrator certificate as well as the principal CE, but later indicated via electronic mail that she no longer wished to have the Board consider an appeal of the denial of the school administrator certificate.

The petitioner appears to have incorporated the denial of the principal's CE into the October 2019 appeal of the denial of the school administrator CE without filing a separate appeal of that denial to the Board or without a subsequent transmittal being sent from the Board to the OAL.

The motion to dismiss the appeal of the denial of the school administrator's CE is being considered as a motion for summary decision. The petitioner filed a response on September 8, 2020; the Board filed a reply on October 6, 2020; and the petitioner filed a sur-reply on October 14, 2020, at which time the record closed.[2]

FACTS

The procedural history sets forth the basic facts that are pertinent to this appeal. On March 13, 2015, the petitioner applied for a school administrator's CE. On March 27, 2015, the Board considered that the application was incomplete and requested additional information and supporting documents from the petitioner in support of her application. This included official transcripts from the university she attended and verification of program completion. The petitioner was advised that her application would be considered "incomplete" until the items were presented.[3] Numerous email exchanges occurred regarding the documents provided, with the last dated June 9, 2016, with an indication that some information remained lacking and that she "should go for a credentials review" as noted in the email chain. Nothing further occurred after that and the application consequently expired on March 6, 2017.

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[2] This Initial Decision is filed in accordance with Governor Phillip Murphy's Executive Order 127, issued April 14, 2020, created by the COVID-19 emergency, which provided that deadlines for filing of a recommended decision pursuant to N.J.S.A. 52:14B-10(c) in any non-emergent contested case were extended by the number of days of the Public Health Emergency declared in Executive Order No. 103 (2020) plus an additional 90 days.

[3] The application allegedly lacked proof that the petitioner had completed a master's degree in educational leadership or that she had completed an appropriate course of graduate study, as required by N.J.A.C. 6A:9B-12.4.

Then, in October 2019, the petitioner, through counsel, sent a demand requesting the production of documents, seeking information about the 2015 application. On or about October 11, 2019, the petitioner appealed the denial of the school administrator's CE. In lieu of an answer, the Board filed a motion to dismiss, alleging that the appeal had been filed out of time. The matter was then transmitted to the OAL, where it was filed on November 12, 2019.

While the matter was pending in the OAL, settlement discussions commenced. The petitioner proposed that she be granted either a school administrator's certificate or a principal's certificate to resolve the matter. In December 2019 she filed an application for a principal's certificate with the Board that was denied on May 14, 2020. The petitioner appears to have filed no appeal of that denial, under the assumption that the appeal of the principal's certificate has been incorporated into this appeal of the school administrator's certificate denial.

LEGAL ANALYSIS

Summary decision is appropriate when "the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). Summary decision is analyzed in accordance with the principles set forth by the Supreme Court in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). Nat'l Transfer v. N.J. Dep't of Envtl. Prot., 347 N.J. Super. 401, 408–09 (App. Div. 2002). Determination of whether there exists a "genuine issue" of material fact that precludes summary decision requires the judge to consider whether the evidence presented, viewed in favor of the non-moving party, is sufficient to permit the fact finder to resolve the dispute in favor of the non-moving party. Brill, 142 N.J. at 540. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Ibid. (citation omitted).

Here, no facts are in dispute.

Timeliness of appeal; 90-day rule

The initial issue that must be determined is whether this petition is time barred pursuant to N.J.A.C. 6A:3-1.3(i). In relevant part, this regulation reads:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing.

In the leading case of Kaprow v. Berkeley Township Board of Education, 131 N.J. 572, 582 (1993), the Supreme Court of New Jersey upheld the 90-day limitations period, as it "provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration . . .. The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days." Due to these cited reasons, the 90-day rule is strictly applied.

Additionally, the Court explained that "[a]dequate notice must be 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 N.J. at 587 (citing Burns v. West Am. Corp., 137 N.J. Super. 442, 446 (Dist. Ct. 1975)). Adequate notice must be sufficient to further the twofold purpose of the 90-day rule: first, "to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims," and, second, "'to penalize dilatoriness and serve as a measure of repose' by giving security and stability to human affairs." Ibid. (citations omitted).

Finally, Kaprow held that an attempt to resolve the claims through negotiations is irrelevant and does not toll the running of the limitations period. Id. at 588 (citing Riely v. Hunterdon Central Bd. of Educ., 173 N.J. Super. 109, 413 (App. Div. 1980)). The 90-day rule is triggered "once notice of the final order, ruling or other action is given, and not

when the injury is felt by the petitioner." See Ciamillo v. Ridgefield Bd. of Educ., EDU 1805-04, Initial Decision (July 15, 2005) (citing Nissman v. Long Beach Island Bd. of Educ., 272 N.J. Super. 373, 379–81 (App. Div. 1994), adopted, Acting Comm'r (August 31, 2005), aff'd, State Bd. (January 4, 2006), http://njlaw.rutgers.edu/collections/oal/).

This matter relates only to petitioner's application for a school administrator's certificate, even though petitioner's arguments also pertain to the principal's certificate applied for in December 2019. The petitioner's application had become dormant and she took no action to activate it. Accordingly, the application was considered denied. No appeal was timely filed.

In 2019, years after the 90-day time period had expired, she sent a demand for production of documents filed in this appeal. The petitioner argues that as part of an agreement, she filed for a principal's certificate in December 2019, and that due to its denial, the 90-day limitation is inapplicable. It is well-settled law that the dispute must be resolved through litigation; other avenues such as negotiation do not toll the 90-day rule. Taylor v. Hardyston Bd. of Educ., EDU 1049-05, Initial Decision (September 13, 2005) (citing Wise v. Trenton Bd. of Educ., 2000 N.J. AGEN LEXIS 462), adopted, Comm'r (October 27, 2005), http://njlaw.rutgers.edu/collections/oal/ (where the ALJ held that the petitioner's attempt to change his employment contract by asking the board to change some terms did not toll the 90-day rule); see also Pacio v. Lakeland Reg'l High Sch. Dist. Bd. of Educ., 1989 S.L.D. 2060, 2069 (where the Commissioner clarified that requests to a board for reconsideration of its final decision did not toll the 90-day rule); Kaprow, 131 N.J. at 588 (where the Court held that an attempt to resolve a dispute through negotiation with the board was irrelevant, as it did not negate the fact of receipt of adequate notice and did not toll the running of the time limit). Similarly, filing an untimely appeal and then a separate application for a different certificate after the appeal had been filed cannot act to toll the 90-day time limitation.

The petitioner does not dispute that she had adequate notice that her application for a school administrator's certificate had been denied. Rather, she argues that her claim was not time-barred because the claim implicated an instance in which the 90-day rule should be relaxed.

Relaxation of 90-day rule

If the 90-day rule is triggered, it should be waived only due to a recognized exception such as public interest. N.J.A.C. 6A:3-1.16 provides that when rules such as the 90-day rule "do not reflect a specific statutory requirement or an underlying rule of the OAL, they may be relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice."

However, the 90-day rule is strictly construed and applied almost without exception. In Riely v. Hunterdon Central High School Board of Education, 173 N.J. Super. 109, 113 (App. Div. 1980), the court noted that a teacher who proceeded to arbitration was not thereby relieved from compliance with the 90-day filing requirement. Generally, the 90-day rule is mandatory and begins to run on the date that notice is received of the action taken. Millford Bd. of Educ. v. Dep't of Educ., EDU 738-05, Initial Decision (March 3, 2005), adopted, Deputy Comm'r (June 2, 2005), http://njlaw.rutgers.edu/collections/oal/; see also Wynne v.Tillery, 96 N.J.A.R.2d (EDU) 995; Portee v. Newark Bd. of Educ., 94 N.J.A.R.2d (EDU) 381.

"[T]he authority to relax or waive the rule is rarely invoked and is generally unsuccessful unless strict adherence would be inappropriate, unnecessary or where injustice would occur." Coles v. Bayonne Bd. of Educ., EDU 10535-06, Order on Emergent Relief (November 2, 2006), http://njlaw.rutgers.edu/collections/oal/, adopted, Comm'r (December 8, 2006), https://www.nj.gov/education/legal/decisions/, aff'd, State Board (April 4, 2007), http://njlaw.rutgers.edu/collections/oal/ (citing DeMaio v. New Providence Bd. of Educ., 96 N.J.A.R.2d (EDU) 449, 453). Further, three circumstances that may be exempt from the 90-day rule include: 1) those involving important and novel constitutional questions, 2) informal or ex parte determinations of legal questions by administrative officials, and 3) important public, rather than private, interests which require adjudication or clarification. Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975).

Extraordinary relief to relax this rule is granted sparingly. "It will be relaxed only where there is some compelling reason for the same, such as the presence of substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties themselves." Portee, 94 N.J.A.R.2d (EDU) at 384 (quoting Bogart v. E. Orange Bd. of Educ., EDU 6245-82, Initial Decision (January 26, 1983), adopted, Comm'r (March 14, 1983)); see also Graves v. State-Operated Sch. Dist. of Newark, EDU 10677-14, Initial Decision (April 28, 2015), http://njlaw.rutgers.edu/collections/oal/, adopted, Comm'r (June 15, 2015), https://www.nj.gov/education/legal/decisions/.

In addition to a substantial constitutional issue or a matter of significant public interest, "[t]he 90-day time limitation has been relaxed to resolve a dispute or delay attributable to the Board of Education . . .." Kaechele v. N. Valley Reg'l High Sch. Dist. Bd. of Educ., EDU 12811-14, Initial Decision (August 13, 2015), http://njlaw.rutgers.edu/collections/oal/ (citing Bland-Carter v. State-Operated Sch. Dist. of Newark, EDU 1505-00, Initial Decision (June 15, 2000), adopted, Comm'r (September 14, 2000)), adopted, Comm'r (September 28, 2015), https://www.nj.gov/education/legal/decisions/.

> Obviously, every time an otherwise meritorious claim is time barred, for whatever reason, there is, in a general sense, an "injustice." . . . The point to be made is that there will always be an arguably harsh result when the 90-day rule is applied. But the cases which have interpreted and applied the rule teach that this is no reason not to use it. Indeed, if the rule was relaxed simply because the result would be harsh if applied, then the rule might as well be ignored in its entirety on nearly every occasion.
>
> [McCrea v. Upper Saddle River Bd. of Educ., 96 N.J.A.R.2d (EDU) 817 (quoting Bogart, EDU 6245-82, Initial Decision).]

Here, the petitioner argues that "during the pendency of this action she re-applied and was rejected [for a principal's certificate] in May 2020, rendering the 90-day limitations period inapplicable." The petitioner argues that using the 90-day rule was arbitrary and capricious, and denied her the right of appeal. But Bogart clearly set the standard that the 90-day rule will be relaxed only for a compelling reason that is beyond that of concern only to the parties themselves.

The petitioner had adequate notice of the decision on her school administrator CE on June 9, 2016. She could have pursued her pending action or appealed the denial of the certificate that was then available to her for 90 days. The petitioner's demand for the production of documents and her appeal filed in October 2019 did not render the 90-day limitation period inapplicable.

Further, the petitioner has not asserted compelling reasons, such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties, nor did she demonstrate that strict adherence to the time limitation would possibly result in an injustice. See Portee, 94 N.J.A.R.2d (EDU) at 384. There is no explanation for the years-long delay to the appeal. Petitioner argues that "to require [her] to refile yet another application for certification, just to be denied again, and only for her to file this exact appeal, would be a waste of judicial resources and would be futile as was demonstrated . . . ." However, this is not a recognized or compelling reason to relax the time requirements.

The petitioner contends that discretion can be used to relax the 90-day time requirements; however, that discretion is not used haphazardly, but only in certain compelling instances. The facts of this matter do not warrant that discretion to relax the time requirements.

Appeal of denial of principal's certificate

The petitioner contends that because she has been denied the principal's certificate while this appeal was pending, a relaxation of the 90-day rule should be permitted. But that argument is not compelling.

N.J.A.C. 1:1-3.1 provides that actions are commenced in the state agencies:

> (a) A contested case shall be commenced in the State agency with appropriate subject matter jurisdiction. A contested case may be commenced by the agency itself or by

> an individual or entity as provided in the rules and regulations of the agency.
>
> (b) A request for a contested case hearing may not be filed with the Office of Administrative Law by the individual or entity requesting the hearing, except as set forth in N.J.A.C. 1:4B-3.1.

The procedural rule is clear: although the application for a principal's certificate was denied while this appeal of the school administrator's certificate was pending in the OAL, no appeal of that denial was filed directly with the agency and no appeal of that denial was transmitted to the OAL for determination. No individual can file an appeal directly with the OAL.

The petitioner contends that the principal's certificate issue is ripe for determination. While that issue may be ripe, the matter is not in the OAL for determination. Thus, the issue of the denial of the principal's certificate is not properly pending within the OAL and cannot be addressed.

Withdrawal of appeal of denial of school administrator's certificate

The determination of the Board in the decision regarding the appeal of the denial of the principal's certificate noted:

> [The petitioner] initially sought to appeal both the denial of a school administrator certificate as well as the principal CE, but later indicated via electronic mail that she no longer wished to have the Board consider an appeal of the denial of the school administrator certificate.

N.J.A.C. 1:1-19.2 provides for the withdrawals of matters pending in the OAL:

> (a) A party may withdraw a request for a hearing or a defense raised by notifying the judge and all parties. Upon receipt of such notification, the judge shall discontinue all proceedings and return the case file to the Clerk. If the judge deems it advisable to state the circumstances of the withdrawal on the record, the judge may enter an initial

> decision memorializing the withdrawal and returning the matter to the transmitting agency for appropriate disposition.
>
> (b) When a party withdraws, the Clerk shall return the matter to the agency which transmitted the case to the Office of Administrative Law for appropriate disposition.
>
> (c) After the Clerk has returned the matter, a party shall address to the transmitting agency head any motion to reopen a withdrawn case.

Here, it appears that while the petitioner may have indicated that she wished to withdraw her appeal of the denial of the school administrator's certificate, she failed to notify the judge or the OAL. Had this desire to withdraw that appeal been conveyed sooner, the matter would have been dismissed earlier and returned to the agency.

However, due to the misunderstanding and confusion as to whether the denial of the application for a school principal's certificate was incorporated into this appeal of the denial of the school administrator's certificate, given the footnote in the decision of the Board on May 19, 2020, in which the Board acknowledged that it was aware that the petitioner wished to appeal the denial of the principal's certificate, I recommend that if the petitioner still wishes to appeal the Board's denial of a principal's certificate, she be permitted to formally file her appeal within 90 days of this initial decision, or it will be deemed abandoned.

CONCLUSION

In conclusion, the Board's motion for summary decision of the denial of the school administrator's certificate is granted. The appeal was filed well out of time and no compelling reasons were provided to justify why the 90-day rule to file an appeal of an adverse determination should be relaxed.

However, due to the misunderstanding and uncertainty as to whether the denial of the application for a school principal's certificate was incorporated by the Board, without a formal transmittal, into this appeal of the denial of the school administrator's certificate, I recommend that if the petitioner wishes to pursue that matter, she be permitted to file

an appeal of the denial of the principal's certificate within 90 days of this initial decision, or it will be deemed abandoned.

ORDER

I **ORDER** that the Board's motion for summary decision regarding the denial of the school administrator's certificate of eligibility is **GRANTED**. The appeal is **DISMISSED**.

I further **ORDER** that the petitioner be permitted to formally file an appeal of the denial of the principal's certificate within 90 days of this initial decision, or it will be deemed abandoned.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 26, 2021
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ
(Ret., on recall)

Date Received at Agency: _____

Date Mailed to Parties: _____

SMS/cb

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

Brief and reply

For respondent:

Brief and sur-reply

154-21

154-21

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Craig Smith, Board of Trustees of the Marion P. Thomas Charter School, Essex County.

Synopsis

The petitioning Board sought the suspension of the teaching certificates of respondent – a non-tenured Science teacher – following his resignation without providing the notice required under *N.J.S.A.* 18A:28-8. Respondent submitted a letter on September 10, 2019, informing the Board that he intended to resign from his position sixty days from the date of the letter. The next day, the school sent respondent a letter advising that pursuant to his contract he would be released from the contract upon completion of the sixty days, on November 10, 2019, or sooner if the school was able to find a replacement. Subsequently, three weeks prior to that date – on October 19, 2019 – respondent stopped coming to work and abandoned his position. Respondent contended that there were mitigating circumstances which compelled him to resign due to the difficult work environment.

The ALJ found, *inter alia*, that: respondent intentionally and deliberately failed to provide the requisite sixty days' notice prior to resigning and abandoning his position; justifications offered for respondent's failure to complete his contractual obligations were without merit as respondent made no effort to provide evidence of mitigating circumstances or compelling reasons for his actions, aside from making unsupported personal attacks on the school administration; respondent made no effort to assure a smooth transition for the school, thereby negatively impacting the education of 120 seventh and eighth graders; respondent's certificates should be suspended pursuant to *N.J.S.A.* 18A:28-8 because he resigned without providing the Board with the requisite statutory notice; and a one-year suspension is the appropriate penalty for such unprofessional conduct. Accordingly, the ALJ ordered that respondent's certificates be suspended for a period of one year.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion for the reasons outlined in the Initial Decision. Accordingly, the Commissioner adopted the Initial Decision as the final decision in this matter. Respondent's certificates were suspended for one year from the filing date of this decision, a copy of which has been forwarded to the State Board of Examiners for implementation of the suspension.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

154-21

OAL Dkt. No. EDU 09789-20
Agency Dkt. No. 45-2/20

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Craig Smith, Board of Trustees of the Marion P. Thomas Charter School, Essex County.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by respondent Craig Smith pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.[1]

The Board filed an Order to Show Cause seeking the suspension of respondent's teaching certificates for resigning from his teaching position without providing the required 60-day notice. Following a hearing, the Administrative Law Judge (ALJ) concluded that respondent failed to provide the required notice and also failed to present any mitigating circumstances or compelling reasons justifying his actions, other than making unsupported personal attacks on the school administration. Accordingly, the ALJ ordered that respondent's teaching certificates be suspended for one year.

In his exceptions, respondent reiterates arguments made below, indicating that he was fearful that there was an intentional attempt to discredit and disgrace him through complaints from and interactions with students, parents, and the school's administration.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons outlined in the Initial Decision – that the respondent's certificates should be suspended pursuant to *N.J.S.A.* 18A:28-8 because he resigned without providing the Board with the requisite statutory notice. The Commissioner is also in accord with the ALJ's determination that a one-year suspension of the respondent's certificates is the appropriate penalty. The Commissioner does not find

[1] The Board did not file a reply to petitioner's exceptions.

respondent's exceptions persuasive, as they merely reiterate arguments that the ALJ, who was in the best position to assess all of the testimony, found not to be credible.

Accordingly, the Initial Decision is adopted as the final decision in this matter. The respondent's teaching certificates are suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 26, 2021
Date of Mailing: July 29, 2021

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09789-20
AGENCY DKT. NO. 45-2/20

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF CRAIG SMITH, BOARD OF TRUSTEES OF THE MARION P. THOMAS CHARTER SCHOOL.

Thomas O. Johnston, Esq., for petitioner (Johnston Law Firm, LLC)

Craig Smith, respondent, pro se

Record Closed: May 13, 2021 Decided: June 9, 2021

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Board of Trustees of the Marion P. Thomas Charter School, (petitioner or School) seeks the suspension of the teaching certificates of Craig Smith, (respondent or Smith) for his failure to provide a 60-day notice of resignation to the District. Respondent contends there were mitigating circumstances and that he was compelled to resign due to the difficult work environment. On or about December 4, 2019, the Board filed with the Commissioner of Education of the State of New Jersey

(Commissioner) a verified application for an Order to Show Cause (OTSC) as to why the teaching certificates of respondent Smith should not be suspended, contending that he resigned from his teaching position with inadequate notice. The Order to Show Cause was issued by the Commissioner on December 13, 2019, and was personally served on respondent on February 17, 2020. The Commissioner transmitted the case to the Office of Administrative Law (OAL) for hearing, where it was filed on October 9, 2020. A hearing was held via "ZOOM" recording on April 21, 2021. The record was left open for receipt of briefs until May 13, 2021 at which time the record closed.

FINDINGS OF FACT

The underlying facts are largely uncontroverted, and **FIND** the following to be the **FACTS:** On May 10, 2019, Smith executed his second one year employment contract as a non-tenured seventh and eighth grade Science teacher, to commence August 19, 2019 and to end June 30, 2020. (P-1). The contract specified that Smith could terminate the contract "upon Sixty (60) days written notice to the School..." On September 10, 2019 Smith sent the School a letter resigning his position effective sixty days from that date. The letter gave no specific reason for Mr. Smith's quitting other than "under the current conditions" he "[would] not be able to carry out [his] responsibilities to the best of [his] abilities." He thanked the administration for "all [their] support for all the time" that he had been there. (P-2)[1] On the next day, Mindy Weidman, the School's chief talent officer sent Smith a letter advising that pursuant to his contract and school policy he would be released from the contract upon completion of the sixty days, on November 10, 2019, or sooner if the School was able to find a replacement.

However, on October 19, 2019, three weeks prior to his date of termination, and without further notice, Smith stopped coming to work and, as admitted by him in his testimony abandoned his position. He did however return to the school sometime after October 23, to return his keys and computer and conduct an exit review. However, both prior to Mr. Smith leaving the school abruptly one day and never returning to class, and after Mr. Smith never wrote to the school or Ms. Weidman, about his complaints.

[1] The exhibits by petitioner were pre-marked A through E, but were designated when entered by the Court as P-1 through P-5 to properly note which party submitted the document and for uniformity in written decisions.

According to Ms. Weidman's testimony, unrefuted by Smith, the School had no coverage for him, which was particularly problematic because science teaching, particularly for the graders who are required to take a science, is a hard to fill position. The result of Smith's abrupt early termination prior to the expiration of 60 days, resulted in the students having a period of those to three months where they had to be taught by less qualified and uncertified teachers. Also, according to Ms. Weidman, other students suffer when a teacher leaves abruptly and without proper notice as they become fearful that other teachers will abandon their posts, thus abandoning them Finally according to Weidman, and undisputed by Smith, the school's continued existence as a public charter school depends on exceeding public schools performance standards. Therefore, from the School's perspective, Smith's abandonment of his position three weeks before he was permitted under his contract to leave certainly negatively impacted the School's 120 students and the continued viability of the School. Smith did not argue to the contrary.

Rather, Smith attempted to justify his actions because a student called him a "pervert." As a result, Smith was forced to physically bat this student from his classroom. Sometime after that Smith was called to the principal's office to learn that a parent had brought in her son, another student to complain about this accusation made by the other student. the result of which was a complaint made by the student's parent. Smith believed he was being set up for a criminal complaint. Also, according to Smith, the parent who had complained about him was a member of the Board of Directors of Brick Network, a management group for School. Further he had, with another teacher complained about the level of competency of one or some of the presenters of professional development meetings. One presenter was a female, who, according to Smith, accused him (and the other teacher, also, like Smith, a male) of "harassment." As a result, according to Smith the principal advised him not to attend further professional development meetings. Also, Smith, the parent who had complained about what Brick Network, a management group, for the administration of charter schools that had done since having "taken over" the management of the School after 2018-2019. According to Smith, the entire previous administration had resigned or not been offered contracts for 2019-2020, as a result of Brick Network's "unscrupulous practices", as summed up by Smith, in his post hearing brief/commentary. Ms. Weidman disputed that the level of resignations and non-renewals of the administrators of the schools was as high as Smith Claimed. I **FIND** these

statements by Smith concerning "unscrupulous practices" by Brick Network to be to be unsupported by any competent evidence presented and coming from a disgruntled ex-employee with a serious stake in the outcome of the present controversy to be otherwise not credible. Further I **FIND** his story about being targeted by the School for the student's accusation and the parents' complaint to be unfounded and because of the harassment accusation to be not credible. I note that there was a complete absence of Smith documenting these concerns to the School and prior to the litigation commencing, was consequently not mentioned in his letter of resignation. Further, no explanation for not calling any witnesses, such as the other teacher, was with Smith when the so called complained of "harassment" occurred. Nor did he attempt to call any ex-employees or document anything about ex-employees to support his claim about the "unscrupulous practices by Brick Network Further I find that Smith's own testimony that the principal told him after learning of the interaction between the presenter and Smith to simply not go to any further professional development classes because he was leaving in a few weeks to be a perfectly reasonable resolution to that "problem" if indeed it was a problem. I do not see why any school should offer professional development classes to any teaching that is leaving in a few weeks.

According to Smith, he had no self-interested, reason for leaving the School, but his actions were completely motivated by his fear of being set up for punitive actions for being accused of being a "pervert" and a harasser. I find it not credible that Smith thought he was facing any punitive action and indeed there is no evidence that the School was doing anything but following normal procedure to discuss any complaint by a parent There is also no evidence the school to the complaint seriously. As for having to put up with the student who made the unjust accusation, Smith admitted he barred the student from his classroom. Moreover, it also would have been unreasonable for Smith to quit because a presenter said she was harassing him concerning his complaints he made over the presenter's competence. Even if the "harassment" comment by the presenter had been made, which I doubt, as the only evidence of it comes from the self-interested respondent, there was no evidence that an "harassment" investigation was undertaken.

Smith impressed me as a strong, and strong willed individual unlikely to be pushed around or one who is particularly sensitive to outrageous claims because of being highly

strung or emotionally delicate. Therefore, Smith's story seems on balance an after the fact justification for quitting when it suited him to quit. Moreover, in November 2019 he began an interview process which resulted in his commencing, in January 2020, his new position as a middle school teacher at another Charter School. (P-5).

LEGAL DISCUSSION

The issue presented here is whether respondent's teaching certificates should be suspended for up to one year for failure to perform his duties prior to the expiration of the employment period, in accordance with N.J.S.A. 18A:26-10, which provides in pertinent part that

> [a]ny teaching staff member employed by a board of education . . . who shall, without the consent of the board . . . , cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

The procedure by which a teaching staff member must provide notice of resignation is set forth in N.J.S.A. 18A:28-8, as follows:

> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.

By using the term "may" and not "shall," the Legislature did not intend for there to be an automatic suspension, rather, it determined to invest the Commissioner with discretion predicated on the facts and circumstances individual to the case. Thus, the Commissioner may suspend, in his or her discretion.

The purpose of these statutes is "to provide notice to the school so that a suitable replacement can be hired without adversely impacting students," and thereby protect students. Penns Grove-Carneys Point Bd. of Educ. v. Leinen, 94 N.J.A.R.2d (EDU) 405, 407. The decision as to whether to suspend a teaching staff member's certificate is a discretionary determination vested in the Commissioner, and historically all attendant circumstances specific to each case have been evaluated. Generally, this evaluation results in suspension of certificates for the maximum one-year period, especially when the facts demonstrate that "individuals violated the sixty-day notice requirement for strictly personal reasons, putting their own self-interest above the interests of students and their professional obligation to provide adequate notice to the Board." In re Suspension of the Teaching Certificate of Capshaw, EDU 12318-06, Initial Decision (April 30, 2007), modified, Comm'r (June 12, 2007), https://njlaw.rutgers.edu/collections/oal/; see also Bd. of Educ. of Alpine v. Yuz, EDU 1116-06, Initial Decision (July 17, 2008), adopted, Comm'r (September 23, 2008), https://njlaw.rutgers.edu/collections/oal/, stating that, generally, a full one-year suspension of a teaching certificate for leaving a district without adequate notice is imposed, with the rare exception of compelling reasons.

The Commissioner imposed a three-month suspension in In re Suspension of the Teaching Certificate of Rogers, 1989 S.L.D. 1962 (May 16, 1989), adopted, 1989 S.L.D. 1968 (June 21, 1989), where a non-tenured teacher of the handicapped resigned to take a position in a State facility, switching employment for more "noble" reasons, to work with more severely handicapped children. Another matter in which less than a one-year suspension was imposed is In re the Suspension of the Teaching Certificate of Borden, School District of Edison, Middlesex County, Commissioner Decision 247-16, where a non-tenured teacher resigned following a debilitating injury that left her unable to drive or climb stairs. The Commissioner determined that while Borden's conduct was unprofessional within the meaning of N.J.S.A. 18A:26-10, her resignation was motivated by a medical crisis, supported by medical records, and not personal gain, and imposed a three-month suspension.

In In re the Teaching Certificate of Burgess, 1983 S.L.D. 183, adopted, 1983 S.L.D. 195, the board accepted a two-week resignation predicated on its plan to find a

replacement by Burgess's termination date. The board failed to follow through on its promise, and so the Commissioner declined to impose a suspension.

In Board of Education of Black Horse Pike Regional School District v. Mooney, 1984 S.L.D. 810, adopted, 1984 S.L.D. 821, a teacher made considerable efforts to assist the board with a smooth transition; developed a program through the end of the year; met with her successor to put the program in place; and left final grades. The Commissioner determined to impose no suspension.

In the matter In re Suspension of the Teaching Certificate of Savino, EDU 11688-04, Initial Decision (July 28, 2005), modified, Comm'r (August 30, 2005), affirmed, State Bd. (February 3, 2006), https://njlaw.rutgers.edu/collections/oal/, Savino asserted that she was uncomfortable being reassigned from elementary school to middle school, and felt "unfit" to teach middle school even though she was fully certified to do so. The superintendent had warned her that the process for suspension would be commenced, as here, should she not comply with the advance-notice requirement. While the ALJ concluded that Savino's fear of unfitness constituted a mitigating factor warranting a shorter suspension, the Commissioner disagreed, and reversed the proposed sixty-day suspension in favor of a one-year suspension. No mitigation was found, nor were compelling reasons, unlike in Mooney and Rogers. Indeed, the compelling reasons found in Rogers nevertheless resulted in the imposition of a three-month suspension. See also In the Matter of Teacher Certificates of Erin Davidoe, Board of Education of Long Hill Township EDU 01563-20, Initial Decision (August 31, 2020).

It is clear and undisputed that Smith, intentionally and deliberately failed to provide the requisite sixty days' notice prior to resigning. At the hearing Smith defiantly took the stance that his actions were completely justified because of his fear of persecution as a result of what was admittedly a baseless complaint by a parent based on a frivolous or malicious action of a pupil. However, as noted by the School, Smith never documented any dispute over the Administration's handling of the complaint and Smith admitted in testimony the school had an obligation to investigate the complaint. Further, Smith's concern about the "harassment" statements made by the presenter at a professional development were unreasonable and not credible. Smith made no effort to offer any

mitigating circumstances or compelling reasons for his actions, other than by making unsupported personal attacks on the school administration.

As such, Smith is guilty of unprofessional conduct as defined in N.J.S.A. 18A:28-8. Undoubtedly, Smith knew the consequences of his actions to leave his position at the School in violation of the Notice requirement of his contract. He did not refute that science teachers for students of this age are difficult to obtain. The issue, therefore, is what constitutes an appropriate term for the suspension of respondent's certificates. The penalty assessed in many similar matters is a one-year suspension. There have been situations where less than a one-year suspension was deemed appropriate due to mitigating circumstances. Here, the respondent's letter of resignation alluded to circumstances which made it impossible to fulfill his duties to the best of his abilities but said nothing about any urgency in his leaving. As stated I find his claims about his fears of prosecution or persecution to be not credible. Further he provided a motive for leaving the School in the lurch and quitting early, by his unhidden expressions of his disdain of the current Administration. Not surprisingly, considering his convictions, he made no effort to to ensure a smooth transition for the School. As a consequence, the education of 120 students were negatively impacted by Smith's self-centered conduct. Further this particular chartered School, the petitioner, was unfairly disadvantaged in its ongoing obligation to retain its own charter, while Smith pursued another position at another charter school. Finally, even if respondent were to be completely believed as to the issues the way he presented them, there were no dire circumstances or compelling reasons which caused him not to continue at the school another three weeks to complete his contractual obligation.

CONCLUSION

There is no dispute that respondent failed to provide the requisite timely notice of resignation, by failing to continue to report to work for the required sixty days after serving the School with Notice, and therefore is guilty of unbecoming conduct as defined in N.J.S.A. 18A:28-8. As there are no compelling reasons for Smith's conduct nor any mitigating circumstances, I **CONCLUDE** that a one-year suspension is appropriate.

ORDER

It is therefore **ORDERED** that respondent's teaching certificates be and hereby are suspended for a period of one year commencing June 9, 2021 and ending on June 8, 2022.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 9, 2021
DATE

Ernest M. Bongiovanni
ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: June 9, 2021

Date Mailed to Parties: June 9, 2021

id

APPENDIX

LIST OF WITNESSES

For Petitioner:

Mindy Weidman, Chief Talent Officer

For Respondent:

Craig Smith

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

P-1 Employment Contract between Craig Smith and Marion P. Thomas Charter School, dated May 10, 2019, for the school year, August 19, 2019 to June 30, 2020

P-2 Letter of Resignation by Craig Smith, dated September 10, 2019, stating the effective date being in sixty days.

P-3 Board acceptance of resignation upon expiration of 60 days' notice on November 10, 2019 or sooner if the Board finds a replacement., dated September 11, 2019

P-4 Termination letter because of abandonment of position, dated October 30, 2019

P-5 Tracking of Instructional/Teaching Certificates of Craig Smith

For Respondent:

None

155-21

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

July 29, 2021

VIA EMAIL ONLY
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Re: *M.M. and L.M., on behalf of minor child, A.M. v. New Jersey State Interscholastic Athletic Association, Agency Dkt. No. 112-7/21.*

Dear Counsel:

I have reviewed the materials filed in connection with the petition of appeal and motion for emergent relief filed by M.M. and L.M in the above-captioned matter. Upon review of the submissions, I have determined that this matter is not properly before me.

M.M. and L.M. are attempting to appeal the New Jersey State Interscholastic Athletic Association (NJSIAA) rule governing the transfer of a student-athlete from one secondary school to another (Transfer Rule), addressed in Article V, Section 4(K) of the NJSIAA Bylaws.

Article V, Section 4(K)(2) of the NJSIAA's Bylaws states:

a. A student-athlete transferring from one secondary school to another, without a bona fide change of residence by that student's parent or guardian, shall be ineligible to participate for a period of thirty (30) calendar days or one half of the maximum number of games allowed in the sport by NJSIAA rules (ineligibility period) from the beginning of the

regular schedule, whichever is less, in any sport in which the student has previously participated at the varsity level.

CL1: Since the thirty (30) days or one half the maximum number of games allowed in a sport by the NJSIAA rules ineligibility period (whichever is less) is intended to serve as a deterrent for students transferring from one school to another without a bona fide parental/guardian change of residence and is one of the most lenient penalties in the United States, appeals will not be heard, regardless of reason.

The NJSIAA rules clearly state that no appeals of the Transfer Rule will be heard. Further, under *N.J.A.C.* 6A:3-7.1(c), "[t]he Commissioner shall summarily dismiss any petition seeking to appeal a determination of the NJSIAA in an area that is expressly designated as not appealable by the NJSIAA constitution, bylaws or rules and regulations as adopted by member schools pursuant to law." Therefore, I am precluded from adjudicating this matter.

Accordingly, the petition of appeal is hereby dismissed.[1]

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner of Education

c: State Law Library

155-21L

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

157-21

157-21

New Jersey Commissioner of Education

Decision

B.M., on behalf of minor child, C.M.,

Petitioner,

v.

Board of Education of the Bergen County Vocational Schools, Bergen County,

Respondent.

Synopsis

Pro se petitioner disputed the respondent Board's finding that her son, C.M., committed an act of harassment, intimidation or bullying (HIB) against a fellow student pursuant to New Jersey's Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13.2 et seq (the Act). After an investigation by the school's anti-bullying specialist, the Board determined that C.M. had committed an act of HIB when he approached a female classmate from behind and grabbed her buttocks. Petitioner claimed, *inter alia*, that C.M. was "discriminated against" in the course of the HIB investigation, causing him academic and emotional harm. The Board filed a motion for summary decision, contending that the HIB investigation was properly conducted and that the Board was not arbitrary, capricious or unreasonable in making the determination that C.M.'s conduct constituted HIB.

The ALJ found, *inter alia*, that: an action by a board of education is entitled to a presumption of correctness unless it is proven to be arbitrary, capricious or unreasonable; under the Act, "harassment, intimidation, or bullying" is broadly defined as any gesture, any written, verbal, or physical act, or any electronic communication that is reasonably perceived as motivated by any actual or perceived distinguishing characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical, or sensory disability, that takes place on school property and substantially disrupts the orderly operation of the school; in the instant case, the record reflects that C.M. did not deny touching his classmate's buttocks, but characterized the physical contact as a "poke" rather than a "grab"; petitioner does not dispute that C.M. committed the act, nor that the school district was required under the HIB statute to report, investigate, make findings, and decide consequences based upon C.M.'s conduct; and petitioner has neither alleged nor shown that the district's handling of the HIB complaint against C.M. was arbitrary, capricious, or unreasonable. The ALJ concluded that the Board's determination of HIB was appropriate as C.M.'s uninvited touching of a fellow student violated the Act; further, petitioner presented no genuine issue of material fact, and the overwhelming weight of the evidence in this case has been presented by the Board. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination pursuant to the Act. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

157-21

OAL Dkt. No. EDU 06600-20
Agency Dkt. No. 83-4/20

New Jersey Commissioner of Education

Final Decision

B.M., on behalf of minor child, C.M.,

Petitioner,

v.

Board of Education of the Bergen County Vocational Schools, Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

In this matter, the Bergen County Vocational Schools Board of Education determined that C.M. committed an act of harassment, intimidation and bullying (HIB) when he grabbed a female student's buttocks. Upon review, the Commissioner agrees with the Administrative Law Judge that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination, pursuant to the Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 *et seq.*

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 2, 2021
Date of Mailing: August 3, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 06600-20
AGENCY DKT. NO. 83-4/20

B.M. ON BEHALF OF C.M.,
Petitioner,
v.
BERGEN COUNTY VOCATIONAL SCHOOLS BOARD OF EDUCATION,
Respondent.

B.M., petitioner, pro se

William C. Soukas, Esq., for respondent (Nowell, P.A., attorneys)

Record Closed: April 5, 2021 Decided: June 17, 2021

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, B.M. on behalf of C.M., filed a Petition of Appeal to the Commissioner of Education in which B.M. disputes the finding of respondent Bergen County Vocational Schools Board of Education that her son C.M. committed an act of harassment, intimidation, or bullying (HIB) pursuant to N.J.S.A. 18A:37-13.2 et seq.

The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on July 7, 2020. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Respondent filed a motion for summary decision and petitioner made multiple submissions thereafter.[1] The record remained open for respondent to submit a reply once petitioner filed her final submission.[2]

FACTUAL DISCUSSION

At an off-school-grounds Halloween gathering in 2019, C.M., a male junior at the Bergen County Academy for Visual and Performing Arts (AVPA), approached a female classmate and acquaintance, N.L., from behind, and without invitation "grabbed her buttocks with both of his hands," she reported later to a school counselor. (Sheridan Cert. at ¶ 5.) The report was corroborated by another student, who told the school's anti-bullying specialist (ABS) that she saw "C.M. come up behind N.L. and touch and 'jiggle' N.L.'s buttocks with two hands." (Resp't's Letter Br. at 5.) As N.L. described the incident, "[C.M.] grabbed my arm and waist and pulled me around harshly, . . . made sex noises in my ear and rubbed his front side up against mine in the middle of us speaking. He came up to me from behind and jiggled my butt. He followed this action by calling me 'thicc' [sic] and cornering me with his body invading my space . . . ." (Resp't's Ex. A at 23.)

N.L. also reported that two days prior to Halloween, after she and C.M. were dropped off at his house after a play rehearsal and he told her his parents were not home, he tried to force her to touch his genitals, "pinned her down and mounted her, and sexually harassed her the entire evening despite her repeatedly telling him to stop." (Sheridan Cert. at ¶ 5.) N.L. alleged a two-year history including disturbing and unwelcome physical and verbal acts by C.M. against her and others, including several incidents of C.M. touching her breasts without permission, at least once in school. (Resp't's Ex. A at 17–18.) She also said C.M. often made racial, anti-Semitic, and anti-gay remarks and called

[1] None of petitioner's submissions included the reply affidavit required pursuant to N.J.A.C. 1:1-12.5(b).
[2] This decision is filed in accordance with Governor Phillip Murphy's Executive Order 127 issued April 14, 2020, created by the COVID-19 emergency.

people "fat." (Id. at 20.) N.L. reported "that she is frightened of C.M. and doesn't feel safe or comfortable in his presence." (Sheridan Cert. at ¶ 5.)

School officials reacted quickly to N.L.'s HIB complaint. On November 4, 2019, the day of her report, the counselor verbally reported her complaint to the vice principal of the Bergen County Academies, a magnet high school housing the AVPA program that is overseen by the Board of Education of the vocational schools in the County of Bergen. The complaint was also reported to the district's ABS. The parents of N.L. and C.M. were notified that day that N.L. had filed an HIB report against C.M. (Resp't's Cert., Ex. A, at 2.) Meetings were held with each student, their parents, the Academies' vice principal, and the ABS, who initiated an HIB investigation. (Resp't's Ex. A at 3.) N.L.'s allegations were also transmitted by the district to the school resource officer with the Bergen County Sheriff's Department, which later reported that the report was investigated but no juvenile or criminal charges would be brought. (Id. at 4.)

On November 6, 2019, a written HIB report was signed by the vice principal. (Id. at 1B.) Ten school days after N.L.'s initial report, on November 18, the ABS's investigation, including interviews with N.L., C.M., and eight witnesses, was completed. (Id. at 3.)

In his interview with the ABS on November 13, 2019, C.M. said he never intended to "harass, intimidate, or bully anyone and does not believe any of his actions had this impact." (Resp't's Ex. A at 9–10.) The student acknowledged that he touched N.L. at the Halloween gathering, but stated that he was "just trying to get [N.L.] to turn around" as the group stood together at an overlook, and the touch was not "in the way he is being accused of." (Ibid.) He stated that N.L. turned around and asked him, "'Did you poke me?'" C.M. said he responded "yes," and N.L. replied, "oh, ok." (Ibid.)

In the interview, C.M. "admitted that at the beginning of sophomore year, he did 'flip' the breast of his friend/classmate," and said "it only happened 2–3 times . . . ." (Ibid.) C.M. also stated that starting with freshman year, "joking and comments about each other were part of the culture of their group," and "it was their way of responding/dealing with" hatred, "to give it less power[.]" (Resp't's Ex. A at 9.) C.M. expressed a belief that no

one was offended by his behavior, and said, "other people have engaged in the same conduct and comments and that it is the culture among his friend and peers," although he told the ABS that in freshman year, classmates told him his jokes went "too far" and they bothered them. (Ibid.)

The ABS's Final Report and HIB Intervention Plan were completed on November 21, 2019. (Sheridan Cert. at ¶ 11.) The report found that C.M.'s actions met the elements of an HIB violation. The ABS concluded that C.M.'s behavior was motivated by a "distinguishing characteristic" of N.L.—in this case, race, sexual orientation, and weight of the victim, categories enumerated in N.J.S.A. 18A:37. (Resp't's Ex. A at 2.) The ABS determined that the incident "substantially disrupted or interfered with the orderly operation of the school or rights of other students and insulted or demeaned a student or group of students," which are also elements of HIB. (Resp't's Br. at 3–4.) She noted, "C.M. did not seem remorseful nor wrong [sic] for any of the comments or actions he has made." (Resp't's Ex. A at 2.)

As a result of the HIB determination, consequences were imposed on C.M. aimed at separating N.L. and him and preventing contact between them, "to ensure that N.L. felt safe while at school." (Sheridan Cert. at ¶ 14.) C.M. was excluded from that fall's school play to avoid interaction with N.L., who also was in the play. He was removed from classes shared with N.L., including his theater classes, and given individualized theater instruction by the same teacher. His schedule was changed to eliminate potential contact with N.L., and he was excluded from the spring play and a class trip to London. (Ibid.)[3] He was suspended for five days as "a matter of student discipline relating to C.M.'s conduct with other students[.]" (Sheridan Cert. at ¶ 15.) The suspension was later removed from C.M.'s records at his and his parents' request. (Ibid.)

The vice principal notified C.M.'s parents about the consequences on November 26, 2019. (Resp't's Ex. B.) On December 10, 2019, the district superintendent reported the HIB case to the Board of Education at its scheduled public meeting. (Resp't's Ex. C.)

[3] None of these consequences were actually suffered by C.M., as the shutdown of the district due to COVID-19 resulted in the cancelation of the class trips and spring play and all other in-person activities.

The next day the superintendent wrote to both students' parents regarding the HIB investigation results and his report to the Board. (Ibid.) He told the families they had a right to a hearing before the Board. (Resp't's Ex. D.)

C.M.'s parents requested the Board hearing to appeal the HIB finding against their son, and on January 28, 2020, the hearing was conducted in executive session. (Resp't's Ex. E.) There, Board attorney William Soukas explained that the family had a right to appeal to the Board, and that the hearing was "not to be adversarial," and informed the Board that it would hear from district witnesses and the family, according to the meeting minutes. (Ibid.)

B.M. told the Board that her son "advised her that he had merely poked [N.L.], rather than grabbed her buttocks." She stated that "there is a culture in (the school) that is 'touchy feely' and that this incident is nothing more than an extension of that conduct . . . ." (Ibid.) She stated that C.M. and N.L. were close friends prior to the incident, and she described her son as "the victim of a 'me-too' movement which resulted in harsher treatment because of his male gender." (Ibid.)

Petitioner was informed on February 10, 2020, that the Board had affirmed the HIB finding against C.M. (Resp't's Ex. F), and of certain consequences the district had imposed on C.M. for the remainder of the school year, including his removal from performing arts classes, and rescheduling to reduce contact with N.L. (Ibid.) C.M. was to continue to receive individualized study for theater. The Board affirmed that he would not be permitted to participate in the spring play or the London trip. (Ibid.)

The Board also determined that C.M. could participate in certain extracurricular and curricular activities during junior year with appropriate district measures to minimize or eliminate interaction with N.L. (Resp't's Ex. F.) Fall-play auditions were rescheduled from spring to fall in order to accommodate C.M. (Ibid.)

The petitioner expressed her displeasure with the Board's decision to school officials (Ibid.), and on or about March 18, 2020, filed a petition of appeal with the

Commissioner of Education, alleging that C.M. was "discriminated against" in the course of the district's HIB investigation, causing him academic and emotional harm.

THE PARTIES' ARGUMENTS

While the touching that triggered the HIB allegation against C.M. is acknowledged and undisputed by the pro se petitioner, petitioner takes issue with the district's determination that C.M.'s behavior constituted HIB, and with the consequences imposed on C.M. In correspondence submitted, petitioner B.M. argues that C.M.'s physical behavior with N.L., and the language he used with her and others, should be viewed within the context of what petitioner claims is a school culture of permissive physical and verbal expression, and of the long, friend/classmate relationship of N.L. and C.M.

Petitioner contends that the consequences were "grossly unjust," and that C.M. was "disciplined on unproven allegations" by school officials, whose actions isolated him and made him a "target to be . . . abused," and who "did nothing to intervene when we raised the concerns of abuse toward him." B.M. states that she and C.M. were never "told by the school that there was a problem" with his behavior, and that C.M. "was never given a chance to correct this and in fact had no ability to understand that this was wrong since how he communicated was demonstrated by most of the students in the program."

Petitioner B.M. acknowledges that the Board "removed some of the disciplinary actions" initially imposed, but claims that her son was "denied the education he deserved" and was traumatized by his treatment. In one letter she writes, "We know that we can't undo the damage but given our experiences we felt it necessary to pursue appeals." In another, apparently referring to the Board's summary-decision motion, B.M. states, "We remain concerned that there are efforts to dismiss this case and silence us." B.M., who appeals pro se, acknowledges administrative deficiencies in her filings with the OAL, but pleads lack of knowledge of the legal system and procedures.

The Board argues that summary decision should be granted on several counts: 1) Petitioner has failed to show any genuine issue of material fact that would preclude summary decision and dismissal of the petition, and instead has expressed

"dissatisfaction with, and continued disbelief that C.M.'s behavior towards N.L. was found to constitute HIB or merited consequences of any sort." (Resp't's Br. at 3.) The Board contends that petitioner's "dissatisfaction" was "always clear and undisputed," and "does not constitute any material issue of fact precluding summary decision." (Ibid.) 2) Petitioner failed to follow administrative procedure under N.J.A.C. 1:1-12.5(b) by submitting the typewritten letters in response to the Board's summary-decision motion instead of the statutorily required affidavit setting forth "specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." The court can grant summary decision "where appropriate" for failure to submit the affidavit, the Board notes. 3) The Board's HIB finding against C.M. and imposition of consequences were "correct and proper," and "[n]othing . . . reflects" that its "handling of the matter was arbitrary, capricious or unreasonable." (Resp't's Br. at 2.)

Citing the case record, including N.L.'s statement (Resp't's Ex. A) reflecting that she "feared being in C.M.'s presence" and that there was "a history of this type of improper, sexually charged behavior by C.M. towards N.L.," the Board contends that "allegations of HIB filed by student N.L. against C.M. were promptly acted upon, being reported and investigated as required by the Anti-Bullying Bill of Rights Act . . . ." (Resp't's Br. at 3.)

The Board states that the district properly found that C.M.'s uninvited touching of N.L. on Halloween of 2019 met the elements of HIB and violated the Act. The Board argues that "there is no credible dispute" that the consequences imposed on C.M. "were proper and narrowly tailored to address this particular situation, namely, to avoid interaction between N.L. and C.M., in interests of protecting each student." (Resp't's Br. at 4.)

The Board also notes, in its letter brief of January 13, 2021, that, "Ultimately, C.M. was unaffected by these consequences" because of the COVID-19 pandemic and resulting shutdown of the school district in March 2020. "No students went on any class trips and no Spring Plays or other in-person activities were conducted." The Board rejects petitioner's claim that the District did not intervene to assist C.M., noting that "supportive

action," including parent contact, follow up, individual counseling, and other assistance, was provided or recommended. (Resp't's Br. at 6.)

The Board argues that the District conducted a prompt, thorough investigation adhering to the procedural requirements of the HIB statute, that it imposed appropriate consequences that were intended to keep C.M. and N.L. from interacting at school, and that there is no credible question that the Board here acted properly and in good faith, not in any arbitrary way. For these reasons, the Board argues, summary decision should be granted and the district's HIB findings should be affirmed.

LEGAL DISCUSSION

The summary-decision analysis is essentially the same as that of summary judgment, and under the New Jersey Rules of Court a party may move for and be granted summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences . . . favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid.

Under the Uniform Administrative Procedure Rules, summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). "When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. . . . If the adverse party does not so respond, a summary decision, if appropriate, shall be entered." Ibid.

In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), the New Jersey Supreme Court clarified the framework for deciding a summary-judgment motion. The judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Summary judgment must be granted if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Ibid.

Here, the Board has filed a motion for summary decision, supporting it with letter briefs and certifications, including the victim's written statement, the school counselor's report of what N.L. told her, the anti-bullying specialist's report on her investigation of N.L.'s allegation and her interview notes, the minutes of the Board's executive-session hearing at which C.M.'s parents presented their concerns, and other documentation.

Petitioner has not filed the reply affidavit that is required under N.J.A.C. 1:1-12.5(b) as the vehicle for setting out "specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." But the critical issue here is not whether petitioner filed an affidavit, but whether petitioner has shown any genuine issue of material fact that, in light of the evidence and with legitimate inferences favoring petitioner as the non-moving party, require that issue to be heard by the factfinder.

Petitioner's submissions consist of several letters reiterating petitioner's displeasure at the Board's findings and the consequences imposed on C.M., along with allegations of abuse and isolation allegedly inflicted on C.M. by the district. The submissions repeat the family's view of C.M.'s behavior, contending that his actions should be understood in the context of student and school culture and the long friendship between C.M. and N.L. "This is a program that deals with mature themes," B.M. says of the theater program. "There is a physicality to their performance work. The group often laid around on the floor with each other and blankets during class and they demonstrated a lot of affection for each other (hugging, etc.), which . . . we have photos to show. The photographic evidence clearly disputed the accounts and fears that N.L. expressed. It was ignored."

It is also irrelevant. Photographs of teenaged theater students dramatizing social issues and hugging each other are unrelated to the district's determination—unchallenged by C.M.'s petition of appeal—that on Halloween of 2019 C.M. violated the Anti-Bullying Bill of Rights Act by touching N.L. in a sexually charged manner, in front of at least one witness, without N.L.'s consent. Photographs of students hugging and text messages between C.M. and N.L. that petitioner submitted to indicate a friendship are irrelevant to whether C.M.'s behavior was improper, and whether it disturbed and frightened N.L.

Petitioner clearly is aggrieved by the HIB finding against C.M., and by the consequences the district imposed. The letters from B.M. repeated petitioner's desire to appeal and be "heard." But petitioner does not dispute that C.M. committed the act for which the district was required, under the HIB statute, to report, investigate, make findings, and decide consequences. Importantly, petitioner has neither alleged nor shown that the district's handling of N.L.'s complaint was arbitrary, capricious, or unreasonable. That is the standard, established by the Commissioner of Education, that must be met by a party seeking to overturn a school board's decision. In fact, petitioner's submissions do not make clear exactly what she is appealing or what remedy she seeks.

The petitioner accuses the district of treating C.M. harshly and unfairly, despite the evidence showing that the Board attempted to protect both students, accommodated C.M.'s academic and extracurricular needs, and offered other assistance. Petitioner does not allege that the Board failed to follow the law or acted improperly. There has been no showing that based on competent evidentiary materials viewed in a light most favorable to petitioner, a reasonable factfinder could resolve the disputed issue in petitioner's favor. No genuine issue of material fact has been presented here, and the overwhelming weight of the evidence in this case has been presented by the Board. Logically, its summary decision motion must prevail.

The Anti-Bullying Bill of Rights Act (ABR Act), N.J.S.A. 18A:37-13 to -47, is designed "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of

students that occur in school and off school premises." N.J.S.A. 18A:37-13.1(f). The Act defines HIB as

> any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, *that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic*, that takes place on school property, at any school-sponsored function, on a school bus, *or off school grounds . . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students* and that:
>
> > a. *a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student* or damaging the student's property, *or placing a student in reasonable fear of physical or emotional harm* to his person or damage to his property;
> >
> > b. *has the effect of insulting or demeaning any student or group of students*; or
> >
> > c. creates a hostile educational environment for the student by interfering with a student's education *or by severely or pervasively causing physical or emotional harm* to the student.
>
> [N.J.S.A. 18A:37-14 (emphasis added).]

Respondent's Board of Education Policy 5512.1, Harassment, Intimidation and Bullying, also defines HIB as "unwarranted, aggressive behavior" that may involve "a real or perceived power imbalance." (Resp't's Br. of January 13, 2021, at 10.)

The framework for addressing school bullying and responding to HIB allegations is set forth in the ABR Act and in the New Jersey Administrative Code, N.J.S.A. 52:14B-1 et seq. Each school district is required under the statute to adopt its own policy prohibiting HIB. N.J.S.A. 18A:37-15(a). District policies must include (1) a statement prohibiting HIB; (2) a definition of harassment, intimidation, or bullying that at least meets

that of N.J.S.A 18A:37-14; and (3) consequences and appropriate remedial action for the HIB offender. N.J.S.A. 18A:37-15(b); N.J.A.C. 6A:16-7.7.

The policy must also detail procedures for quick investigation of HIB allegations, informing parents, and reporting results of the school's inquiry to the district superintendent and local board of education. N.J.S.A. 18A:37-15(b)(5)–(6). The board then decides whether to affirm, reject, or modify the superintendent's decision. Parties can appeal the board's finding, by petition, to the Commissioner of Education. N.J.S.A. 18A:37-5(b)(6). The Commissioner is empowered to "hear and determine, without cost to the parties, all controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9.

The filing of the petition, which must state the basis for appeal and the relief sought, N.J.A.C. 6A:3-1.4(a), initiates a contested case, as noted in a New Jersey Department of Education publication available on the agency's website, Guidance for Parents on the Anti-Bullying Bill of Rights Act, at 42. Under the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., the parties must have an opportunity "to respond, appear and present evidence and argument on all issues involved." N.J.S.A. 52:14B-9(c).

The Commissioner of Education has established the "arbitrary, capricious and unreasonable" standard as central to ALJ fact-finding in contested cases. An ALJ's determination of whether the school officials properly followed the anti-bullying statute is made under the "arbitrary, capricious" standard, and the Commissioner will not overturn a school-board decision unless its actions are found to meet it. T.B.-M. v. Moorestown Bd. of Educ., EDU 02780-07, Initial Decision (February 6, 2008) (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966)), adopted, Comm'r (April 7, 2008), https://njlaw.rutgers.edu/collections/oal/.

Agency determinations are generally presumed to be correct. In Thomas, the Appellate Division upheld a school-board decision in an employment dispute. Citing Education Department decisions dating to1960, the court noted:

> We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. The agency's factual determinations must be accepted if supported by substantial credible evidence.
>
> [Thomas, 89 N.J. Super. at 332.]

In 2015, a school board found by an ALJ to have acted in an arbitrary, capricious, and unreasonable manner in not finding HIB in a sexual-harassment case argued that "its determination was entitled to deference and the ALJ had no authority to modify it by granting summary decision to the petitioners *sua sponte*." T.R & T.R. ex rel. Minor Child E.R. v. Bd. of Educ. of the Bridgewater-Raritan Reg'l Sch. Dist., Somerset Cty., EDU 10208-13, Comm'r's Amended Decision (May 6, 2015), https://www.nj.gov/education/legal/. The Commissioner reiterated, "It is well established that when a local school board acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable." Ibid. (citing Thomas, 89 N.J. Super. at 332). "The fact that the substance of this case involves a challenge to the Board's HIB determination and the application of the Act does not impact the customary standard of review." Ibid.

To prevail in a challenge to an HIB decision, a petitioner "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014) (citation omitted), adopted, Comm'r (April 10, 2014), http://njlaw.rutgers.edu/collections/oal/. A school board's decision may also be overturned if it violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Pittsgrove Bd. of Educ., EDU 10826-12, Initial Decision (March 11, 2013) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)), adopted, Comm'r (April 25, 2013), http://njlaw.rutgers.edu/collections/oal/.

A review of the record in this matter shows that the Board followed the protocols set out by the ABR Act in promptly responding to N.L.'s complaint and launching an investigation, and implemented a plan reasonably aimed at reducing or eliminating interaction between C.M. and N.L. The fact that the Board modified some of the original consequences it imposed on C.M., removed his suspension from his school record, and accommodated him by moving the fall-play auditions to fall 2020, when he would be permitted to participate, reflects an effort to work with his family and listen to their concerns. The Board's intervention plan included discussions with his parents, and offers and recommendations that he receive counseling.

The Board properly found that C.M.'s uninvited touching of N.L. on Halloween violated the ABR Act, as it was "reasonably perceived as being motivated either by any actual or perceived characteristic," and because "a reasonable person should know" that the behavior would "have the effect of physically or emotionally harming" N.L. or placing her "in reasonable fear of physical or emotional harm," and had "the effect of insulting or demeaning" her.

Petitioner has provided no legitimate evidence that the Board's actions in this matter were arbitrary, capricious, or unreasonable, and as such petitioner cannot meet the standard established by the Commissioner for disturbing the Board's HIB finding or consequences.

CONCLUSION AND ORDER

Based upon all of the foregoing, I **CONCLUDE** that the Board's motion for summary decision should be granted, and petitioner's appeal dismissed, because petitioner has failed to show that there is any genuine issue of material fact that can only be determined in an evidentiary proceeding, and because the Board adhered to the requirements of the Anti-Bullying Bill of Rights Act in its reporting and investigation of N.L.'s complaint and in imposing consequences, and its actions were not arbitrary, capricious, or unreasonable. Without such a showing, and based on the record made by the parties, the Board's motion for summary decision is **GRANTED** and the petition is hereby dismissed in its entirety.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 17, 2021
DATE



LESLIE Z. CELENTANO, ALJ

Date Received at Agency: June 17, 2021

Date Mailed to Parties: June 17, 2021

dr

158-21

158-21

New Jersey Commissioner of Education

Final Decision

A.M., on behalf of minor child, A.S.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

Synopsis

Pro se petitioner appealed the determination of the respondent Board that A.S. resides in Hillside with her father, J.S., and is therefore not eligible to receive a free public education in the Elizabeth public schools. The Board sought out-of-district tuition reimbursement for A.S.'s attendance. A.M. contended that A.S. has always resided with her in Elizabeth, but that due to the COVID-19 pandemic, the concomitant switch to remote education, COVID-19 in the family, and A.M.'s work schedule, A.S. attended Elizabeth's remote learning at J.S.'s home in Hillside so that he could provide childcare and assist A.S. with homework and the technology required for remote learning.

The ALJ found, *inter alia*, that: during the 2020-2021 school year, A.S. was enrolled as a kindergartner in the Elizabeth School District; due to the COVID-19 pandemic, instruction was conducted remotely from September 8, 2020 to the week of April 19, 2021; A.S.'s father, J.S., resides in Hillside, and has joint custody of A.S. with A.M.; A.S. participated in remote learning from her father's house in Hillside while A.M. worked, because no one at the Elizabeth address was available to provide childcare and assist A.S. with remote-learning technology; there is no dispute that A.S. resides with A.M. during the school year; petitioner's testimony was highly credible, while the testimony of the Board's witnesses was not; petitioner provided substantial documentary evidence that her legal domicile is in the city of Elizabeth; and the Board's failure to accept A.M.'s reasonable explanations for A.S.'s presence in Hillside for childcare, remote learning, and quarantine purposes during the Covid-19 pandemic was unreasonable and callous. The ALJ concluded that A.M. met her burden of proof that she and A.S. are domiciled in Elizabeth, and that A.S. was therefore entitled to a free public education in the Elizabeth school district; further, the Board is not entitled to any tuition reimbursement under *N.J.S.A.* 18A:38-1b(2).

Upon review, the Commissioner concurred with the ALJ that the petitioner sustained her burden of demonstrating that she was domiciled in Elizabeth from October 29, 2020 to the present. Accordingly, the minor child, A.S., was entitled to a free public education in the District's schools during that time. The Initial Decision of the OAL was adopted as the final decision in this matter, and the Board's counterclaim for tuition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

158-21

OAL Dkt. No. EDU 00255-21
Agency Dkt. No. 242-12/20

New Jersey Commissioner of Education

Final Decision

A.M., on behalf of minor child, A.S.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon review, the Commissioner agrees with the Administrative Law Judge that petitioner sustained her burden of demonstrating that she was domiciled in Elizabeth from October 29, 2020 to the present. As such, the minor child, A.S., was entitled to a free public education in the District's schools during that time.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein. The Board's counterclaim for tuition is dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 2, 2021
Date of Mailing: August 3, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00255-21
AGENCY DKT. NO. 242-12/20

A.M., ON BEHALF OF
MINOR CHILD, A.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY
OF ELIZABETH, UNION COUNTY,
Respondent.

A.M., petitioner, pro se

Christina M. DiPalo, Esq., for respondent (La Corte, Bundy, Varady & Kinsella, attorneys)

Record Closed: June 15, 2021 Decided: June 16, 2021

BEFORE **SARAH H. SURGENT, ALJ**:

STATEMENT OF THE CASE

Petitioner A.M., on behalf of her minor child, A.S., challenges the Board of Education of the City of Elizabeth, Union County's (Board's) residency determination that

A.S. resides in Hillside with her father, J.S., and is therefore not entitled to be enrolled in the Elizabeth school district. The Board seeks out-of-district tuition reimbursement accordingly. A.M. maintains that A.S. has always resided with her in Elizabeth, but that due to the COVID-19 pandemic, concomitant remote education, COVID-19 in the family, and A.M.'s work schedule, A.S. attended Elizabeth's remote learning at J.S.'s home in Hillside, so that he could provide childcare and assist A.S. with homework and the technology required for remote learning.

PROCEDURAL HISTORY

A.M.'s pro se petition of residency appeal was timely filed with the Commissioner of Education (Commissioner) on November 20, 2020. (P-2). It was transmitted to the Office of Administrative Law (OAL) and docketed on December 15, 2020, to be heard as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -23. On January 15, 2021, it was assigned to this Administrative Law Judge (ALJ). After three telephonic conferences on February 11, February 26, and March 11, 2021, a remote plenary hearing commenced via videoconference on April 21, 2021, due to the COVID-19 pandemic. Due to an emergency in this ALJ's family, the continuation of that hearing was carried sua sponte from April 23, 2021, when J.S. was expected to testify, to May 18, 2021, when A.M. then reported that J.S. was unavailable to testify because he had been hospitalized early that morning. The hearing was concluded on that date and the record remained open for post-hearing submissions until June 15, 2021. The Board's written summation was received on May 20, 2021. A.M.'s written summation was received on June 15, 2021, and the record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

Sharon Calixto (Calixto), A.S.'s Elizabeth kindergarten teacher, and William Buteau (Buteau), Investigator for the Board's legal department, testified for the Board. A.M., A.M.'s sister, A.A., and A.M.'s grandmother, M.V., testified on A.M.'s behalf. These salient points are undisputed. I therefore **FIND** the following **FACTS**:

A.S. is five years old. During the 2020-2021 school year, A.S. was enrolled as a kindergartner in the Elizabeth School District. Due to the COVID-19 pandemic, instruction was conducted remotely from September 8, 2020 to the week of April 19, 2021. A.S.'s father, J.S., resides in Hillside, and has joint custody of A.S. with A.M. A.S. participates in remote learning from her father's house in Hillside while A.M. works, because no one at the Elizabeth address is available to provide childcare and assist A.S. with remote-learning technology. A.M.'s grandmother and sister reside in Elizabeth. There is no dispute that A.S. resides with A.M. during the school year. The issue is whether A.M., and thus A.S., are domiciled in Elizabeth or Hillside.

TESTIMONY AND EVIDENCE

Calixto

Calixto testified that she has been a kindergarten teacher for the Board for seventeen years, and that A.S. was one of her students for the 2020-2021 school year. During the 2020-2021 school year, all students were taught remotely due to the COVID-19 pandemic until in-person learning resumed the week of April 19, 2021. During the remote-learning phase, parents who could pick up learning materials during school hours would do so, and for parents who could not pick up those materials due to their own work schedules, Calixto would deliver the materials to the students' homes. "Sometime" in October, Calixto went to the home in Elizabeth to drop off supplies for A.S. She obtained the Elizabeth address from "Power School," which is a database with all students' addresses on file.

Calixto testified that on that day, she called A.M. and asked her if she was home, and that A.M. said "yes." Calixto said "I'm outside," and A.M. purportedly said, "I don't live there, I live a block away." Calixto asked for the correct house number, and A.M. put her on hold. When A.M. came back on the line, A.M. purportedly said "I got nervous. I don't live there. I live . . . in Hillside." A.M. purportedly said that she had not had time to change her driver's license and requested that Calixto leave the materials at the door to

the Elizabeth address where A.M.'s grandmother resides. Calixto left the materials with a note to A.S. that said, "I hope you feel better." According to Calixto, A.M. did not indicate that her change of address was a temporary situation. The next day, Calixto reported to the school principal that A.M. was living in Hillside.

Calixto stated that while she was teaching A.S. remotely, the only parent she ever saw remotely was A.S.'s father, and that A.S. was learning remotely from the same location every day and wore "mostly pajamas." Calixto had no personal knowledge as to whether A.S. slept at that location. Calixto stated that A.S. was absent from remote learning "quite often," for medical reasons, and that A.S. was never considered to be truant. Indeed, A.S. was not "in school" for the entire week of Calixto's visit to the Elizabeth address, due to what Calixto described as a "pandemic-related illness," which A.M. had informed Calixto of. Calixto did not explain why she attempted to have physical contact with A.M. or A.S., knowing that A.M. and A.S. were both ill with a highly infectious and dangerous disease, and that A.S. would not be attending remote learning that week, and therefore did not need the school supplies.

Buteau

Buteau has been an investigator in the Board's legal department for approximately three and one-half years. Prior to that he was an Elizabeth police detective. He is responsible for student residency investigations. He checks public records, does residency checks, and conducts surveillance, if necessary, to determine whether students reside in Elizabeth. He conducted a residency investigation of A.S. and prepared an investigation report and an amended (updated) investigation report of his findings. (R-1; R-7). He did not testify from memory, and constantly referred to and read from his updated report to refresh his recollections. (R-7).

On October 29, 2020, he commenced the investigation based on Calixto's claim that A.M. and A.S. were living in Hillside. (R-7 at 2). Although Calixto testified that A.S. was never truant, Buteau's report indicates that "[t]he investigation was initiated because

of truancy," and the report references an attendance officer whose referral and testimony were not offered by the Board. Ibid. Buteau stated that he ran an Accurint public records check on A.M., which revealed both the Elizabeth and Hillside addresses at issue. The Hillside address was also associated with A.S.'s father, J.S. Ibid.

Buteau visited the Hillside address on [Friday][1] October 30, 2020, at an unspecified time. J.S.'s car was in the driveway, and A.M.'s car was not. Ibid. No one answered the door, and he noted that the mailbox had both J.S.'s and A.M.'s names on it. He photographed the house and the mailbox. (R-2 dated 10/30/20).

Because A.M.'s name was on the Hillside mailbox, a Notice of Initial Determination of Ineligibility dated October 30, 2020 (Initial Determination) was sent to A.M. at the Hillside address via UPS with tracking. (R-3). Buteau surmised that A.M. signed for the delivery, because someone had written "11/2/20 signed by [A.]" on the tracking slip. (R-3 at 3). Notably, there is no actual signature on the tracking slip, and the Board did not provide any copy of A.M.'s signature related to that delivery.

The Initial Determination states: "We have determined that your family is not domiciled in the city of Elizabeth. . . . Therefore, we have concluded that in accordance with N.J.S.A. 18A:38-1(A), your child is NOT entitled to attend in the Elizabeth Public School District." (R-3 at 1). A.M. did not request a hearing before the Board. However, contrary to his report, Buteau neglected to mention that on November 3, 2020, A.M. emailed a completed residency verification form and provided copies of her New Jersey driver's license, an envelope from the New Jersey Department of Labor and Workforce Development, a printout of unemployment, a letter from Chase bank, a CapitalOne credit card statement, and a lease dated August 1, 2020. (R-7 at 1). None of those documents were provided by the Board to this Tribunal.

[1] Pursuant to N.J.S.A. 52:14B-10(b), I have taken Judicial notice of the days of the week which correspond to Buteau's report and testimony, as indicated in brackets.

Buteau conducted further surveillance at the Hillside address on [Monday] November 9, 2020, at 11:45 a.m., and saw both J.S.'s and A.M.'s cars in the driveway. (R-7 at 2; R-2 dated 11/9/20). J.S.'s car was registered to the Hillside address and A.M.'s car was registered to the Elizabeth address. (R-7 at 2). Buteau testified that he spoke with J.S., who confirmed that A.S. was present, but further explained that he was watching A.S. while A.M. was at work, and that A.S. did not reside with him, she resided in Elizabeth with A.M. and A.M.'s grandmother. Ibid. Contrary to his report, Buteau neglected to testify that upon informing J.S. that A.M. "said she lived in Hillside," J.S. explained that "there was a big misunderstanding," and that "three weeks ago [A.M., A.S., and J.S.] had COVID and didn't want to spread it to [A.M.'s] grandmother because she is 92 years old so [J.S.] let [A.M. and A.S.] stay with him during that time but they're back in Elizabeth." Ibid.

As a result of that visit, a Notice of Final Ineligibility (Final Determination) dated November 13, 2020 was sent to A.M. at the Hillside address, stating "**YOUR DOMICILE/RESIDENCY IS NOT IN THE DISTRICT. OUR INVESTIGATION REVEALS THAT YOU RESIDE OUTSIDE OF ELIZABETH.**" (R-4 at 1) (emphasis in original). Buteau's report states that that notice was signed for by "DD," (R-7 at 1), but no proof of delivery was supplied by the Board. Contrary to his report, Buteau failed to mention that in response to that notice, on November 19, 2020, A.M. contacted the Office of the Assistant Superintendent to voice her concerns, and also emailed the school Principal. (R-7 at 2). The Board did not present that email to this Tribunal. Buteau's report also notes that on an unspecified date in December 2020, A.M. contacted the Board's legal department and advised someone there that she would be filing an appeal of the residency determination. (R-7 at 1).

Notwithstanding the November 13, 2020 Final Determination, Buteau continued his surveillance, and returned to the Hillside address on [Thursday] November 19, 2020, at 6:15 a.m. (R-7 at 2). Both A.M.'s and J.S.'s cars were in the driveway and covered with frost. (R-7 at 2; R-2 dated 11/19/20). On [Tuesday] January 12, 2021, at 6:30 a.m., Buteau returned to the Hillside address and again noted that both A.M.'s and J.S.'s cars

were in the driveway. (R-7 at 3; R-2 dated 1/12/21). On [Thursday] January 14, 2021, at 7:00 a.m., Buteau returned to the Hillside address and again noted that both A.M.'s and J.S.'s cars were in the driveway. (R-7 at 3; R-2 dated 1/14/21). At 8:15 a.m., A.M. drove out of the driveway. Buteau tried to follow her but could not keep up due to traffic conditions. (R-7 at 3). At 8:45 a.m., Buteau went to the Elizabeth address, knocked on the door, and got no answer. Ibid.

On [Thursday] January 21, 2021, at an unspecified time, Buteau again went to the Elizabeth address and A.M.'s grandmother, M.V., answered the door. She did not speak English and yelled for someone to come to the door. Buteau stated that an unidentified young male came to the door and purportedly explained that A.S. had "just left with her mother to get some groceries. He then called [A.M.] and put her on speaker. [A.M.] told [Buteau] she was at work and [A.S.] was at [J.S.'s] house because [A.M.'s] grandmother could not take care of [A.S.]." (R-7 at 3; R-2 dated 1/21/21). On [Tuesday] February 16, 2021, at 7:00 a.m., Buteau returned to the Elizabeth address and noted three cars in the driveway, none of which were A.M.'s. (R-7 at 3; R-2 dated 2/16/21).

On [Monday] March 22, 2021, at 7:00 a.m., Buteau returned to the Hillside address. (R-7 at 3). J.S.'s car was parked in the driveway, A.M.'s car was parked on the street in front of the house, and each car was covered with frost. (R-7 at 3 and photo dated 3/22/21). On [Monday] March 29, 2021, at 7:05 a.m., Buteau returned to the Hillside address and noted that A.M.'s car was parked in the driveway, and that J.S.'s car was absent. (R-7 at 3 and photo dated 3/29/21). On [Tuesday] April 6, 2021, at 11:22 a.m., Buteau returned to the Hillside address and both A.M.'s and J.S.'s cars were parked in the driveway. (R-7 at 3 and photo dated 4/6/21). On [Wednesday] April 7, 2021, at 6:15 a.m., Buteau returned to the Hillside address and both A.M.'s and J.S.'s cars were parked in the driveway. (R-7 at 3 and photo dated 4/7/21). Buteau testified that throughout his surveillance, he never saw A.M.'s car at the Elizabeth address.

The Board's 2020-2021 Tuition Rates for Out-of-District Students Attending Elizabeth Public Schools indicates that the per diem tuition rate for a kindergartner is

$69.68. (R-5). Notwithstanding the Board's residency determination, A.S. is still enrolled in the Elizabeth school district, pending the final outcome of this appeal. The Board is therefore seeking tuition reimbursement from A.M. for the period of October 29, 2020 to present, and for each school day thereafter while A.S. is enrolled in Elizabeth. The Board's 2020-2021 school calendar indicates that as of the May 18, 2021 hearing date, 101 school days had occurred, and that the school year ends on June 25, 2021. (R-6).

On cross-examination, Buteau contradicted his report about A.S. having been truant, and stated that the truancy officer is a liaison between the Principal and the Board's legal department. He agreed that the issue of truancy does not apply to this case. He also stated that UPS does not provide copies of signatures, and merely provides information about who signed for a delivered package. However, I note that on the proof of delivery, someone typed in "**Received By** [A.]," and that the empty signature box below that notation says, "**Signature is not available at this time.**" (R-3 at 4) (emphasis in original). Buteau had no personal knowledge about who wrote "11/2/20 signed by [A.]" on the shipping receipt. (R-3 at 3).

A.M.

In her pro se opening statement, A.M. relied upon and incorporated on the record her signed, notarized version of events, entitled "RE: LETTER PETITION; NOTICE OF FINAL INELIGIBILITY," dated November 20, 2020, which was sent to the Board's Legal Department. (P-1). That document states, in relevant part:

> What happened:
> I, [A.M.], find myself writing this petition to clarify this confusion with my daughter [A.S.], Student ID#[]. On October 9, 2020, I tested positive for [C]ovid-19. I followed guidelines and had my family tested as well. Including my daughter's father, [J.S.]. He tested positive as well. My grandmother went to get tested and she tested negative[.] SINCE my 88 year old grandmother tested negative the reasonable thing to do was stay away from her while we got better. Since [J.S.] tested positive we quarantined at his house. During our quarantine process, [A.S.'s] teacher Mrs. Calixto called me telling me she

was outside of my home and she just wanted to drop off a dry erase board and also say hi to my daughter. (I was confused at first because I found it unsettling how there was no questions or previous suggestion as to if it were okay to pop up at my home and even so, in who's right mind goes to a persons house knowing they are [C]ovid-POSITIVE) might I mentioned my daughter wasn't attending class either due to our main symptom being headaches. Either way I informed her I wasn't quarantined at home and she could leave it with my grandmother who was home. She proceeded to ask me where I was and I didn't find an issue in letting her know where I was being that it was a temporary stay. Resuming to my first day back to my normal living, we were already back at home & while at work I received an email stating to send in my proof of address, which I did, I sent in all the paperwork the same day. I figured it was a procedure since it's [A.S.'s] first year there. A week later [J.S.] tells me a guy from the board of education popped up at his door asking if [A.S.] was here, which she was since it was 11:30am and she was attending her virtual class in his house while I was at work. I tried many times to reach out to the legal department as it said on the paper "if I had any questions" but wasn't successful since I didn't receive any answer. Exactly a week later, a certified letter was delivered again to [J.S.'s] stating it was a final notice and that they made the decision [A.S.] didn't reside in the school district. Which is where I became baffled with the conclusion since I never had spoke to anyone to explain anything. Never had an investigator come to my ACTUAL home inspect and see the actual truth. In this week I was finally able to get a hold of the legal department and they asked me to follow procedures and if I oppose to file the appeal form. For these reasonings is why I have to appeal to this wrongful decision.

Actual Facts:
[J.S.] and I have a very good co-parenting relationship/agreement. We both share custody of [A.S.] but she lives with me. Due to the obvious conditions we are currently facing I have found it nearly impossible to find a babysitter/tutor for [A.S.]. Coincidentally, as many people in the world [J.S.] was furloughed from his work and since he has been home since before school started, he has been doing school with her at his home while I am at work. He remains with her until I end my shifts from work and when I end my shifts, I head straight to his house to pick her up and head on to my home . . .[in] Elizabeth . . . . This is a daily schedule. There has been a night or so out of the week where

> she might sleepover his house because he is her father and also it's a little brake from our daily schedule, allowing them to sleep in a tad bit longer but she does not live with him. There also may have been a night where I may have spent the night as well but that's my personal life, I don't see why one or two nights may change my actual address or why my night out may affect my daughter's school. I usually take my daughter while she's asleep since its in the early hours of the morning, with that being said I leave her school lab-top at [J.S.'s] house since her homework and school work is completed by the time I pick her up. I don't find it necessary to have the lab top back and forth. All that's occurring is due to how school is being handled, the school being virtual baby sitters are charging double from the usual, my grandmother cannot understand or even handle doing the virtual learning with [A.S.] and her father playing his father, babysitter & tutor role is what is working for us. I would have no benefit at all in lying about where I reside, I have been in this location for 12 years. If [A.S.] gets put out of this school, where can I possibly place her if my address and all proofs remains the same which is [the Elizabeth address]. I had also requested to have an investigator come to our actual home to clarify any confusion but again have been unsuccessful.
>
> **In conclusion,** I just needed to clarify on my behalf since I haven't been able to. I have attached the *appeal form* requested from me if I disagreed and also for your records I have attached *copies of my proof of address* along with *my license* and anything else that may be useful to this situation. Thank you in advance for the opportunity of explaining our situation and hope we can reach a resolution sooner rather than later.
>
> [(P-1) (emphasis in original) (sic passim).]

In her Pro Se Residency Appeal form, A.M. added, "[A.S.] goes to [J.S.'s] house daily due to me working fulltime. He does virtual learning with her along with homework and watches her while I work. Once I'm done with my work I head to his house to pick her up & we repeat the same routine everyday!" (P-2) (emphasis in original).

In addition to those documents, A.M. submitted as proof of her Elizabeth residency copies of the following:

A.M.'s sister A.A.'s Month-to-Month Elizabeth lease dated August 1, 2020, naming the relatives of A.A. authorized to occupy the premises, including A.M., her children A.S. and A.W., and A.M.'s grandmother, M.V., (P-3);

A.M.'s New Jersey Driver's License issued April 25, 2017, with an expiration date of April 30, 2021, depicting the Elizabeth address, (P-4);

A.M.'s Car Finance Loan billing statement dated November 5, 2020, addressed to the Elizabeth address, (P-5);

A.M.'s New Jersey Auto Insurance Identification Card effective August 1, 2020, depicting the Elizabeth address, (P-6);

A.M.'s Mastercard credit card statement with a payment due date of October 24, 2020, addressed to the Elizabeth address, (P-7);

A.M.'s CreditOne credit card statement with a payment due date of November 17, 2020, addressed to the Elizabeth address, (P-8);

A.M.'s CapitalOne credit card statement with a payment due date of November 24, 2020, addressed to the Elizabeth address, (P-9);

A.M.'s Chase checking account statement for period of October 6, 2020 through November 4, 2020, addressed to the Elizabeth address, (P-10);

A.M.'s T-Mobile cell phone bill with a payment due date of November 6, 2020, addressed to the Elizabeth address, (P-11);

a notarized affidavit by A.M.'s sister, A.A., attesting to A.M.'s and A.S.'s Elizabeth residency, (P-13);

a notarized affidavit by A.M.'s grandmother, M.V., attesting to A.M.'s and A.S.'s Elizabeth residency, (P-14); and

an email from A.M. with an attached Time Frame of relevant events, (P-15).

In her testimony, A.M. stated that when they tested positive for COVID-19, she reported it to the school. She did not realize that she had to report where she was staying during quarantine. A.M. and her sister, A.A., decided it would be more convenient for A.M. to quarantine away from the Elizabeth address and stay with J.S. in Hillside, because he was COVID positive as well. A.M. stated that she and A.S. live with her grandmother, her sister, and her brother, who had returned home from college.

During their quarantine in Hillside, Calixto called A.M. and asked A.M. if she was home, A.M. said "yes," not realizing that Calixto was outside the Elizabeth residence. Calixto said that she had something to drop off for A.S., and A.M. was surprised and confused because she'd never had a teacher "pop up" at her house before. Calixto had previously told A.M. that her family would have to pick up materials for A.S. at the school, which they did. The Elizabeth residence is two blocks away from A.S.'s school.

A.M. then told Calixto that she was not at home, she was at [A.S.'s] dad's house, and she did not know that she had to report that. Calixto replied that that was "okay," and that she was just there to drop off something, so A.M. asked Calixto to leave it with A.M.'s grandmother. Calixto asked for the address where A.M. was at the time, and A.M. gave her J.S.'s address, which was also listed in the school address system as A.S.'s father's address in Hillside. A.M. thought that Calixto would then go to the Hillside address because A.M. assumed that Calixto wanted to see A.S. in person, which A.M. found to be "odd," because A.M., A.S. and J.S. were all still positive for COVID-19. A.M. had called and face-timed with Calixto "first thing" on the morning of Monday October 19, 2020, and advised her that she, J.S., and A.S. had all tested positive for COVID-19 on Friday October 16, 2020, so A.S. would not be attending school that week. I note that A.M. was

uncertain of some exact dates and bemoaned that she did not have a calendar in front of her during her testimony.

Calixto "popped up" at the Elizabeth address the following day, Tuesday, October 20, 2020, with the above-described supplies. On Thursday, October 22, 2020, Calixto "followed up," by calling A.M. and asking "how everything was going." On October 26, 2020, J.S. told A.M. that someone "popped up" at his house in Hillside at 11:00 a.m., while A.S. was "in school," and asked if A.S. was there. A.M. reached out to the legal department to ask about the reason for their request for residency paperwork, but she assumed that it was merely a routine practice because it was [A.S.'s] first year in that school, and A.S.'s brother, A.W. had been in that school since he started school nine years ago. The school had previously asked for similar paperwork regarding A.W. on two occasions, and there were no problems. A.M. timely complied with the Board's request for paperwork related to A.S.'s residency.

As stated in her written submission, (P-1), A.M. never denied spending some nights at J.S.'s house. A.M. testified that she would spend two or three nights per week at J.S.'s house, and that is how she and J.S. "managed [their] relationship, because it worked out better than living together," which they previously did in Elizabeth. A.S. was doing remote learning with J.S. because A.M. was working at the time. On March 15, 2021, A.S. became very ill with MIS-C,[2] and was hospitalized in an Intensive Care Unit (ICU) for five days. A.M. had lost her job "right before" that.

A.S. was discharged from the hospital on March 19, 2021, and again quarantined for two weeks at J.S.'s residence. During that time, A.M. did not move her car from J.S.'s residence. As a result of A.S.'s illness and complications, she has seen numerous medical specialists since her MIS-C quarantine ended, and she was unable to attend in-person kindergarten instruction which commenced on April 22, 2021, due to her still-delicate health. At the time of the hearing, A.S. was still doing remote learning and undergoing further medical treatment until her doctors give her clearance to return to the

[2] Multisystem Inflammatory Syndrome in Children, a COVID-19 sequelae.

physical classroom. A.M. posited that if the pandemic had not occurred, "we wouldn't be in this predicament right now." A.M. noted that A.S. attended two years of public preschool in Elizabeth prior to the pandemic.

As to Buteau's surmising that A.M. signed for the Initial Determination letter at J.S.'s home, A.M. insisted that she never signed for anything, and that she was not at J.S.'s home for that delivery or for the delivery of the Final Determination letter. A.M. explained that J.S. had advised her that when he went to his front door, he saw the UPS envelope with the Initial Determination from the Board had been slipped under the door. He picked up the envelope and sent A.M. a picture of it, and A.M. gave him permission to open it. J.S. told A.M. that he had not signed for the letter.

A.M. emphasized that her grandmother could not assist A.S. with remote learning because she does not speak English, does not understand computers, and requires the assistance of an aide who watches over her when A.M. and A.A. are not at home. A.A. is too busy to watch her grandmother because she is running a business. The only person available to help A.M. with A.S. is J.S.

On cross-examination, A.M. disputed Calixto's testimony that A.M. stated that she had moved to Hillside and had not had time to update her driver's license. A.M. stated that she had not mentioned moving or her driver's license — at all. She conceded that she and J.S. had recently become closer and resumed a romantic relationship during the pandemic. She stated that J.S. has lived at the Hillside address for approximately three years.

A.M. stated that she has never resided at the Hillside address. She agreed that her name is on the Hillside address mailbox, along with J.S.'s name, and explained that she has all of her packages delivered to Hillside because her grandmother has trouble with her knees and "cannot walk all the way outside, and if it's something heavy . . . and J.S. is always home." She stated that when she picks up her children or goes to visit J.S., she picks up her packages at his home. She also noted that packages have disappeared

from the Elizabeth address, which I note is part of a duplex home, (R-2 dated 1/12/21). J.S. had given A.M. permission to ship her packages to his address, and J.S. added her name to his mailbox. A.M. stated that none of her mail goes to J.S.'s address, and that she has never used that address for anything but package deliveries.

A.M. admitted that she and her children spend "a few nights a week" with J.S. at the Hillside address, meaning two to three nights per week, but that there is no set schedule. They stay a combination of school nights and weekends, but "mostly weekends," to coincide with A.M.'s days off from work. On school days, A.M. would drop her children off in Hillside very early in the morning, or J.S. would pick them up, so that A.M. could drive straight to work. A.M. stated that from April 5, 2021 to April 14, 2021, she and J.S. and the children went on a vacation and she left her car parked at J.S.'s address the entire time.

On the first hearing date, A.M. was at the Elizabeth address with her sister, A.A., and her grandmother, M.V. When asked by the Board why A.M. had not called J.S. as a witness, A.M. stated that J.S. was in Hillside with A.S. helping her with remote learning. A.M. conceded that J.S. could have testified remotely from his Hillside residence, but that had not occurred to her prior to the hearing. As two hearing dates were scheduled, I gave A.M. the opportunity to have J.S. testify on April 23, 2021, but that date was carried sua sponte to May 18, 2021, at which time A.M. informed us that J.S. was hospitalized at 2:00 a.m. that morning and was too ill to speak. I offered to carry the hearing until J.S. was well enough to testify, but A.M. declined, and indicated that she was overwhelmed by these proceedings[3] and a lack of closure, by numerous ongoing family medical emergencies, and by the April 29, 2021 death of her father, and her subsequent ongoing efforts to maintain his business in New York. Contrary to the Board's urging, I therefore draw no negative inference from the absence of J.S.'s testimony, particularly in light of J.S.'s November 9, 2020 statements to Buteau, which were favorable to A.M., not to the Board.

[3] A.M. also indicated that subsequent to the Board's Final Determination concerning A.S.'s residency, the Board initiated separate residency and tuition reimbursement proceedings against her for her son, A.W., which has caused her further distress. That appeal, if any, is not before me.

According to the timeline that A.M. submitted at my request at the conclusion of the first hearing date, (P-15), on October 16, 2020, A.M., A.S., and J.S. all tested positive for COVID-19. On March 15, 2021, A.S. was hospitalized and diagnosed with MIS-C. On March 19, 2021, A.S. was discharged from the hospital, and began another quarantine in Hillside. On March 23, 2021, J.S. went on a business trip. On April 3, 2021, A.S.'s quarantine ended and A.M. and A.S. returned to the Elizabeth address. On April 5, 2021, A.M., J.S., and the children went on a vacation, and returned on April 14, 2021.

A.A.

A.M.'s sister, A.A., completed and signed a notarized affidavit dated February 22, 2021, noting that she is a waitress/owner of a restaurant, and stating, in relevant part:

> I, [A.A.], Swear or affirm:
>
> 1. I am [A.M.'s] sister. [A.S.] & [A.W.] Aunt.
>
> 2. That in January 2009 we moved into this residency located . . . [in] Elizabeth . . . . Previously resided at . . . [in] Elizabeth . . . for 2 years. We have been part of this district for well over a decade.
>
> 3. [A.M.], [A.S.] & [A.W.] has always and continues to live with our grandmother and myself at our current household.
>
> 4. There are a couple of nights out of the week where [A.M.] sleeps out of the house.
>
> 5. Her current child care/tutor is [A.S.'s] father [J.S.] due to me running a business and our grandmother [M.V.] not being able to manage or understand online schooling.
>
> [(P-13) (sic passim).]

In keeping with her affidavit, A.A. testified as follows. She is a restaurant owner. She is A.M.'s sister and A.S.'s aunt. In January of 2009, A.A. moved to the Elizabeth address with her grandmother M.V., A.M., and A.W. I note that A.S., who is only five, obviously was born after they moved in. A.S. does her remote learning at J.S.'s residence

in Hillside because A.A. is very busy with her work and M.V. is elderly and does not understand English or how to use a remote-learning system.

In October 2020, A.M. and A.S. did not stay at the Elizabeth address after they tested positive for COVID-19, to protect M.V., who is in delicate health. A.M. and A.S. stayed with J.S. in Hillside to quarantine and convalesce. The only other time A.M. and A.S. also stayed with J.S. for an extended period was when A.S. was hospitalized and in the ICU, and after she was discharged, because A.S. was still in frail health and A.A. is "always in contact with customers," which posed a risk to A.S. A.M. has never moved out of the Elizabeth address. A.M. and A.S. have never resided with J.S. in Hillside. A few nights a week, "like two or three," A.M. and A.S. sleep at J.S.'s Hillside residence. There is no set schedule – "it's random." A.S. has her own bedroom in Elizabeth. A.A. had no knowledge as to whether A.S. had a bedroom in Hillside.

M.V.

A.M.'s grandmother, M.V., with the aid of a Spanish interpreter, completed and signed a notarized affidavit dated February 22, 2021, which states, in relevant part:

> "I [M.V.], grandmother of [A.M.], great-grandmother to [A.S.] & [A.W.] would like to state that we all live in the same household and there has never been any change to that. [A.S.] does the school with her father at his house because I am not capable of keeping up with the classes or how to even manage a computer. I am also in and out of doctor's appointments. To be clear, I even have an aid who watches over me and does mostly everything for me when my grand-daughter isn't home. In October of 2020, [A.M.] tested positive for Covid-19 and as I heard her ([A.M.]) and my other grand-daughter ([A.A.]) talk they discussed it was best for her to stay at [A.S.'s] father house to avoid getting me sick. Finally, once [A.M.] and the kid's tested negative again they came back home to our home which is . . . [in] Elizabeth, NJ."
>
> [(P-14) (quotation marks in original) (sic passim).]

With A.M.'s assistance as M.V.'s Spanish interpreter, M.V. testified as follows. She has been living at the Elizabeth address for "a lot of years." She was born in 1932. She believes that she is eight-nine years old. She reported that she does not have memory problems, and she knew that her birthday is April 30, "which is the end of this month." She was able to identify the current President of the United States as "Joe," but did not know his last name. She lives with A.M., A.S., A.W., and A.A. She remembered that A.M. was staying elsewhere when A.S. was in the hospital. She recalled that there were times when A.M. "stayed out" with A.S. because of school and because M.V. does not understand English and therefore cannot assist A.S. with schoolwork. She stated that there were other times when A.M. and A.S. "sleep out" of the house, "about two times."

She stated that A.S. does her remote learning with J.S. in Hillside, and that some days A.S. does not return to the Elizabeth address. She stated that A.S. sleeps at J.S.'s house two to three times per week. M.V. goes to bed between 9:00 p.m. and 10:00 p.m., and A.S. returns to Elizabeth before M.V. goes to bed "more or less." M.V. normally wakes up at 7:00 a.m., but sometimes she wakes up earlier and sees A.S. leave to go to J.S.'s residence. When asked directly if A.M. has always lived with her at the Elizabeth address, M.V. replied, "Of course. She lives here. This is where she lives, in this house." When asked if A.S. lives with her in Elizabeth, M.V. replied, "Of course. Both kids live here." She confirmed that both A.S. and A.W. were born and raised in Elizabeth and have lived there all their lives.

J.S.

Although J.S. was unavailable to testify on May 18, 2021, due to his hospitalization, I **FIND** that his hearsay statements recorded in Buteau's report are admissible under the residuum rule, as there is legally competent evidence to support findings of fact "to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b). In this case, J.S.'s hearsay statements were recorded in Buteau's report, which was heavily relied upon by Buteau, and admitted into evidence in its entirety.

According to Buteau's report, on November 9, 2020, he went to J.S.'s residence and spoke with J.S. directly. (R-7 at 2). J.S. confirmed that A.S. was present, but further explained that he was watching A.S. while A.M. was at work. Ibid. J.S. stated that A.S. does not reside with him, and that she resides in Elizabeth with A.M. and A.M.'s grandmother. Ibid. When Buteau informed J.S. that A.M. had purportedly "said she lived in Hillside," J.S. explained that "there was a big misunderstanding," and that "three weeks ago [A.M., A.S., and J.S.] had COVID and didn't want to spread it to [A.M.'s] grandmother because she is 92 years old so [J.S.] let [A.M. and A.S.] stay with him during that time but they're back in Elizabeth." Ibid. J.S.'s hearsay statements are corroborated by other competent credible evidence of record, including the testimony of A.M., A.A., and M.V., and J.S.'s reported statements give added probative force to that testimony.

CREDIBILITY DETERMINATIONS AND FURTHER FINDINGS OF FACT

I.

I must weigh the credibility of the witnesses to determine the ultimate issues. Credibility is the value that a factfinder gives to a witness's testimony. An ALJ's findings of fact as to issues of credibility of lay witness testimony may not be rejected or modified unless the record demonstrates that the findings are arbitrary, capricious or unreasonable, or not supported by sufficient, competent, credible evidence in the record. N.J.S.A. 52:14B-10(c).

"Credibility involves more than demeanor. It [contemplates] the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "'Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.'" State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)).

A fact finder is expected to base credibility decisions on their common sense and life experiences. State v. Daniels, 182 N.J. 80, 99 (2004). Credibility is not dependent on the number of witnesses who appeared, State v. Thompson, 59 N.J. 396, 411 (1971), and a fact finder "is not bound to believe the testimony of any witness, in whole or in part," State v. Muhammad, 182 N.J. 551, 577 (2005) (internal quotation marks omitted). Rather, they "may reject what in their conscientious judgment ought to be rejected and accept that which they believe to be credible." Ibid. "The interest, motive, bias, or prejudice of a witness may affect [their] credibility and justify the [trier of fact] . . . in disbelieving [their] testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952) (internal quotation marks omitted).

Having heard the witnesses' testimony and observed their demeanors and spontaneity, or lack thereof, I **FIND** that Calixto's testimony was illogical, incomplete, less than credible, and contradicted by a preponderance of more competent credible evidence, including A.M.'s testimony and documentary evidence. I **FIND** that Buteau's testimony was selective and misleading, particularly with respect to truancy, A.M.'s signature, A.M.'s responses to the Initial and Final Determinations, and J.S.'s explanation as to why A.M. and A.S. had stayed with him in Hillside while they all had COVID-19.

I **FIND** that A.M.'s testimony was candid, spontaneous, and highly credible. It was replete with details to which she testified from memory. Although some of the dates in her testimony do not align with Buteau's report, (R-7), she testified without the aid of a calendar, and understandably struggled to identify certain dates from memory. At my request, she later produced a timeline of events, (P-15), which I take to be more reliable, as it is supported by J.S.'s November 9, 2020 statement to Buteau that he, A.M. and A.S. had come down with COVID-19 "three weeks ago." Similarly, I **FIND** that A.A.'s and M.V.'s testimony was candid, spontaneous, and highly credible. Their testimony "hung together" with A.M.'s testimony and J.S.'s recorded statements to Buteau.

II.

Based upon the foregoing credibility determinations and the competent, credible evidence of record, I further **FIND** the following **FACTS**:

A.M. and A.S. are domiciled in Elizabeth with A.A., M.V., and A.W. The family has resided at the Elizabeth address since January 2009. J.S. resides in Hillside. But for the COVID-19 pandemic and the remote learning necessitated by it, A.S. would have physically attended kindergarten in Elizabeth, at the school which is two blocks from her house. She attended public preschool in Elizabeth for two years prior to kindergarten. Due to remote learning, A.S.'s tender years, and her medical conditions, she required childcare and adult assistance with remote learning, and her father was the only adult available to assist her, because hiring a babysitter/tutor was not economically feasible, A.M.. and A.A. both worked during the day, and M.V. was incapable of assisting A.S. due to M.V.'s advanced age and language and technology barriers.

A.M., A.S., and J.S. were all diagnosed with COVID-19 on October 16, 2020. They continuously quarantined together at J.S.'s home in Hillside for the requisite two weeks, to protect M.V. from the ravages of that deadly virus. A.M. and J.S. have a cooperative co-parenting relationship, and have resumed a romantic relationship, but choose to live in separate houses for the health of their relationship. Two to three random nights per week, A.M. and her children stay overnight with J.S. to further their relationships and for their convenience. There is no credible evidence that A.M., and thus A.S., have moved from Elizabeth to Hillside. Although J.S. placed A.M.'s name on his mailbox, that was solely for the purpose of receiving package deliveries, as all of A.M.'s documentary evidence demonstrates that her permanent address is in Elizabeth. (P-1 through P-14).

To cast Calixto's testimony in a most favorable light, she misunderstood and overreacted to: (1) A.M.'s surprise and confusion that she would "pop up" at A.M.'s Elizabeth residence knowing that the family was infected with COVID-19; and (2) A.M.'s statements about staying in Hillside during their quarantine. To cast Buteau's testimony

and report in a most favorable light, he stated that he conducted surveillance on eleven separate occasions: nine times at J.S.'s residence, and two times at A.M.'s Elizabeth address. He did not clarify whether he conducted surveillance on any other dates or on weekends.

On Friday October 30, 2020, at an unspecified time, Buteau visited J.S.'s residence, and only J.S.'s car was in the driveway. On Monday November 9, 2020, at 11:45 a.m., he observed both J.S.'s and A.M.'s cars in the Hillside driveway, and J.S. confirmed that A.S. was there doing remote learning, but that she resided with A.M. in Elizabeth. Buteau did not inquire about or establish A.M.'s whereabouts, and he had no knowledge of why A.M.'s car was parked in the driveway, or whether, when, or how she commuted to work. On Thursday November 19, 2020, at 6:15 a.m., Tuesday January 12, 2021, at 6:30 a.m., and Thursday January 14, 2021, at 7:00 a.m., he observed both J.S.'s and A.M.'s cars in the driveway. He did not contact either of them for any explanation.

On Thursday January 21, 2021, at an unspecified time, Buteau visited A.M.'s address in Elizabeth and spoke with A.M. by telephone. A.M. advised him that she was at work and that A.S. was at J.S.'s house because M.V. could not take care of A.S. On Tuesday February 16, 2021, at 7:00 a.m., A.M.'s car was not parked at her Elizabeth address. No evidence was adduced as to where A.M.'s car was.

On Monday March 22, 2021, at 7:00 a.m., Buteau returned to J.S.'s residence in Hillside and observed J.S.'s car in the driveway and A.M.'s car parked in the street. That was during the period of A.S.'s second quarantine at J.S.'s home while she was recovering from MIS-C, from March 19 to April 3, 2021. The same is true of Buteau's Monday March 29, 2021 7:05 a.m. observation of A.M.'s car at J.S.'s residence. On Tuesday April 6, 2021, at 11:22 a.m., and Wednesday April 7, 2021, at 6:15 a.m., Buteau observed both A.M.'s and J.S.'s cars in J.S.'s driveway, while they were away on vacation with the children from April 5 to April 14, 2021.

In sum, of the nine surveillance visits to J.S.'s residence that Buteau reported, A.M.'s car was absent from J.S.'s address on one occasion, present on four scattered occasions, from November 9, 2020 to January 14, 2021, present on two separate occasions while A.S. was quarantined and convalescing from MIS-C in March 2021, and present on two separate occasions while the family was away on vacation in April 2021. The first and last four observations are therefore not dispositive in any way as to A.M.'s domicile, particularly in light of the fact that Buteau made no effort to speak with A.M. on those dates.

Of the four scattered occasions from November 9, 2020 to January 14, 2021 when Buteau observed A.M.'s car at J.S.'s residence, only two of those observations were made during the same week, on January 12 and January 14, 2021, which supports A.M.'s, A.A.'s, and M.V.'s testimony that A.M. only stays at J.S.'s house two to three nights per week, at most, and that A.M. and A.S. reside in Elizabeth. While Buteau's observations and photographs of A.M.'s and J.S.'s cars were accurate, he drew the wrong ultimate conclusion by failing to speak with A.M. directly for an explanation. If he had, he would have learned that A.S. lives with A.M. in Elizabeth for the majority of the school year, as four to five nights per week in Elizabeth constitutes the majority of a seven-day calendar week.

Calixto's, Buteau's, and the Board's choice to turn a blind eye and deaf ear to A.M.'s reasonable explanations for A.S.'s presence in Hillside for childcare, remote learning, and quarantine purposes during the worst pandemic this world has seen in more than a century was callous, to put it mildly. We have all had to make unforeseen, creative adjustments during this pandemic, and A.M. deserves credit, not punishment, for finding coping mechanisms that work for her family.

LEGAL ANALYSIS AND CONCLUSIONS

A student is eligible to attend a public school free of charge if the student is domiciled within the school district. N.J.S.A. 18A:38-1a; N.J.A.C. 6A:22-3.1(a). "A

student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district." N.J.A.C. . 6A:22-3.1(a)1. "Domicile" has been defined as the place where a person has their true, fixed, permanent home, and to which, whenever they are absent, they have the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). A person may have multiple residences, but only one domicile. Id. at 251.

> When a student's parents or guardians are domiciled within different school districts and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year. This subparagraph shall apply regardless of which parent has legal custody.
>
> [N.J.A.C. 6A:22-3.1(a)1.i (emphasis added).]

N.J.A.C. 6A:22-3.4, provides, in relevant part, that as proof of a student's eligibility for enrollment in a school district,

> (a) A district board of education shall accept a combination of any of the following or similar forms of documentation from persons attempting to demonstrate a student's eligibility for enrollment in the school district:
>
> > 1. Property tax bills; deeds; contracts of sale; leases; mortgages; signed letters from landlords; and other evidence of property ownership, tenancy, or residency;
> >
> > 2. Voter registrations; licenses; permits; financial account information; utility bills; delivery receipts; and other evidence of personal attachment to a particular location;
> >
> > 3. Court orders; State agency agreements; and other evidence of court or agency placements or directives;
> >
> > 4. Receipts; bills; cancelled checks; insurance claims or payments; and other evidence of expenditures demonstrating personal attachment to a particular location or to support the student;

> 5. Medical reports; counselor or social worker assessments; employment documents; unemployment claims; benefit statements; and other evidence of circumstances demonstrating family or economic hardship, or temporary residency;
>
> 6. Affidavits, certifications, and sworn attestations pertaining to statutory criteria for school attendance from the parent, guardian, person keeping an "affidavit student," adult student, person(s) with whom a family is living, or others, as appropriate;
>
> 7. Documents pertaining to military status and assignment; and
>
> 8. Any other business record or document issued by a governmental entity.
>
> (b) A district board of education may accept forms of documentation not listed in (a) above, and shall not exclude from consideration any documentation or information presented by an applicant.
>
> (c) A district board of education shall consider the totality of information and documentation offered by an applicant, and shall not deny enrollment based on failure to provide a particular form or subset of documents without regard to other evidence presented.
>
> [N.J.A.C. 6A:22-3.4(a)-(c) (emphasis added).]

Based upon the law, the evidence of record, and my factual findings, I **CONCLUDE** that A.M. has met her burden to prove by a preponderance of the competent credible evidence that she and A.S. were domiciled in Elizabeth, and that A.S. was therefore entitled to a free public education within the Elizabeth school district. N.J.S.A. 18A:38-1a. I therefore further **CONCLUDE** that the Board is not entitled to any tuition reimbursement under N.J.S.A. 18A:38-1b(2).

ORDER

It is therefore **ORDERED** that the Board's determination that A.M. and A.S. were not domiciled in Elizabeth and that A.S. was not eligible for a free education in Elizabeth is hereby **REVERSED**; and it is further **ORDERED** that the Board is not entitled to any tuition reimbursement.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the Judge and to the other parties.

Sarah H. Surgent

June 16, 2021
DATE

SARAH H. SURGENT, ALJ

Date Received at Agency: June 16, 2021 (emailed)

Date Mailed to Parties:

SHS/mel

APPENDIX

Witnesses

For Petitioner:

A.M.

A.A.

M.V.

For Respondent:

Sharon Calixto

William Buteau

Exhibits

For Petitioner:

P-1 A.M.'s notarized Letter Petition: Notice of Final Ineligibility, dated November 20, 2020

P-2 A.M.'s pro se Residency Appeal, dated November 20, 2020

P-3 A.M.'s sister A.A.'s Month-to-Month Elizabeth lease dated August 1, 2020, listing authorized relatives of A.A. to occupy the premises, including A.M., her children A.S. and A.W., and A.M.'s grandmother, M.V.

P-4 Photocopy of A.M.'s New Jersey Driver's License issued April 25, 2017 with expiration date of April 30, 2021, depicting address in Elizabeth

P-5 A.M.'s Car Finance Loan billing statement dated November 5, 2020, addressed to Elizabeth address

P-6 A.M.'s New Jersey Auto Insurance Identification Card effective August 1, 2020 depicting Elizabeth address

P-7 A.M.'s Mastercard credit card statement with payment due date of October 24, 2020, addressed to Elizabeth address

P-8 A.M.'s CreditOne credit card statement with payment due date of November 17, 2020, addressed to Elizabeth address

P-9 A.M.'s CapitalOne credit card statement with payment due date of November 24, 2020, addressed to Elizabeth address

P-10 A.M.'s Chase checking account statement for period of October 6, 2020 through November 4, 2020, addressed to Elizabeth address

P-11 A.M.'s T-Mobile cell phone bill with payment due date of November 6, 2020, addressed to Elizabeth address

P-12 Not in evidence (non-existent; exhibit number used in error)

P-13 Notarized affidavit by A.M.'s sister, A.A., dated February 22, 2021

P-14 Notarized affidavit by A.M.'s grandmother, M.V., dated February 22, 2021

P-15 Email from A.M. with attached Time Frame of events, dated April 23, 2021

For Respondent:

R-1 Undated Residency Report from Buteau to Christina DiPalo, Esq., covering period from October 29, 2020 through February 16, 2021

R-2 Color photographs taken by Buteau dated October 30, 2020, November 9, 2020, November 17, 2020, November 18, 2020, November 19, 2020, January 12, 2021, January 14, 2021, and January 21, 2021

R-3 Notice of Initial Determination of Ineligibility, dated October 30, 2020

R-4 Notice of Final Ineligibility, dated November 13, 2020

R-5 2020-2021 Budget Worksheet, Tuition Rates for Out-of-District Students Attending Elizabeth Public Schools

R-6 Elizabeth Public Schools 2020-2021 School Calendar

R-7 Undated Amended Residency Report from Buteau to Christina DiPalo, Esq., covering period from October 29, 2020 through April 6, 2021, with attached photographs by Buteau dated March 22, 2021, March 29, 2021, April 6, 2021, April 7, 2021

R-8 Number of days requested for tuition reimbursement pursuant to N.J.A.C. 6A:22-6.2(a)

162-21

State Board of Examiners Dkt No. 1516-178
OAL Dkt. No. EDE 10769-16
Agency Dkt. No. 3-2/21A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Certificates of
Rita O'Malley, State Board of Examiners,
New Jersey Department of Education.

Order of Revocation by the State Board of Examiners, December 10, 2020

For the Respondent-Appellant, Victoria A. Lucido, Esq.

For the Petitioner-Respondent, State Board of Examiners, Amna Toor, Deputy Attorney General (Andrew J. Bruck, Acting Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Rita O'Malley's appeal of the Order of the State Board of Examiners (Board), dated December 10, 2020, revoking her Teacher of Social Studies, Teacher of the Handicapped, and Learning Disabilities Teacher-Consultant (LDTC) certificates. Following the issuance of an Order to Show Cause by the Board and a hearing at the Office of Administrative Law (OAL), the Administrative Law Judge (ALJ) found that appellant's conduct was neglectful and evidenced incompetence, and imposed a three-year suspension, with a requirement that appellant complete an educational program on testing procedures and educational evaluations to be approved by the Board.[1] The ALJ reasoned that revocation was not the appropriate penalty because appellant had

[1] In its exceptions to the Initial Decision, the Board argued that it does not have the authority to require this type of remedial program. This issue was not addressed in the Order of Revocation, presumably because the Board altered the penalty from a suspension to revocation, making the issue moot. As the Commissioner herein affirms the Order of Revocation, the question of a remedial program remains moot. Nonetheless, the Commissioner notes that *N.J.A.C.* 6A:8B-4.5 does not include a provision whereby the Board may order the completion of a remedial program as a requirement for reinstatement following a suspension.

already been sanctioned for her conduct through the loss of her tenure and her former teaching position, and her previous record was clear. Thereafter, the Board adopted the Initial Decision but modified the penalty to revocation of appellant's certificates.

On appeal, appellant argues that the Board acted in an arbitrary, capricious, and unreasonable manner when it modified the three-year suspension recommended by the ALJ to a penalty of revocation. According to appellant, the Board improperly relied on evidence regarding allegedly fraudulent mileage reimbursement vouchers that the ALJ determined to be unsubstantiated.[2] Appellant also contends that the cases relied on by the Board to support the penalty of revocation all involved willful conduct, which are distinguishable because the ALJ found that appellant's conduct was neglectful and evidenced incompetence, not that appellant's faults constituted conduct unbecoming a teacher. Appellant urges the Commissioner to adopt the Initial Decision and the ALJ's recommendation of a three-year suspension, based on the fact that appellant's record prior to this matter was clear and she has already been sanctioned through the loss of her tenure.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute her judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a). With regard to reviewing a sanction imposed by the Board, the Appellate Division has defined the standard as determining whether the "punishment is so disproportionate to the offense, in light of all the circumstances,

[2] Appellant requests that, if the mileage submissions continue to be used by the Board to support a harsher penalty than that imposed by the ALJ, appellant be permitted to introduce evidence from a handwriting expert to rebut that evidence. As detailed herein, the Board did not rely on evidence of alleged fraud to support its decision, and the Commissioner accepts the ALJ's finding that appellant did not submit fraudulent mileage reimbursements. Therefore, the Commissioner finds it unnecessary to reopen the record to receive additional evidence on this topic.

as to be shocking to one's sense of fairness." *In re Certificates of Benjamin Norton*, 2016 *N.J. Super. Unpub. LEXIS* 2291, *6-7 (internal citations and quotations omitted).

The Commissioner first notes that the Board's decision does not modify any findings of fact or legal conclusions of the Initial Decision. Additionally, appellant does not contest those findings or conclusions on appeal, and, in fact, urges the Commissioner to adopt the Initial Decision. Accordingly, the Commissioner accepts the findings and conclusions reached by the ALJ in the Initial Decision. Specifically, the Commissioner finds that appellant failed to administer tests, incorrectly scored tests, and incorrectly reported test results, as thoroughly detailed in the Initial Decision. Appellant's failures involved eleven students, a number of whom experienced more than one issue. Additionally, the Commissioner accepts the ALJ's finding that appellant's supervisor was credible regarding the tests that should have been administered, and that appellant was less credible regarding this topic. The Commissioner further finds that the record as a whole does not show that appellant submitted false mileage reimbursement requests, that appellant was credible that she did not hold herself out as having a doctorate, that the evidence did not prove a pattern of tardiness to warrant a negative finding, and that appellant's request to use vacation time instead of personal days was inadvertent. Finally, the Commissioner concludes that appellant's conduct was neglectful and evidenced incompetence.

The question of the appropriate penalty is the only area in which the Board differed from the ALJ, and the only one that appellant seeks to overturn on appeal. While appellant argues that the Board improperly relied on evidence of allegedly fraudulent mileage reimbursements that the ALJ found to be unsubstantiated, the Commissioner's review of the Board's decision demonstrates that it was not based on any evidence of fraud. Appellant seems

to be confusing arguments made by the Deputy Attorney General during the proceedings at the OAL and in exceptions to the Initial Decision – which are summarized in the Order of Revocation, along with arguments made by appellant – with the basis for the Board's decision. Contrary to appellant's arguments, the Board did not rely on evidence of fraud in assessing the penalty. In fact, the Board specifically noted that the Board found appellant's conduct was "egregious and careless, if not intentionally fraudulent." This statement, combined with the Board's acceptance of the ALJ's findings of fact and legal conclusion, and the Board's multiple references throughout the section of the decision analyzing the appropriate penalty for appellant's "errors" and "failures" – rather than fraud – clearly demonstrate that the Board did not find appellant's conduct to be fraudulent or base its decision on alleged fraud. Therefore, the Commissioner finds appellant's argument unavailing.

Appellant also argues that revocation is not warranted because her conduct was not willful. However, the Commissioner concurs with the Board that, even if not willful, appellant's errors were so significant and pervasive, demonstrating a pattern of conduct that the Board found to be egregious and careless, that revocation of her certifications is appropriate. The ALJ noted that appellant's "conduct was not an isolated incident but rather a pattern of significant errors in the performance of her duties as an LDTC." As the ALJ noted, the testing and evaluation done by an LDTC are critical to determining whether a student receives special education services, as well as the nature, frequency, duration, and other specifics related to the delivery of those services. It was not arbitrary, capricious, or unreasonable for the Board to conclude that appellant's repeated failures to live up to these critical responsibilities warranted revocation of her certificates, nor does the Commissioner find that this penalty shocks one's sense of fairness.

Finally, appellant argues that her loss of tenure and previous good record should mitigate her penalty. The Commissioner notes that *N.J.A.C.* 6A:9B-4.5(a) specifically contemplates that, following a teacher's loss of tenure or employment, the Board may initiate proceedings to suspend or revoke the teacher's certificates. Accordingly, the possible consequences of incompetence or unbecoming conduct may be *both* loss of tenure/employment *and* revocation of certificates, and the former does not mitigate the latter. Furthermore, while the Commissioner acknowledges appellant's prior good record, that alone does not suffice to mitigate a pattern of conduct that involved multiple errors, omissions, and failures relating to eleven different students.

Accordingly, the decision of the State Board of Examiners is affirmed. Appellant's Teacher of Social Studies, Teacher of the Handicapped, and Learning Disabilities Teacher-Consultant certificates are hereby revoked.[3]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 12, 2021
Date of Mailing: August 12, 2021

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
RITA O'MALLEY	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 1516-178

At its meeting of April 14, 2016, the State Board of Examiners (Board) reviewed information it received regarding Rita O'Malley. O'Malley was employed by the Woodbridge Township School District (Woodbridge). Pursuant to *N.J.A.C.* 6A:9B-4.5, the Commissioner of Education (Commissioner) referred to the Board the tenure matter captioned *In the Matter of the Tenure Hearing of Rita O'Malley,* Dkt. No. 358-11/15 (Commissioner's Decision, January 6, 2016).

Woodbridge certified tenure charges against O'Malley alleging unbecoming conduct. In the tenure charges, which are incorporated herein by reference, Woodbridge alleged that O'Malley had submitted inaccurate and potentially fraudulent student educational evaluation reports. According to Woodbridge, those reports were deficient because O'Malley had inserted false test scores for subtests that had not been administered, included incorrect test results for subtests that had been completed, misplaced or failed to complete protocols, prepared write-ups regarding subtests that were not administered, failed to include test results for subtests that were completed and failed to administer subtests and complete an educational evaluation report. O'Malley also allegedly submitted false mileage reimbursement vouchers and received monetary payment for funds to which she was not entitled.

O'Malley failed to respond to the charges against her and in his decision the Commissioner deemed the allegations to be admitted. He found that the charges of conduct unbecoming a teaching staff member had been proven and warranted O'Malley's dismissal from her tenured employment. The Commissioner granted summary decision to the district and dismissed O'Malley from her tenured position in Woodbridge. The Commissioner transmitted the matter to the Board for its review.

O'Malley currently holds a Teacher of Social Studies certificate, issued in February 1979, a Teacher of the Handicapped certificate, issued in July 1988 and a Learning Disabilities Teacher-Consultant certificate, issued in April 1995. After reviewing the above information, at its April 14, 2016 meeting, the Board voted to issue an Order to Show Cause (OSC) to O'Malley as to why his certificates should not be revoked.

The Board sent O'Malley the OSC by regular and certified mail on April 20, 2016. The OSC provided that O'Malley must file an Answer within 30 days. On May 13, 2016, O'Malley submitted an Answer. In that Answer, O'Malley denied the allegations in the tenure charges. O'Malley acknowledged that Woodbridge filed tenure charges but during the pendency of those charges she submitted a letter of resignation.

Since there were material facts in dispute, on July 20, 2016, the Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. On August 31, 2020, Administrative Law Judge (ALJ) Patricia M. Kerins issued an Initial Decision in the case. *In the Matter of the Certificates of Rita. O'Malley*, Dkt. No. EDE 10769-16 (Initial Decision, August 31, 2020).

After reviewing the record, ALJ Kerins found that the Board successfully demonstrated O'Malley failed to administer tests to students and her test scoring and evaluation reports contain discrepancies or other inaccuracies. (Initial Decision, slip op. at p. 19). Further, the record demonstrated that O'Malley's conduct was not an isolated incident but more "a pattern of significant errors in the performance of her duties as an LDTC." *Id.* at p. 19-20. As a result of her findings, ALJ Kerins found that O'Malley had already been sanctioned for the conduct through loss of her tenured position and she demonstrated years of unblemished work as an LDTC. Accordingly, the appropriate penalty would be a three (3) year suspension along with "successful completion of an educational program on testing procedures and educational evaluations to be approved by petitioner." *Id.* at p. 20.

In the Exceptions, O'Malley argued that she "made mistakes along the way" but that the witnesses in this matter also made errors. (Exceptions at p. 3.) Additionally, she argued that there was no evidence that students were denied special education services as a result of the errors. *Id.* O'Malley states that the initial decision erred by "placing more credibility on Ms. Gricko's testimony." *Id.* at p. 5. She points to concerns regarding Gricko's testimony being based upon her knowledge as an LDTC rather than other authority. O'Malley then reviewed the testing issues for several students individually, noting in each instance whether she believed there was a discrepancy or typographical errors, the requirement/necessity for the test; O'Malley consistently argued that no student was denied special education services. *Id.* at p. 5-11. O'Malley admits to several of the errors, indicating in one instance that there was "sloppy work that probably should have been corrected when Respondent was reviewing her report." *Id.* at p. 8.

The DAG filed reply exceptions which argued that the ALJ's credibility assessments should not be disturbed and that the appropriate penalty in this matter is revocation. *Id.* at p. 2 and 5. The DAG argued that Gricko testified with consistency and that the ALJ found her testimony to be credible and found her to be knowledgeable, direct, and articulate. *Id.* at p. 4. Specifically, the ALJ did not find O'Malley to be credible because she was not confident in her command of the Woodcock-Johnson II tests and appeared confused at times when questioned. *Id.* at p. 4-5.

The DAG also argued that prior case law supports revocation in situations where a teacher submits fraudulent material and that O'Malley's conduct here is no less egregious. *Id.* at p. 6. Further, the DAG argued that O'Malley falsified learning-disabled student tests results and presented them to parents and teacher in her educational evaluations. *Id.* at p. 6. O'Malley's conduct "clearly demonstrate that Respondent neglected her duties and exhibited gross incompetence, thereby providing other just cause for the revocation of her certificates." *Id.* at p. 7.

The DAG further argued that O'Malley acknowledges many of her errors, omissions, and discrepancies but seeks that the Board overlook it because students were not denied special education services. *Id.* at p. 21. O'Malley's pattern of falsifying test results supports the finding of unbecoming conduct and revocation of her educator certificates. Moreover, O'Malley submitted fraudulent mileage reimbursement vouchers, and defrauded Woodbridge out of funds that could have been used for educational purposes.

The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of December 10, 2020, the Board reviewed the Initial Decision and the Exceptions and Reply Exceptions. After full and fair consideration of the Decision and submissions, the Board voted to adopt the Initial Decision, but modify the penalty in this matter.

The ultimate issue in this matter is the nature and degree of the unbecoming conduct. As noted above, ALJ Kerins found that O'Malley's conduct is unbecoming of a teacher, but she determined that in light of her loss of tenure and her prior good record, she should receive a suspension as opposed to a revocation.

After reviewing the entire record, the Board agrees with the ALJ's assessment regarding O'Malley's unbecoming conduct but disagrees with the appropriate resultant penalty. O'Malley's unbecoming conduct occurred several times and involved several students. O'Malley admits to many of the errors and omissions, in one instance indicating the errors were sloppy. Moreover, her testimony was found not to be credible as she appeared confused before the ALJ.

The Board does not find it is appropriate to mitigate the penalty because students were not denied special education services or that O'Malley lost her tenure, thus having been penalized for her unbecoming conduct by the employing district. O'Malley's failures are significant and pervasive; these errors were not isolated or limited but demonstrate a pattern of conduct that the Board finds to be egregious and careless, if not intentionally fraudulent. An LDTC bears great responsibility in ensuring an appropriate educational program for special education students. In light of that, O'Malley's failures here are so significant that the Board finds revocation to be the appropriate penalty.

Accordingly, on December 10, 2020, the Board voted to adopt the Initial Decision and ordered a six-month suspension of O'Malley's certificates. On this 22nd day of January 2021, the Board formally adopted its written decision to adopt the Initial Decision in this matter and it is therefore ORDERED that Rita O'Malley's Teacher of Social Studies certificate, issued in February 1979, a Teacher of the Handicapped certificate, issued in July 1988 and a Learning Disabilities Teacher-Consultant certificate, issued in April 1995 are hereby REVOKED, effective immediately. It is further ordered that O'Malley return her certificates to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Rani Singh, Secretary
State Board of Examiners

RS/KG/rg

Date of Mailing: January 27, 2021
Via Certified and Regular Mail:

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.

164-21

164-21SEC

New Jersey Commissioner of Education

Final Decision

Atif Nazir,

Complainant,

v.

Nitang Patel, Board of Education of the Township of Piscataway, Middlesex County,

Respondent.

Synopsis

Petitioner, a community resident and former member of the Piscataway Board of Education, alleged that respondent, a then-current member of the Piscataway Board of Education, violated *N.J.S.A.* 18A:12-24.1(e), (f) and (g) of the School Ethics Act when he included his name, picture, and a reference to his position on the Board of Education on a political flyer that was distributed during a primary election in 2019. The flyer, which did not include a disclaimer to indicate that respondent's position only represented his personal views and not that of the Board, referred to "a radical group under the leadership of [complainant] that wants to take over our township government." The School Ethics Commission (SEC) recommended a penalty of censure.

The case was forwarded to the Commissioner for final determination of the appropriate penalty in this matter. Upon review, the Commissioner concurred with the penalty recommendation of the SEC, finding that a censure is the appropriate penalty for respondent's failure to include a disclaimer while referencing his position on the Board in a targeted political mailing. Accordingly, the respondent shall be censured as a school official found to have violated the School Ethics Act.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

164-21SEC

Agency Dkt. No. 85-5/21
SEC Dkt. No. C43-19

New Jersey Commissioner of Education

Final Decision

Atif Nazir,

Complainant,

v.

Nitang Patel, Board of Education of the Township of Piscataway, Middlesex County,

Respondent.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed, as have the exceptions filed by respondent and complainant's reply thereto.

The SEC found that respondent violated *N.J.S.A.* 18A:12-24.1(e), (f) and (g) when he included his name, picture, and a reference to his position on the Board of Education on a political flyer that was distributed during a primary election in 2019. The flyer, which did not include a disclaimer to indicate that respondent's position only represented his personal views and not that of the Board, referred to "a radical group under the leadership of [complainant] that wants to take over our township government." The SEC recommended a penalty of censure.[1] Pursuant to *N.J.S.A.* 18A:12-29(c), the SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty.

In support of its recommendation for a penalty of censure, the SEC relied on four cases. First, in *Kwapniewski v. Curioni, Lodi Board of Education, Bergen County*, SEC Docket No. C70-17, decided December 18, 2019 (*Curioni*), *aff'd* Commissioner January 23, 2020, the board member received a six-month suspension after repeatedly personally attacking a teacher on blog

[1] The Initial Decision of the Office of Administrative Law recommended a penalty of reprimand, finding that respondent only violated *N.J.S.A.* 18A:12-24.1(f) and not *N.J.S.A.* 18A:12-24.1(e) or (g).

posts over a two-month period by posting inaccurate information about her salary, questioning her teaching qualifications and honesty, calling her names, and posting a picture of the street where she lives. Despite inclusion of a disclaimer, the board member repeatedly referenced his status on the Board. Here, the SEC noted that while respondent only endorsed a single political flyer rather than a series of blog posts, the significance of his failure to include a disclaimer while referencing his position on the Board cannot be ignored, and a censure is the appropriate penalty.

Second, in *Dunbar Bey v. Brown, Camden Board of Education, Camden County*, SEC Docket No. C25-11, decided December 21, 2011 (*Brown*), the SEC recommended a penalty of censure after a board member failed to remove the superintendent's picture which had appeared under his Facebook post referencing local terrorists; the Commissioner, however, found a reprimand was more appropriate given the lack of prior violations. In the instant matter, the SEC explained that the respondent's conduct was more deliberate and egregious than the action in *Brown* and warrants a penalty of censure.

Third, in *Fleres v. Zhong, West Windsor-Plainsboro Board of Education, Mercer County*, SEC Docket No. C17-18, decided May 3, 2019 (*Zhong*), a board member disclosed confidential information about an incident involving a student to his immediate family, and the information then spread. The SEC recommended a penalty of censure for the first-time offense, and the Commissioner agreed. The SEC noted that, as in *Zhong*, a penalty greater than a reprimand is appropriate for the first-time offense in this case.

Finally, in *I/M/O Christopher T. Treston, Randolph Township Board of Education, Morris County*, SEC Docket No. 71-18, decided April 27, 2021 (*I/M/O Treston*), the SEC recommended a penalty of censure, finding that a board member used an insufficient disclaimer in an Op-Ed that targeted a candidate for the Board and endorsed another because he made multiple references to his position on the Board. While the Commissioner has not yet issued a decision on the penalty in *Treston*, the SEC notes that the facts are similar to the within matter.

While respondent did not file an appeal to the Commissioner of the underlying finding of a violation, he did file exceptions to the recommended penalty. In his exceptions, respondent argues that the Commissioner should reduce the penalty from a censure to a reprimand because he had no prior infractions and his conduct was not severe enough to warrant a censure. Respondent contends that the cases the SEC relied upon do not support a penalty of censure. He maintains that the conduct in *Curioni, supra,* is so severe that it cannot be compared to the present matter, and that petitioner's conduct does not rise to the same level of indecency. He also notes that the penalty in *Treston, supra,* is not final as it is pending before the Commissioner. Respondent argues that the disclosure of information concerning a minor in *Zhong, supra*, was much more egregious than his conduct; therefore, while a penalty of censure was justified for a first-time infraction in *Zhong*, it is not justified here. Finally, respondent contends that this matter is most analogous to *Brown, supra,* where the final penalty was a reprimand, and that his actions were even less egregious than in that case, because the flyer was only sent to a group and not posted to social media. Accordingly, respondent urges the Commissioner to reduce the penalty to a reprimand.

In reply, complainant agrees with the SEC that a penalty of censure is appropriate in this circumstance, and the case law supports such a penalty. Complainant emphasizes that the flyer was inflammatory and Islamophobic because, as the flyer was translated into Gujarati and sent to Hindu homes, it exploits the divide between Muslim Pakistani and Hindu Gujarati Indian communities.

Upon review, the Commissioner concurs with the SEC that censure is the appropriate penalty. Respondent attached his name to a political flyer and deliberately chose to indicate that he was a member of the Board, without including any disclaimer to indicate that his views were not those of the Board. His violations were not inadvertent; he purposefully referenced his position on the Board to support his political agenda. The Commissioner does not find respondent's exceptions to be persuasive. Instead, the Commissioner agrees with the SEC that, like *Zhong, supra*,

respondent's violations warrant a penalty of censure for a first-time offense. Additionally, respondent's actions were more egregious than those in *Brown*, *supra*, because he intentionally used his status as a Board member on a political flyer without any type of disclaimer. As such, the Commissioner finds that a censure is the appropriate penalty for respondent's failure to include a disclaimer while referencing his position on the Board in a targeted political mailing.

Accordingly, the respondent shall be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 12, 2021
Date of Mailing: August 12, 2021

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

165-21

165-21

New Jersey Commissioner of Education

Final Decision

Andrew Meehan,

Petitioner,

v.

Board of Trustees of the College Achieve Central Charter School, Union County, and Nadia Bennett,

Respondents.

Synopsis

Pro se petitioner filed an appeal objecting to a post on the website of College Achieve Central Charter School by the school's chief executive officer which petitioner found offensive. The post in question was an image and a statement in support of the Black Lives Matter movement following the death of George Floyd in May 2020. Petitioner sought an investigation into the posting, removal of the post, and an apology to the community for the posting, as well as punitive measures against the respondents. The Board filed a motion to dismiss, contending that petitioner failed to state a claim upon which relief may be granted under the school laws.

Upon review, the ALJ found, *inter alia*, that: pursuant to *N.J.A.C.* 6A:3-1.10, the Commissioner may dismiss a petition if the petitioner has advanced no cause of action, which is the case in this matter; petitioner has, in fact, cited no violation of any law in his petition, but simply asserts his objection to the image and the statement on the school's website; further, any allegations of violation of the School Ethics Act must be initiated by filing a complaint with the School Ethics Commission, and petitioner has not filed such a complaint. Accordingly, the ALJ granted the Board's motion for summary decision, and the matter was dismissed.

Upon review, the Commissioner concurred with the ALJ that the petitioner has failed to advance a cause of action. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

165-21

OAL Dkt. No. EDU 03402-21
Agency Dkt. No. 191-9/20

New Jersey Commissioner of Education

Final Decision

Andrew Meehan,

Petitioner,

v.

Board of Trustees of the College Achieve Central Charter School, Union County, and Nadia Bennett,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge that petitioner has failed to advance a cause of action. Accordingly, the Board's motion to dismiss is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 12, 2021
Date of Mailing: August 12, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03402-21
AGENCY DKT. NO. 191-9/20

ANDREW MEEHAN,

Petitioner,

v.

BOARD OF TRUSTEES OF THE COLLEGE ACHIEVE CENTRAL CHARTER SCHOOL, UNION COUNTY, AND NADIA BENNETT,

Respondents.

Andrew Meehan, petitioner, pro se

Thomas O. Johnston, Esq., for respondents (Johnston Law Firm, LLC, attorneys)

Record Closed: June 16, 2021 Decided: June 25, 2021

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

Petitioner, Andrew Meehan, objects to an image and a statement respondent, Nadia Bennett, the chief executive officer of respondent, College Achieve Central Charter School Network, posted on the school's website.

PROCEDURAL HISTORY

On September 3, 2020, petitioner filed a petition of appeal with the Department of Education, Office of Controversies and Disputes. In his petition, petitioner objects to an image and a statement Bennett posted on the College Achieve Central Charter School Network website. Petitioner seeks an investigation into their posting, their removal, and an apology to the community for their posting. Finally, Petitioner seeks punitive measures against respondents.

On October 1, 2020, respondents moved to dismiss the petition instead of answering it under N.J.A.C. 6A:3-1.5.

On October 10, 2020, the Office of Controversies and Disputes transmitted the case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On April 19, 2021, the case was assigned to me for hearing.

On June 7, 2021, petitioner filed his opposition, and on June 16, 2021, respondents filed their reply.

FINDINGS OF FACT

On June 23, 2020, petitioner, Andrew Meehan, witnessed an image and a statement respondent, Nadia Bennett, the chief executive officer of respondent, College Achieve Central Charter School Network, posted on the school's website.

CONCLUSIONS OF LAW

The Commissioner may dismiss a petition if the petitioner has advanced no cause of action:

> At any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason.
>
> [N.J.A.C. 6A:3-1.10.]

In this case, petitioner has advanced no cause of action in his petition. In fact, petitioner has cited no violation of any law in it. In short, petitioner has only asserted his objection to the image and the statement on the school's website.

If petitioner now believes, as he writes in his opposition to the motion, that respondents are in violation of the School Ethics Act, N.J.S.A. 18A:12-21 to -34, then petitioner should file his complaint before the School Ethics Commission under N.J.S.A. 18A:12-29. As respondents note, alleged violations of the School Ethics Act are within the exclusive jurisdiction of the School Ethics Commission, and this tribunal has no jurisdiction to address those alleged violations without a transmittal from that agency. Accordingly, this petition must be dismissed.

ORDER

The petition and this case are hereby dismissed in keeping with the findings of fact and conclusions of law above.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this case. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days, and unless such time

limit is otherwise extended, this recommended decision shall become a final decision under N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 25, 2021
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: June 25, 2021

Date Mailed to Parties: June 25, 2021

dr

166-21

New Jersey Commissioner of Education

Final Decision

The Patrick School,

Petitioner,

v.

New Jersey State Interscholastic Athletic Association,

Respondent.

Synopsis

Petitioner, The Patrick School, appealed the determination of the New Jersey State Interscholastic Athletic Association (NJSIAA) Executive Committee that it does not currently qualify to be a member of the NJSIAA because it is in violation of a NJSIAA rule that requires that no member school may have any team that operates outside of NJSIAA's jurisdiction in any NJSIAA-sanctioned sport. The NJSIAA found that The Patrick School did not comply with this provision and cannot be a member of the NJSIAA because it sponsors multiple basketball teams that do not comply with NJSIAA rules. The Patrick School sought a stay and/or reversal of the revocation of its membership.

Upon review, the Commissioner determined that she lacks jurisdiction over this matter as The Patrick School is not a public school. In making her determination, the Commissioner found that: *N.J.S.A.* 18A:11-3 governs voluntary associations which regulate certain student activities between and among their members, such as the NJSIAA; the statute provides, *inter alia*, that in matters involving public school districts, appeals involving NJSIAA rules and regulations shall be made to the commissioner and thereafter to the Superior Court; however, in non-public school matters involving NJSIAA rules and regulations, appeals shall be made directly to the Superior Court. The Commissioner noted that while she is mindful that this matter was originally filed in Superior Court and was dismissed in order to afford The Patrick School an opportunity to pursue this matter before the Commissioner, the Superior Court Judge's decision to dismiss the matter does not confer jurisdiction to the Commissioner when it is expressly precluded by the governing statutory provision. Accordingly, the petition was dismissed for lack of jurisdiction.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

166-21

Agency Dkt. No. 33-3/21

New Jersey Commissioner of Education

Final Decision

The Patrick School,

Petitioner,

v.

New Jersey State Interscholastic Athletic Association,

Respondent.

For Petitioner, The Patrick School, Hassen Ibn Abdellah, Esq.

For Respondent, New Jersey State Interscholastic Athletic Association, Stephen P. Goodell, Esq. and Scott T. Miccio, Esq.

This case involves an appeal of a decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) Executive Committee determining that The Patrick School does not qualify to be a member of the NJSIAA at this time as it is in violation of the NJSIAA Rules and Regulations, Specific Sports Regulations, Note 3, Clarification 3. Clarification 3, which was adopted by the Executive Committee on June 3, 2020, provides that "[a]ll NJSIAA member school athletic teams are bound by NJSIAA rules" and requires that "[n]o member school may have any team that operates outside of NJSIAA's jurisdiction in any NJSIAA sanctioned sport." The NJSIAA found that The Patrick School did not comply with this provision and cannot be a member of the NJSIAA because it sponsors multiple basketball teams that do not comply with NJSIAA rules.

On appeal, The Patrick School seeks a stay and/or reversal of the revocation of its membership. Petitioner previously filed an Order to Show Cause and Verified Complaint in the Superior Court of New Jersey seeking emergent relief and an order overturning the Executive Committee's decision. The judge denied the motion and dismissed the case without prejudice so that The Patrick School could pursue an appeal before the Commissioner. Accordingly, The Patrick School filed the instant petition.

Upon review, the Commissioner finds that he lacks jurisdiction over this matter as The Patrick School is not a public school district. *N.J.S.A.* 18A:11-3 governs voluntary associations which regulate certain student activities between and among their members, such as the NJSIAA. Pursuant to *N.J.S.A.* 18A:11-3, the "constitution, bylaws, and rules and regulations" of the association must be approved by the Commissioner and "enforced first by the internal procedures of the association." The statute further provides that when a party appeals a determination of the association, "[i]n matters involving *only public school districts* and students, faculty, administrators and boards thereof, appeals shall be to the commissioner and thereafter the Superior Court." *N.J.S.A.* 18A:11-3 (emphasis added). The statute specifies that "[i]n all other matters, appeals shall be made directly to the Superior Court." *Ibid.* Therefore, because The Patrick School is not a public school district the appropriate forum for its appeal of the NJSIAA's determination that it violated Specific Sports Regulations, Note 3, Clarification 3 is Superior Court.

When considering the basic rules of statutory construction, it is well-known that "[t]he Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language." *DiProspero v. Penn*, 183 *N.J.* 477, 492 (2005). Statutory words are ascribed their ordinary meaning and are viewed in the context of the

legislation as a whole. *Ibid.* As such, when the Legislature uses the word "may," it is ordinarily permissive, while the word "shall" has a mandatory meaning. *Aponte-Correa v. Allstate Ins. Co.,* 162 *N.J.* 318, 325 (App. Div. 2000).

In enacting *N.J.S.A.* 18A:11-3, the Legislature clearly and unambiguously made a distinction in the procedure between public and non-public schools for challenges involving voluntary associations, such as the NJSIAA. Appeals of matters involving public school districts "shall" be to the Commissioner, and all other matters "shall be made directly to the Superior Court." *N.J.S.A.* 18A:11-3. The plain meaning of the statutory language is clear, and therefore the Commissioner has no discretion by which to exercise jurisdiction in this matter, as it does not involve a public school.

The Commissioner is mindful that this matter was originally filed in Superior Court and was dismissed in order to afford The Patrick School with an opportunity to pursue this matter before the Commissioner. However, the Superior Court Judge's decision to dismiss the matter does not confer jurisdiction to the Commissioner when it is expressly precluded by the governing statutory provision.

Accordingly, the petition of appeal is hereby dismissed for lack of jurisdiction.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 13, 2021
Date of Mailing: August 13, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

IN THE MATTER OF THE PATRICK SCHOOL – APPEAL OF CONTROVERSIES COMMITTEE DECISION	**BEFORE:** **NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION** **EXECUTIVE COMMITTEE**

This matter having been brought before the Executive Committee on appeal by The Patrick School of the November 4, 2020 Controversies Committee decision; and the Executive Committee having met on December 9, 2020; and the Executive Committee having considered the Controversies Committee decision, the record below, and the brief and supporting documents submitted by The Patrick School; and The Patrick School having waived its right to oral argument; and the Executive Committee having questioned the Controversies Committee chairperson, David Frazier; and the Executive Committee having deliberated in closed session and voted in open public session; and the Executive Committee having decided, on motion by Greg Bailey, seconded by Mary Liz Ivins, to AFFIRM the decision of the Controversies Committee; and the vote having been recorded as 41 in favor, none opposed, and three abstaining;

The Executive Committee of the NJSIAA now resolves that the November 4, 2020 decision of the Controversies Committee is AFFIRMED.

This decision is the final decision of the NJSIAA.

Dated: December 9, 2020

Signed: _____
Steven Shohfi, President

167-21

OAL Dkt. No. EDU 03052-20
Agency Dkt. No. 21-1/20

New Jersey Commissioner of Education

Decision

K.L., on behalf of minor child, M.L.,

Petitioner,

v.

Board of Education of the Township of Verona, Essex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon review, the Commissioner agrees with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that no issues remain in dispute and that the petition of appeal should be dismissed. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED. [1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 17, 2021
Date of Mailing: August 17, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 03052-20
AGENCY DKT. NO. 21-1/20

K.L. ON BEHALF OF MINOR CHILD, M.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY
Respondent.

K.L., petitioner, pro se

Daniel R. Roberts, Esq., for respondent (Kenney Gross Kovats & Parton, attorneys)

Record Closed: July 7, 2021 Decided: July 7,2021

BEFORE, **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On January 24, 2020 Petitioner K.L., on behalf of M.L., filed an appeal challenging the disciplinary action imposed by respondent. Petitioner's request for a hearing was

granted and the matter was transmitted to the Office of Administrative Law where it was filed on March 2, 2020, for hearing as a contested case.

A telephone conference was scheduled for October 7, 2020, however petitioner failed to appear for the telephone conference. On October 7, 2020, correspondence was sent to petitioner inquiring as to whether she wished to continue to pursue this matter. No response was received. On May 27, 2021, correspondence was again sent to petitioner inquiring as to the status of this matter, and advising that if there was no response, the matter would be dismissed on June 4, 2021. No reply to that correspondence was received, and there has been no communication whatsoever from petitioner.

Based upon all of the foregoing I **FIND** that this matter should be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 7, 2021
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: July 7, 2021

Date Mailed to Parties: July 7, 2021

dr

168-21

168-21

OAL Dkt. No. EDU 13252-17
Agency Dkt. No. 189-8/17

New Jersey Commissioner of Education

Decision

C.G. and S.G., on behalf of minor child, C.G.,

Petitioners,

v.

Board of Education of the Township of West Orange, Essex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon review, the Commissioner agrees with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that no issues remain in dispute and that the petition of appeal should be dismissed. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 17, 2021
Date of Mailing: August 17, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 13252-17
AGENCY DKT. NO. 189-8/17

C.G. AND S.G. ON BEHALF OF MINOR CHILD C.G.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondent.

Marc D. Haefner, Esq., for petitioners (Walsh, Pizzi O'Reilly, Falaga, LLP, attorneys)

Jodi S. Howlett, Esq., for respondent (Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys)

Record Closed: July 12, 2021 Decided: July 12, 2021

BEFORE, **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the Board's decision to suspend their child. The petitioner's request for a hearing was granted and the matter was transmitted to the Office of Administrative Law on September 11, 2017, for hearing as a contested case.

The hearing was scheduled for October 15, 2018. On October 11, 2018, the hearing was adjoured at petitioner's request. The parties agreed to discuss disposition and advise the undersigned.

On December 9, 2020, correspondence was sent to the parties inquiring as to the status of this matter. Counsel for petitioner advised the matter had been subject to settlement discussions and that he would reach out to his adversary to provide a more complete response.

On May 4, 2021, correspondence was sent to the parties inquiring as to the status of this matter and no response was received.

On May 24, 2021, correspondence was again sent to parties requesting the status of this matter. Petitioner's attorney responded that he would reach out to his adversary and and advise. No reply was received.

On June 9, 2021, correspondence was again sent to parties requesting the status ot his matter. On that date petitioner's attorney responded that he will reach out to his adversary.

On June 30, 2021, correspondence was again sent to the parties requesting the status. No response has been received to that latest of many inquiries.

Over three years have elapsed since the transmittal and filing of this matter, and no substantive response as to the status of this matter has been received from either party. Based upon all of the foregoing I **FIND** that this matter should be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



July 12, 2021
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: July 12, 2021

Date Mailed to Parties: July 12, 2021

dr

173-21

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
Agency Docket No.: 39-3/21

In the Matter of the TENURE Hearing between

The FLORENCE TOWNSHIP BOARD OF EDUCATION, BURLINGTON COUNTY NEW JERSEY

PETITIONER

and

KATELYN HUTCHISON,

RESPONDENT

BEFORE: **Ira Cure, Esq.**
Arbitrator

APPEARANCES

For the Petitioner School Petitioner:
Geoffrey N. Stark, Esq.
Sanmathi Dev, Esq.
Capehart & Scatchard, P.A.

For the Respondent:
Nicholas J. Repici, Esq.
Lenox, Socey Formidoni et al.

ORDER

Pursuant to *N.J.S.A., 18A:6-16,* as amended by *P.L. 2012, c. 26 and P.L. 2015, c. 109* ("TEACHNJ"), the tenure charges brought by the Petitioner Florence Township Board of Education, Burlington County ("Petitioner") against Katelyn Hutchison ("Respondent") were referred to me for a hearing and decision. The charges were filed with the New Jersey Department of Education ("DOE") on March 9, 2021. The charges allege that the

Respondent: 1) neglected her duty; 2) failed to report to work; 3) abandoned her position; 4) engaged in conduct unbecoming her position; 5) was incapacitated; and 6) provided other just cause. An answer was filed by the Respondent with the DOE on April 13, 2021. On April 15, 2021, Jennifer Killough-Herrera, the DOE's Director of the Office of Controversies and Disputes, appointed me to hear this dispute. The Petitioner is represented by the firm of Capehart and Scatchard, by Geoffrey N. Stark, Esq. and Sanmathi Dev, Esq. The Respondent is represented by the firm of Lenox, Socey Formidoni, Giordano, Lang, Carrigg & Casey by Nicholas J. Repici, Esq.

FINDINGS

1. Respondent was a tenured Payroll Clerk, a non-certificated position.
2. The Commissioner of Education certified the charges against the Respondent.
3. On August 4, 2021, the Respondent notified the petitioner that she was resigning from her position effective immediately.
4. On August 4, 2021, counsel for the Respondent notified me of the Respondent's resignation and stated that the tenure charges are moot and do not require adjudication.
5. The Petitioner formally accepted the Respondent's resignation at a meeting of its Board on August 9, 2021.
6. On August 10, 2021, the Petitioner requested withdrawal of the tenure charges.
7. As a result of the Respondent's resignation, the tenure charges are moot.
8. The Respondent understands that by resigning from her position, she has

given up all tenure rights and the right to rehire.

9. Because Respondent is not a teaching staff member, no referral to the New Jersey State Board of Examiners must be made.
10. The Parties agree that this tenure matter is resolved.
11. The Parties agree that the above stated circumstances justify the withdrawal of the tenure charges.

Based on the above, I render the following:

ORDER

The undersigned Arbitrator having been designated pursuant to *N.J.S.A., 18A.6-17.1(c), and AAA Labor Rule no. 27* hereby issues, and ORDERS as follows:

A. The tenure charges brought by Petitioner Florence Township Board of Education, Burlington County against Respondent Katelyn Hutchison are withdrawn.

Dated: August 18, 2021

Ira Cure

State Of New York)
)
County of Kings)

On this 18th day of August 2021 before me personally came and appeared Ira Cure, to me known and known to me to be the individual described herein and who executed the foregoing instrument and he acknowledged that he executed the same.

Notary Public

ELIZABETH ORFAN
Notary Public, State of New York
No. 02OR6376601
Qualified in Kings County
Commission Expires April 23, 2023

178-21

178-21

COMMISSIONER OF EDUCATION, State of New Jersey

IN THE MATTER OF THE PROCEEDING BETWEEN:

Tenured Teacher Donna Coleman
"Teacher" or "Tenured Teacher"

and

School District of the Borough of Roselle, Bergen County
"Petitioner", "District," or "Board"

Petition: Dismissal, Tenured Teacher Donna Coleman, by Roselle Board of Education
Agency Docket No: 18 - 1 /2

AWARD AND OPINION

Pre-Hearing Procedural Motions;	March 8 – 30, 2021
Substantive Hearings, Clark, NJ	May 10 and 11, 2021
Transcripts	May 26, 2021
Briefs, w/ materials	July 6; revised fr. June 22, 2021
Date of Award:	August 30, 2021

Arbitrator Jay David Goldstein

APPEARANCES

For the Roselle School District
Ari D. Schneider, Esq.
The Busch Law Group LLC

Dr. Nathan Fisher, Superintendent

Bernice Marshall Simmons, Dir. HR

Lisette Gonzalez-Perez, Asst. Sup.

***

For Donna Coleman, Tenured Teacher
Ben Weathers, Esq.,
Caruso Smith Picini, P.C.

Nicholas Poberezhsky, Esq.

Donna Coleman [Tenured Teacher]

Antoinette Coleman [daughter of Teacher]

Randolph Dorcent [Former student]

INTRODUCTION

The underlying dispute over this dismissal action by the 'Roselle School District' arose from a single incident purportedly emanating from, the Tenured Teacher's posting action on her personal "Facebook" account [hereinafter, 'website' or 'web account'], occurring during the 2019-2020 school year. There was no dispute that the 'posting' occurred on May 29, 2020, leaving only inquiries in dispute regarding the technicalities over 'how' the incident happened and, the Teacher's motive(s) or intention behind an incident which caused significant and deleterious effects upon her School District community and the larger external community.

Significant investigation into the incident transpired over many months, with each side ostensibly represented by individuals identified as: "*Roselle Education Association president Rosemary Longo... there to represent Ms. Coleman's interests.*" [Teacher Brief, Pg. 7]
and, "*District decided to retain an outside third-party independent investigator*" [Board's Brief, Pg. 9]

Outlined extensively hereunder, both during and after that investigatory process, the parties engaged in disputes ranging from procedural to substantive, including the weight of the evidence, credibility determinations and burden of proof. Added to the above considerations were mitigating or aggravating factors considered.

While there were issues raised concerning adherence to District Policies [i.e., prohibiting certain actions and behaviors] and, whether or not the 'posting', and /or its content was protected 'free speech' [i.e., 1st Amendment rights], there are overarching principles at stake here. As each Party defined during the Hearing, the Issue for decision here will be determined based upon the factual analysis of the Teacher's actions, i.e., whether or not this Teacher engaged in 'Conduct Unbecoming', Insubordination and other elements of the just cause standard.

The District, believing it had satisfied the just cause requirements needed to do so, filed "Tenure Charges" [by the 'Board'] on/ about January 26, 2021 against Tenured Teacher Donna Coleman [hereinafter, 'Teacher'] with the NJ DOE, as referenced herein. Despite questions raised by the 'Teacher's Response to the Charges' [on / about February 10, 2021], the evidence demonstrates this Teacher being charged with causing a message [deemed by the District as inappropriate] to be 'shared' on her social media account.

The content of the post [alleged to be 'inflammatory, insensitive and racially charged'], including its motive, manner and the methods employed to have 'shared' that post are at issue here. The negative characterization of the 'shared' message was shaped by a plethora of negative comments [exceeding 200] which were posted and/ or received by the School District (and/or in reply to the Teacher's account), subsequent to the Teacher's May 29, 2020 posting.

The gist of the responsive commentary was detrimental in nature, specifically directed against both the Teacher and the School District, for continuing to employ her. Hence, hundreds of people in the community of, in and around the Roselle School District [Bergen County, NJ] commented negatively regarding the incident.

The gravamen of the underlying disciplinary action against the Teacher began with the interception of the offending message by another teacher in the School District. That teacher reported her views to School District authorities who took immediate steps, discussed hereunder, in efforts to contain, control and / or remediate the situation, especially with regard to the onslaught of negative feedback from the external community. Thereafter, the District moved to a formal investigation as more complaints were received. Investigation led to 'Charges' being filed against Teacher and finally, the procedural steps leading to a 'Dismissal'.

In summary presentation, further chronological background events are abridged here and expanded in greater detail under the Background, Facts. and Party Positions below this section. [*underlining for emphasis has been added by the Arbitrator throughout this document]

May 29, 2020; the date of a [Facebook] 'post' at issue here appeared.

Each party hereunder commented extensively regarding the 'post'. By the 'Teacher': "*The events of May 29, 2020 occurred four days after the death of George Floyd when racial tensions, unrest and protests were prevalent across the United States.*" [Teacher's Brief, Pg. 6; citing Exhibit J-1, at page 5]

Further, "*Ms. Coleman testified that she believed on May 29, 2020, and ... still believes, that an individual, or individuals, that witnessed the first post that she had deleted found a second image which was similar in nature and made it appear as if it was her post. T 292, 12-20. As a result of this second post in question, Ms. Coleman began receiving comments and messages directed to her and/or about her, some of which were threatening in nature. See, Exhibit R-3*". [Teacher Brief, Pg. 6]

The 'District', commenting upon the intentional nature of the Teacher's actions: "*30. Dr. Fischer concluded that Respondent intentionally made the Post on May 29, 2020. Specifically, he testified (and illustrated an example), that posting something on Facebook requires a two-step process (the second step being the opportunity that you do, in fact, wish to post what you are about to post. T-1, 192:14-22; 200:1-201:14*" [Board's Brief, Pg. 9; citing Superintendent's testimony]

June 01, 2020; "*...Director of HR, Ms. Marshall-Simmons, was tasked ... with investigating the Post. T-1, 58:9-13.*" Further, "*...Marshall-Simmons met with Respondent on June 1, 2020. When asked about the genesis of (it), Respondent initially asserted "I saw the post and what it said. It came up on my feed and I did not share the post. There is a fake account with my name. I would never share anything derogatory on my page.*" [Board's Brief, Pg. 8; citing J-2, Ex. E (Ex. A); T-1, 63:9-15]

Further by the Board, "*Respondent then asserted that her account had been hacked and proceeded to represent that she would obtain a police report indicating same. Id.* [Board's Brief, Pg. 8]

By the Teacher, "*On June 1, 2020, a virtual meeting was held in which Bernice Marshall Simmons, Ms. Coleman, Assistant Superintendent Lissette Gonzelez Perez and Roselle Education Association president Rosemary Longo, who was there to represent Ms. Coleman's interests. T 59, 6-25; T60, 1-6; Exhibit A, attached to Exhibit D, of Exhibit J-2. Ms. Simmons testified that at the time of the meeting, no school district policies had been identified as having been potentially violated by Ms. Coleman. T 77, 6-10.* [Teacher Brief, Pg. 6]

June 3, 2020; "*...Ms. Coleman made a report to the Bedminster Police Department of what it characterized as "cyber harassment." Exhibit C, page 1, Exhibit J-2. Ms. Coleman reported to police that "[s]omeone cut photos from her Facebook account . . . and pasted the photos under a new account with her name and attached derogatory/racist comments to it." Exhibit C, page 2, of Exhibit J-2. Ms. Coleman did as was requested and provided the police report to Ms. Simmons. T 66, 7-15; T 79, 17-25.* [Teacher Brief, Pg. 8]

January 26, 2021; the District's Tenure Charges against Teacher Donna Coleman are filed with NJ DOE citing, among other contentions, that the post was, "*...racially charged, racially offensive, racially motivated.*" Further that, "*...district argues that its ability to provide public services was disrupted because it* [had... *received daily phone calls, emails"* [Motion, Oral Arg.,Tr. 25]] Related arguments followed the underlying evidentiary hearings. [Board Brief, Pgs.12, 14] Pertinent sections of the 'Charges' are reproduced hereunder [see Findings, below]

February 10, 2021; in reply to the Tenure Charges, Teacher's contentions included,

"*...this entire prosecution is frivolous. Ms. Coleman isn't accused of harassing students, insulting students, discriminating students, using students, anything like that. In a nutshell she's being prosecuted because something was said on Facebook that some people didn't like*" [Teacher's Motion for Dismissal, Tr. 16, Oral Arg.] Related arguments followed the underlying evidentiary hearings. [Teacher's Brief]

February 12, 2021; this Arbitrator appointed to the matter by the NJ State Board of Education.

March 15 and 23, 2021; by mutual request in writing followed by oral argument conducted in a virtual Hearing, the Teacher's "Motion for Summary Decision", and District, "Petitioner's 'Opposition Brief', are argued in a procedural effort to adjudicate the matter prior to a full evidentiary hearing [prior scheduled hearings held in abeyance were re-scheduled]

March 26-30, 2021; upon review of 'procedural' transcript and pleadings, Arbitrator issues an, "Interim Ruling", dismissing, "Motion for Summary Decision", without prejudice. Evidentiary hearing(s) re-scheduled to May 10 and 11, 2021.

May 5, 2021; District request for conference call to address, 'Motion' for a witness to appear virtually (prior scheduled, 'live'), due to medical necessity; no objection by Teacher's Counsel. Both advised all witnesses will receive instruction for testimony decorum.

May 10 and 11, 2021; During two (2) hearings scheduled by agreement between Counsel, each side had full and fair opportunity to present written exhibits, sworn testimony, including time for cross-examination and rebuttal. The Tenured Teacher was present during both evidentiary Hearings [Day 1 and 2], given opportunity to and did testify in her own behalf. Each Party agreed to written closings and to protocols for those submissions.

May 26, 2021; the transcribed record of hearing was received.

July 6, 2021; by agreed upon schedule [after extension] to file closing briefs electronically to one another and Arbitrator; thereafter mailing same with cited materials, both briefs [+ materials] were received. Each Party cited from an extensive array of prior arbitration and judicial decisions [30 & 20]. The Hearing record was declared closed at this juncture. All evidence, including the arguments and positions adopted by each party prior to, during and post-hearing were thereafter considered at length, however not all were afforded the same significance for determination, as discussed hereunder.

August 29, 2016; decision rendered to each side and filed with the NJ Commissioner of Education.

ISSUE

During the evidentiary hearings, each Party's Counsel was afforded opportunity to state the issue believed to be before the Arbitrator. Absent consensus, the Arbitrator reserved the right to adjust the 'issue' for determination appropriate to the evidence. [Arbitrator, Tr. 9]

While the parties could not agree *per se* to each other's statement, they came close.

By the District: "*...whether or not the board did, in fact, have just cause to seek the termination of Ms. Coleman.*" [District's Opening, Tr. Pg. 10]

By the Teacher: "*whether or not the post was shared intentionally, and if that rises to the level of conduct unbecoming. And further, if it does, whether termination is warranted.* [Teacher's Opening, Tr. Pg. 22]

As the parties subsequently enhanced their respective arguments to take account of the statements above, it is deemed more relevant to state the issue as:

"***Whether the District had just cause to dismiss Tenured Teacher Coleman? If not, what should be the remedy?"***

BACKGROUND, FACTS and PARTY POSITIONS

As learned, the Tenured Teacher had taught, "...*English... at Abraham Clark High School in Roselle,... where she has been employed for 17 years. T 260, 20-24. She was assigned to the high school for the entirety of her career with the Roselle Public Schools District, though she also provided instruction in the District's alternative school and home instruction programs. T 261, 16-24. In addition to her normal teaching duties she was involved in multiple extracurricular activities and programs including, but not limited to: the JROTC Marine Corps program; the teen arts program; the intergenerational day program; the school newspaper; the school literary magazine. T 261, 25; T 262 1-8; see also, Exhibit J-3, Respondent's Statement of Position, at pages 1-2; Exhibit J-4, Respondent's Answer, at page 2. She also served as the school's senior class adviser for a number of years. T 262, 8-9; Exhibit J-3, at page 2; Exhibit J-4, at page 2.* [Teacher's Brief, Pg. 4]

Of further note is that her lengthy employment was discipline free, "*Further, Ms. Coleman's performance evaluations had been uniformly positive, and the record reveals no prior history of discipline. T 183, 9-10; see also, Exhibits R-1 and R-2."* [Teacher's Brief, Pg. 4]

The above facts concerning 'Teacher's' employment history were undisputed. Discussed below, each party adopted differing positions regarding its effect on the outcome here.

Each side's well documented post-hearing briefs contained their respective view-points, i.e., positions. In a preliminary statement the District contended: "...*Board has proven, by a preponderance of the evidence, that Respondent, Donna Coleman ("Respondent"), is guilty of* ***unbecoming conduct, insubordination*** *and/or other* ***just cause warranting*** *her* ***dismissal*** *from employment with the Roselle Board of Education".* [Board Brief, Pgs. 4, 12 -14]

Preliminarily, the Teacher argued, "*Petitioner Roselle Board of Education (hereinafter "Petitioner" or "the Board") failed to meet its burden of proving the tenure charges against Respondent Donna Coleman ("Respondent" or "Ms. Coleman") by a preponderance of the relevant evidence.* [Teacher's Brief, Pg. 3]

The District's post-hearing arguments urged findings in favor of charges against this Teacher alleging, '*criminal misconduct*', and being, '*...unfit to remain a tenured teaching staff member*', having, '*...intentionally shared and then lied about a racially charged (...) post*', [or] being, '*grossly negligent*', ...and that her, '*post [i.e., of May 29,2020] created a great deal of disruption*' and finally that her post, '*... is not protected speech under the First Amendment*' [Board Brief, Pgs. 2, 4, 5, 9, 10, 11, 12, 14, 16, 28]

Maintaining the charges supported the standard of 'just cause' argued preliminarily, the District urged [post-Hearing] that any conclusions reached include that, "*Respondent should be dismissed from her tenured position based on the egregiousness of her criminal misconduct* [and] "*...notwithstanding any consideration of her prior record of employment.*" [District Brief, Pgs.2, 26, 27].

Moreover from the District's [post-Hearing] 'Preliminary Statement' regarding 'credibility', it also argued as rationale for dismissal that, "*...the testimony of Respondent illustrates a lack of remorse* [which] *suggests a likelihood of future misconduct of a similar or more severe nature.*" [District Brief, Pg. 5]

Reiterating similar themes in concluding remarks, the District summarizes by claiming:

"*... it is evident that...Respondent has failed to satisfy the standards of a profession predicated on public trust and respect. She has betrayed that trust and breached the high standard enunciated by the Commissioner of Education. Moreover, Respondent's lack of remorse is illustrated by her failure to recognize why members of the Roselle community were upset and offended by her actions, coupled with her constant effort to curry sympathy related to the fallout with which she has had to deal as a result of her misconduct. Indeed, the only remorse articulated by Respondent concerns the impact of her actions upon her own career (i.e., the anger directed towards her by those whom she so deeply offended) and not the damage it has done to this school District, her reputation and her ability to still serve as an effective educator. Notably missing from Respondent's testimony and/or pre-hearing submissions is any statement of apology directed towards the students and the school district she let down. In any case, it's simply unfathomable to imagine a scenario where the Superintendent of Schools has to place the Respondent back in the classroom and explain same to the parents who are now uncomfortable ...with having their children around her. Respondent's misdeeds were not mere oversights, nor simple mistakes. Rather, her misconduct, as well as the manner in which she handled herself after sharing the Post, go to the heart of her character and unfitness to continue to serve as a public-school teacher. Respondent must be dismissed.*" [District's Brief Pgs. 28-29]

The Teacher's primary arguments address multiple categories, including the burden of proof, factors in mitigation of remedy and the effect of the alleged posting: " *Petitioner has failed to meet its burden that Ms. Coleman failed to share any post, racially insensitive or not, intentionally. Assuming even arguendo that Ms. Coleman did share the post intentionally, the Board cannot show that her intent was to disparage or demean any student, parent, staff member or any member of the Roselle community in general sufficient to support a charge of conduct unbecoming.* [Teacher's Brief, Pg. 18]

Speaking to the remedy and notwithstanding culpability it contends further that, "*It is Ms. Coleman's position that the Board has not met its burden in showing that she committed the alleged offenses, and even if it has, it is precluded from taking any disciplinary action against her under the First Amendment. However, should the arbitrator find that the District has met its burden and finds that Ms. Coleman did engage in conduct unbecoming and her speech is not protected by the First Amendment the offenses are de minimis in nature and do not warrant the stripping of her tenure.* [Teacher's Brief, Pg. 22]

Moreover, argues the Teacher: "*...should the arbitrator find that the District has met its burden in proving that Ms. Coleman engaged in conduct unbecoming, an intermediate penalty such as a Corrective Action Plan ("CAP") or increment withholding would be a more appropriate remedy. Revoking Ms. Coleman's tenure* ***under these circumstances*** *would constitute an excessive, draconian penalty, which should be reserved for only the most egregious offenses.*" [Teacher's Brief, Pg. 24]

Further, "*Even if one or more of the charges are sustained, there is significant mitigating evidence – including but not limited to Ms. Coleman's unblemished work performance and lack of disciplinary record, along with her lack of malicious intent – that militates against the imposition of severe discipline. Moreover, the allegations in the charges, even if accepted as true, are not sufficiently flagrant to warrant termination and the Board failed to implement progressive discipline.* [Teacher's Brief, Pgs. 3-4]

Thus the overarching positions from each party are:

"*Board has proven by a preponderance of the credible evidence that Respondent is guilty of conduct unbecoming a teaching staff member, insubordination and/or other just cause warranting dismissal.* " [District Brief Pg.4]

By the Teacher: "*the Board failed to meet its burden of proving the allegations contained in the tenure charges by a preponderance of the relevant evidence. Consequently, the charges must be dismissed with prejudice and Ms. Coleman made whole for all emoluments withheld during the pendency of this proceeding. Even if Ms. Coleman is found guilty of conduct unbecoming, the substantial mitigating evidence presented in this case militates against the imposition of severe disciplinary action.*" [Teacher's Brief, Pg. 27]

Further, at the 'Conclusion' of Teacher's Brief, "*...PETITIONER DID NOT MEET ITS BURDEN IN PROVING THAT MS. COLEMAN WAS INSUBORDINATE OR UNTRUTHFUL. Ms. Coleman is charged with lying to the District's investigators and being insubordinate. However, the record proves quite the contrary.* [Teacher's Brief; Pg. 20]

FINDINGS AND OPINION

A careful review of all evidence presented, including all documents submitted into the record and transcribed notes of testimony occurred. This take into account the positions taken and arguments advanced by both parties.

Pertinent portions of the District's 'Tenure Charges' [January 26, 2020] as filed against the Teacher are:

I. **Unbecoming Conduct and/or Other Just Cause, Including Insubordination. (Intentional Public Sharing and Lying About a Racially-Charged Facebook Post)**
II. **Unbecoming Conduct and/or Other Just Cause, Including Insubordination. (Grossly Negligent Misconduct in Publically Sharing a Facebook Post)**
III. **Unbecoming Conduct and/or Other Just Cause, Including Insubordination. (Causing Disruption in the District/Effect on Ability to Continue To Serve)**
IV. **Unbecoming Conduct and/or Other Just Cause, Including Insubordination. (Violations of District Policy)**

Relevant portions of NJ statutory sections which the Parties mutually acknowledged being bound to were cited by each side and are deemed relevant without further recitation here. The statues impose a, "just cause" standard for dismissal and also grant school districts the

right to issue reasonable rules, orders and regulations that are not conflicting. There has been no challenge to the statutory standards for discipline by either side.

While challenges to several Board policies cited in the Tenure Charges dealing with 'Conduct' were raised by the Teacher, the allegations dealt with *de minimis* changes to them which, upon examination at hearing when raised, demonstrated that the policy language in question, while edited several months after the underlying incident [May 29, 2020], were edited with language having nothing to do with the content of this matter. Thus the Teacher's contentions that, "*Ms. Coleman can't violate a policy retroactively.*" is moot and deemed irrelevant.

As alleged by the District, "*Further, an inspection of District Police 3281-Inappropriate Staff Conduct was edited in September of 2020, subsequent to the events at issue. 1.* [District's Brief, Pgs. 6, 13]

1. *Board Policy 3281, Inappropriate Staff Conduct, states, in relevant part, that [t]he Commissioner of Education has determined inappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member...Therefore, school staff members are advised to be concerned with such conduct which may include, but are not limited to, communications and/or publications using e-mails, text-messaging, social networking sites, or any other medium that is directed and/or available to pupils or for public display." This Policy further states that "[a] school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils."*[1] *J-2, Ex. G*

Analysis; Overview

At the core of the issue stated above was whether a 'just cause' dismissal occurred and whether the penalty was too harsh or instead, proper under the principles and precedents espoused by both parties. The overriding principle at arbitration of any disciplinary proceeding

[1] "*Note that this Policy shows that it was edited in September 2020, following the incident at issue. However, as testified to by the superintendent of schools, that the only new language is the language in bold. All other language existed in the Policy on May 29, 2020. T-1, 168:21-169:11.*"

is whether a good faith showing of just cause existed and whether it was properly enforced. Both sides' extensive post hearing briefs exhaustively explored these principles.

The issue stated above is clear, succinct and forms the basis for the underlying decision. As moving party, the School District has the burden to prove its charges against the Teacher. Taking all manner of evidence and argument by both sides into consideration, the overwhelming weight of the evidence favors sustaining the charges for dismissal.

Moreover, another sub-issue involving whether this Teacher had a constitutional [1st Amendment] right of 'free speech' to have uttered, transmitted and/or shared the referenced May 29, 2020 'post' was raised as a defense in this dispute. Counsel for each Party engaged in substantial arguments surrounding that issue. While 'free speech' contentions are important and deserving attention in many settings, the facts of this case demonstrated there were overriding considerations in issue here. This Teacher's self-imposed actions and behaviors here created highly publicized racial discord and community conflict which, in the context of her employment could not allow the 'free speech' arguments to take precedence.

Regardless of whether the Teacher had a constitutionally protected 'right' to have shared the post in question, her behavior and actions in doing so and her shifting excuses thereafter for having done this thing [whether intentionally, accidently or negligently] amounted to 'Conduct Unbecoming', for any public school 'Teacher'. Regardless of motive or intent, her lack of good judgement exhibited by allowing the 'post' to be shared was confirmed and compounded by her statements and testimony. When confronted by overwhelming evidence that the 'post' was received by numerous offended community members, this 'Teacher' was also unrepentant and unremorseful.

Notwithstanding 'how or why' the posting occurred, the Teacher's lack of remorse when confronted with probative evidence of the hundreds of negative community responses received by her and/ or the District was revealing and instructive. This unrepentant attitude was displayed during investigation and was evident during her testimony at Hearing.

The rationale for propriety in the education of the public's children is at the core of this matter. While constitutional rights of free speech are important, there was an overriding concern raised by this Teacher's posting action and subsequent behaviors after the incident which became a superseding set of factors leading to her being dismissed. Those concerns involved the effects of that behavior on this School District and the external community as well. As a result of the racially hostile posting of the Teacher, the District had lost the faith and trust in this Teacher she had accumulated over a substantial [approx. 17 years] period of time.

Moreover and of greater significance is that Teacher Coleman herself acknowledged during the investigation over the incident that, based upon the tone and content of numerous negative texts, emails and postings received, she was fearful of returning to work. "*Coleman began receiving comments and messages directed to her and/or about her, some of which were threatening in nature. See, Exhibit R-3*. [Teacher's Brief, Pg. 6]

Shared by the District, its concern over community 'outrage' was yet another factor in the rationale for its dismissal decision. "*Respondent's conduct severely damaged the reputation of the Board and has subjected it to an unremitting onslaught of public outrage*. [District Brief, Pg. 38]

Thus the factors superseding 'free speech' considerations were found to be related to the appropriate operation of a school district, public safety and the well-being of the community.

Indisputable facts established that the Teacher's version of events shifted, starting out with her assertion that her 'computer' [or, other web based device] had been hacked. Ostensibly, that defense might have supported her initial contention that she had no involvement in any way,

shape or form with the posting of the message to a social media [believed to be 'Facebook'] website. However, the Teacher thereafter changed that version or explanation for the posting.

As detailed hereunder, that 'shifting' of events allegedly causing the 'posting' to occur, changed dramatically during the disciplinary proceedings during the District's investigation of the matter. The Teacher had many opportunities to explain her version of events involving the 'posting' at varying times during those proceedings and during two (2) days of Hearing.

Despite all efforts provided by experienced and competent Counsel on her behalf, both the Teacher and a supporting witness [her adult daughter] provided little evidence to assist her or explain any version of how this Teacher was not responsible for the 'posting' to have occurred. Thus the essence of the School District's rationale for dismissal is clear.

The propriety of this Teacher's behavior is measured by such factors as trustworthiness, dependability, integrity and forthrightness. While all employers have the need to depend on every employee to be engaged in a trustworthy and dependable manner for the common good and success of any enterprise, there is an enhanced need for these factors in a public employment-relationship setting. Today's headlines are filled with stories about such requirements, and range from public safety, health and by no means the least, public education. This school district, as any other, must have unequivocal faith and trust in each and every employee, but especially those employees having direct contact with the children entrusted to its care. That faith and trust was broken in this case, by this Teacher.

Paradoxically as this Teacher had a substantial and otherwise clear record, she also had the obligation and clear duty to have thoughtfully and carefully considered the ramifications and potential result, before engaging in her 'posting' actions of May 29, 2020. The undisputed facts are clear that she did not take that care. Whether it was mistake or negligence, her actions broke

the faith and trust between her and her employer, the Roselle School District. Moreover, she displayed no remorse for her actions, instead blaming unidentified others for her actions.

Accordingly, the primary basis for the underlying decision is the effect of her behavior on the Teacher-Student and Teacher-School District relationship(s). Consistent with the indisputable facts presented, these effects extended as well to the School's external community. Further analysis below here leads to the decision at the end hereof.

Burden of Proof

Every matter involving employee disciplinary action places the burden upon the employer [here, Petitioner, Roselle School District] to prove it had just cause to take the action of dismissal including that the penalty was appropriate under the attendant circumstances. Here, the Tenured Teacher challenged that the, "*Board failed to meet its burden of proving the allegations contained in the tenure charges by a preponderance of the relevant evidence*."

The District's evidence tracked the four major 'points' (*Unbecoming Conduct and/or Other Just Cause, Including Insubordination*) outlined above, including specific sub-categories and directly related to the evidence presented at the hearing(s). As detailed hereunder, the preponderance of that evidence was met. Using the factors below here, it was persuasive that the evidence satisfied the standard of review.

Under the procedures of the Department of Education, State of New Jersey, the appointed Arbitrator must determine the weight and credibility of the evidence presented. It is conclusive and thus persuasive that the 'Unbecoming Conduct' of this Teacher was inappropriate. The District has met its burden of proof for this Tenured Teacher's dismissal.

Just Cause

Just cause required that the elements of a fair disciplinary proceeding were necessary before the final step of dismissal could be imposed by the District on the Tenured Teacher in this matter. This included a full and fair investigation of the charges and careful consideration of any mitigating and/or aggravating circumstances, which occurred.

Despite the diligence of Teacher's Counsel which assured she was well represented, the overwhelming facts herein were not in her favor. A preponderance of the evidence against her was substantially more damaging than any defenses available to her or brought.

Primarily, the Teacher's testimony was found wanting. Instead, the evidence confirmed the documentary proof of her having shared the post shared to her social media page. Her statements thereafter served to authenticate the documentary material and worse, were vague, evasive and shifting, which irreparably damaged her credibility and thus contributed to finding that the remedy of dismissal was necessary.

Teacher Coleman could not explain inconsistencies between the varying statements she proffered during investigatory interviews, including versions to explain what happened, how it happened or especially, why it happened that her internet social media account page suddenly contained an unwarranted and abusive message, deemed racially insensitive by a multitude of her school's external community members. Those failures, both in causing the post to be shared and thereafter, in compounding her rationale for doing it by vague and evasive explanations occurred during an extensive investigation and contributed to the just cause determination against this Teacher. She availed herself of representation during the investigatory process and was afforded ample opportunity to clarify [by Mr. Klein, for the District] several versions of her own account, i.e., being 'hacked' or, some other technical variation to exculpate herself from responsibility.

While the District cited customary elements of the just cause standard in its brief, arbitrators may be guided by those elements but are not bound to them as an absolute standard. In this case it has been determined and is thus persuasive that this Teacher was, by virtue of her extensive period of employment [17 years], on notice of multiple District policies prohibiting inappropriate conduct, and therefore, also to the consequences of her actions. Regardless of the content of any written policy, her acknowledgement of the overwhelming student body being black and Latino [Teacher's Brief, cited above] should have given her pause to think before 'sharing' such a message which she posted on May 29, 2020.

Other elements of just cause established by the District include that the Teachers actions caused serious disruption in the District's operations and its community relations. Further, that its need to contain the resultant disorder is reasonably related to its need for 'business efficiency' and that the detrimental consequences described hereunder did occur. Thus, the after effects cited by the District preclude the Teacher's continued service.

Thus the probative evidence demonstrates the District's investigation was full, fair and conducted in a manner that allowed the Teacher ample opportunity to demonstrate or explain her rationale for how the 'post' shared to her social media page got there. Those attempts by her instead appear as a squandered opportunity, due to the changing descriptions previously addressed. Therefore, substantial efforts were made before dismissal action was taken which determined that the Teacher was properly charged.

Accordingly, there was just cause for the charges brought against Teacher for her actions on and after May 29, 2020 relating to a racially charged statement 'shared' to her social media account and negatively commented upon by people in both her school and external community. Moreover and subsequent to the posting, the Teacher's behavior and actions in attempting to

explain what had occurred amounted to a tangled web of excuse, not reason, and included fabrication or negligent rationalization for her poor judgement.

Under the circumstances addressed, the penalty of dismissal imposed was reasonably related to the seriousness of the Teacher's 'Tenure Charges' and included consideration of her past record. Thus the District's Tenure Charges were appropriate and therefore it is persuasive that the Teacher's dismissal is proper as supporting just cause.

Conduct Unbecoming and Insubordination

The preponderance of the evidence found in this record determined this Teacher was culpable of the charge, "Conduct Unbecoming". Her fabrication of certain details and proposing shifting versions for how the content of the post came to and left from her telephone device encompassed the requisite elements necessary for the District to conclude this Teacher had engaged in behavior and conduct which it deemed as no longer trustworthy.

In addition to the internet posting of a racially insensitive message shared with the community, her behavior in compounding that action by being evasive during investigation of the posting was appropriately found to be, 'Conduct Unbecoming'. The separate charge of insubordination was less about defiance in the face of authority and more analogous to her evasive conduct in lieu of being forthcoming. Thus the characterization of the Teacher's behavior as being insubordinate was more identifiable as 'Conduct Unbecoming'.

An employee engaging in abusive communications may come under the broadest definition of insubordination but the charges and evidence of this charge do not rise to the level of typical insubordination where an employee is given a direct order and intentionally defies authority by failing to perform that specific order. Thus, insubordination is not found here.

The distinction between a justifiable communication and one that is not may occur in the context of the message as well. A simple example is in the context of someone who yells "Fire!" perhaps foolishly to raise alarm, but in an outdoor area with few people around. While such an example might be uncalled for or rude, it is not *per se* abusive. Yet the very same action of yelling "Fire!", in a darkened movie theater crowded with people is the very definition of an unwarranted and abusive communication. In the context of the present case the Teacher's posted communication was unjustified and abusive, but only as 'Conduct Unbecoming', sustained here.

The explanations offered by District witnesses regarding the effects caused by the Teacher's posting to her social media page were deemed credible as supporting the charge of Conduct Unbecoming. Each account described how the District's investigation included processing and follow-up to a multitude of telephone calls, emails and other communications by and between administrative personnel of the District and community members that included parents (and other family members) of school students. The communications received [including copies of emails made a part of the record] were overwhelmingly negative, some threatening and, directed at the continued employment of this Teacher by the District.

While the community's reaction to an internal disciplinary matter at this School District is not a determinative factor for consideration of the outcome here, the cause and effect of the posting upon the District's ability to operate efficiently, maintain order and proper decorum within its boundaries of operation are determinative. Based upon a preponderance of the evidence in this record, it is persuasive that the District's version of the cause and effect of the May 29, 2020 posting formed an appropriate rationale for it to conclude that the Teacher's actions in sharing the post and behaving evasively thereafter amounted to a finding of 'Conduct Unbecoming'

Whether or not the Teacher was attempting to exercise some perceived right to have shared this post, she ultimately took no responsibility for her actions and additionally, ignored requests to forthrightly participate in the interview process during investigation. Thus Conduct Unbecoming was charged to this Teacher and is properly within the finding of just cause.

Credibility

There was overwhelming evidence of this Teacher compounding her mistake in posting (regardless of whether deliberately done, thoughtlessly, or through negligence), by also being less than candid when questioned about her actions during the District's investigation. As a highly experienced teacher with 17 years of service including extra-curricular roles, she was constructively on notice of prohibited conduct, appropriate behaviors and in particular, the need to be forthcoming when called upon. Despite the above and being represented during these proceedings, she was less than forthcoming to her employer and evasive: "*Specifically, Respondent's version of events has changed from, the Post was accidently shared; to the Post was purposefully shared; to she was hacked; to she was cloned and mirrored; to she actually shared a different Post.*" [Board's Brief, Pg. 12]

Thus the totality of the Teacher's evidence is lacking in credibility. The arguments concerning the Teacher's evasiveness during investigation were evident, continuing as well during the Teacher's testimony before this Arbitrator. Notwithstanding the District's characterizations of her statements as 'bizarre', it is conclusive that the Teacher's credibility is lacking and thus a contributing factor in determining that just cause was present for her dismissal.

Unsupported vs. Corroborated Evidence

There is no basis for the defense that the evidence provided by the District was unsupported by the proofs. The Teacher's testimony [the changing versions regarding the

posting], coupled with that of her adult daughter (Antoinette Coleman; regarding the lengthy time period of Teacher's internet usage/ experience) contributed to a finding that the Teacher was responsible, solely, for the posting. Thus the Teacher's disingenuous attempts to distance herself from the responsibility for her actions were not supported by the Teacher's evidence.

Instead, the totality of the evidence corroborated the District's findings regarding the Teacher's culpability. Taking all manner of evidence and argument into consideration thus provided a basis for finding that the 'unbecoming conduct' described hereunder and included in the charges against this Teacher were corroborated and proven by a preponderance of the evidence presented.

Clearly established, the evidence demonstrated that the Teacher violated basic notions of the faith and trust required between every employee and employer. It should have been self-evident to any public school teacher with 17 years' experience that regardless of any 'written' rules prohibiting specific conduct, certain behaviors are proscribed by common sense. Formal notice prohibiting violence or possessing a weapon on school property are examples.

The injudiciousness of this Teacher's 'mistake in sharing' the underlying post, compounded by her poor judgment in not being forthcoming, instead being evasive about it, operated to undermine the faith and trust required between her as a Teacher and this School District. Thus the District's Tenure Charges were supported and corroborated by the evidence.

Incompetence; alleged 'Criminal Behavior'

There was no express showing of incompetence *per se*, in this matter. While arguably incompetent to have demonstrated the behavior exhibited by the Teacher under the facts here, it is not included in this opinion or otherwise affecting the decision below.

Further, despite use of the term '*criminal behavior*', as alleged by the District below, the term was never explored in greater detail nor specifically attributed to any underlying factual scenario.

As such, there is no basis for attributing any degree of 'criminal behavior' to the underlying findings, or in the decision following.

Mitigating vs Aggravating Circumstance

The Teacher's Brief contained multiple references to factors in mitigation of the charges and severity of penalty. One example requiring attention was that: "*Even if Ms. Coleman is found guilty of conduct unbecoming, the substantial mitigating evidence presented in this case militates against the imposition of severe disciplinary action.* [Teacher's Brief, Pg. 27]

While correct that 17 years of discipline-free service typically deserves consideration, the facts here circumvent that argument. Arguably, a one-time mistake in conjunction with a lengthy and otherwise discipline free record might be factors in mitigation, except for the presence of overwhelming aggravating factors. Stated hereunder, this Teacher's extensive background and experience should have served her to behave more prudently. Had she applied even a marginal degree of wisdom gained from her lengthy experience, it is likely she might have comprehended the probable consequences of sharing the post, in advance of her mistake. Failing to consider the implications of a racially insensitive internet posting to her social media page, within days after the murder of George Floyd, was an overwhelming aggravating factor in this matter, and not one to be considered in mitigation of the dismissal penalty.

Additional aggravating factors included the consequences of the posting to the School District [discussed above]. There was evidence, not refuted, that this Teacher was threatened, or felt threatened, by negative and repeated external communications from community members. The potential effect of those circumstances were additional factors cited by the District as reasons why the District felt it had no choice but to move for the Teachers dismissal. Thus these aggravating factors are also persuasive in concluding there was just cause for termination.

Perhaps more consequential to the just cause standard here was the evidence of this Teacher's total lack of remorse during the investigation and again, demonstrated at Hearing. As stated above, "*...the testimony of Respondent illustrates a lack of remorse* [which] *suggests a likelihood of future misconduct of a similar or more severe nature.*" [District Brief, Pg. 5]

Therefore it is persuasive to consider the Teacher's demonstrated lack of remorse or regret, if not to her School than to the external community and thus, as a possibility of repeat behavior. Considering all circumstances discussed, any potential for returning this Teacher to a workplace environment where the charges addressed are deemed reliable, risks a potential for ongoing and continued conduct of the same or similar nature. Therefore and without attributing mitigation, the above factors add to the finding of just cause for dismissal. Thus it is determined here that the majority of charges filed by the District were appropriate. Moreover, the penalty of dismissal is warranted under all the attendant circumstances found here.

Also argued by the Teacher but not found to be in mitigation of penalty was the contention that a dismissal in this case would have a potential negative effect upon her pension rights or future education career, including the possibility of a proceeding against her for certificate revocation. While the potential for these were considered, it is notable that this case did not involve any criminal proceedings nor was any criminal behavior established.

Furthermore, there were neither accusations nor suggestions made involving any acts of moral turpitude or inappropriate conduct toward a child at issue here. Hence, unlike a case involving mental or physical abuse toward a child (not present here) nothing in this matter suggests even a hint of moral turpitude that should cause concern for or damage to one's expectations for employment in a school setting.

The fact pattern here involves a singular incident of wrongdoing, punishable as directed.

Conclusions

In summation after careful consideration of all evidence and arguments in support thereof, it is conclusive that the Tenured Teacher was dismissed for just cause. The preponderance of the evidence warrants a finding that the majority of charges against this Teacher were proper.

At Hearing(s) in the matter, both Parties were afforded full and fair opportunity to present evidence and argument in support of their respective positions. The evidence conclusively demonstrates that on May 29, 2020, this Teacher caused a message to be 'shared' on her social media account, the content of which included an inflammatory, insensitive and racially charged statement adversely received by and commented on by hundreds of people in the community of, in and around the Roselle School District, Bergen County, NJ.

Moreover, the content of the posting was not the sole reason for the District's determining 'Charges' against her. Other factors also became the focus of this disciplinary matter.

Initially it was the Teacher's mistake in sending a message she either knew or should have considered before sending, which had the likelihood of exacerbating the sensibilities of an already raw community only days after the death of George Floyd. The second and overriding element involves the Teacher's compounding of her initial mistake by engaging in somewhat 'bizarre', but still less than forthcoming accounts regarding how the posting occurred, all discussed at length hereunder. The net result of these compounded behaviors acted to severely undermine her trustworthiness as a teacher by the School District.

Arguments and positions framed by each Party persuasively demonstrated that the District's investigation of the matter was thorough and fair. The Tenured Teacher was represented during the investigatory process and gave her version of events preceding, during and subsequent to posting.

During the investigation, the Teacher gave several versions of what led up to the posting process, initially stating that her social media account had been "hacked, cloned or mirrored", i.e., that the posting was, allegedly, not within her discretion or control.

Notwithstanding the initial disclosures, the Teacher subsequently volunteered another version of the posting process, this time declaring that the 'sharing' event had occurred accidentally, i.e., while not intending a posting yet, the post was discovered on her electronic device as showing the message had been shared. Teacher's latter rationale, during testimony, was that it was sent to her social media account by an improper keyboard manipulation or, inadvertent stroke of the keypad.

Despite the above stated versions by the Teacher, School Superintendent Dr. Fisher gave highly convincing rebuttal testimony. Dr. Fisher demonstrated using a similar internet connected telephone to the one utilized by the Teacher, and that an accidental or inadvertent 'stroke of the keypad' version was nearly impossible to achieve. Dr. Fisher demonstrated credibly that the act of sending (i.e., 'sharing' a post) involved a two-step process whereby the device's software required the user to reconsider the send command after an initial request was entered, but prior to sending.

Consequently, Dr. Fisher educated all those present in the hearing room, and convincingly to this Arbitrator that the Teacher's version of events preceding the 'sharing' or 'posting' was at best a fiction or, under a worst case scenario, a deliberate act. Thus the testimony offered by the Teacher in this regard was a vital contributing factor in assessing her credibility and, confirmed other necessary elements for finding just cause existed in the District's dismissal action.

Moreover to the above, Dr. Fisher gave convincing testimony concerning the effects upon the District when it concluded that the incident had caused serious, negative and lasting damage to the Roselle School District community environment. He emphasized the deleterious effects caused

by this Tenured Teacher having provided no plausible explanation to justify her actions and her failure to show any remorse for her hurtful behavior.

Accordingly, the Tenure charges filed against this Teacher and her subsequent removal must be sustained. The evidence is clear as detailed hereunder that all appropriate elements required for a just cause dismissal were present in this case.

Despite Teacher seeking progressive discipline as an alternative remedy, the mitigating factors necessary were not found here, as discussed. Moreover, the very fact of her extensive tenure serving in this community should have operated as an early warning for her to have first considered the consequences of her actions, before sending the 'post'.

Taking all manner of evidence, argument and positions of the Parties into full consideration here, there is clear evidence that just cause was served by the District's dismissal action.

Accordingly, the decision in this matter follows.

AWARD

The Teacher's 'Answer' to the Tenure Charges filed against her in this matter, is denied. The District had just cause to dismiss Tenured Teacher Coleman.

In view of the above, the District's imposed penalty of dismissal for this Tenured Teacher is sustained.

No other remedies apply.

Jay D. Goldstein,

Jay D. Goldstein, Arbitrator

Dated: August 30, 2021

Jenkintown, PA

179-21

179-21

OAL Dkt. No. EDU 11393-19
Agency Dkt. No. 175-7/19

New Jersey Commissioner of Education

Final Decision

Christopher Kastner,

Petitioner,

v.

Board of Education of the Borough of North Arlington, Bergen County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 1, 2021
Date of Mailing: September 1, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11393-19
AGENCY DKT. NO. 175-7/19

CHRISTOPHER KASTNER,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,
Respondent.

Joshua M. Forsman, Esq., for petitioner (Caruso, Smith, Picini, attorneys

Eric Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: July 12, 2021 Decided: July 19, 2021

BEFORE **MARGARET M. MONACO**, ALJ:

Petitioner, Christopher Kastner, filed a Petition of Appeal alleging that the Board of Education of the Borough of North Arlington (the Board) failed to comply with the due process requirements of the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13, et seq., when it determined that he engaged in conduct that constituted harassment, intimidation

or bullying (HIB). On or about August 5, 2019, the Board filed its Answer to Petition of Appeal, and the Department of Education transmitted the matter to the Office of Administrative Law, where it was filed for determination as a contested case. Prior to the hearing, petitioner filed a motion for summary decision. Subsequently, the parties amicably resolved the matter and submitted the attached Settlement Agreement and Release, indicating the terms of agreement between the parties, and the attached resolution of the Board approving the Settlement Agreement and Release.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 19, 2021
DATE

Margaret M. Monaco
MARGARET M. MONACO ALJ

Date Received at Agency: 7-21-21

Date Mailed to Parties: 7-21-21

jb

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Our File No. 87967 ELH

CHRISTOPHER KASTNER Petitioner-Appellant V. BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY Respondent.	NEW JERSEY DEPARTMENT OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF NO.: OAL DOCKET NO.: EDU 11393-2019 N **SETTLEMENT AGREEMENT AND RELEASE**

WHEREAS, Petitioner Christopher Kastner ("Petitioner"), a former employee of the North Arlington Board of Education (hereinafter "North Arlington"); and

WHEREAS, a dispute between the parties arose with regard to a Harassment, Intimidation, and Bullying (hereinafter "HIB") investigation and finding took place in or about April 2019; and

WHEREAS, Petitioner filed a Petition Appealing the HIB Determination("Petition") contending, among other things, that the Board's finding that Petitioner committed multiple

acts of HIB was in error, which Petition was assigned OAL Docket Number EDU 11393-2019 N; and

WHEREAS, the parties wish to resolve the issues raised by the Petition, and have reached an amicable resolution thereby avoiding the time and expense associated with further litigation; and

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the parties agree as follows:

1. A new HIB hearing will take place on August 10, 2021. If this Settlement Agreement is not approved by the Commissioner of Education by that date, the HIB hearing will take place at the next Board meeting following approval of this Settlement Agreement by the Commissioner of Education.
2. The parties will exchange discovery at least 30 days prior to the HIB hearing date
3. The Board shall provide, by way of discovery, to Mr. Kastner and his attorney, a true and complete copy of the investigatory file, a true and complete copy of all witness statements, a true and complete copy of the HIB report, and all other documentary evidence.
4. If following the hearing Mr. Kastner is determined not to have committed an act of HIB then the Board shall purge his personnel file of any and all correspondence,

memoranda, findings, the determination letter, reports and any other documents referencing the prior HIB determination.

5. The HIB hearing to be conducted shall proceed in compliance with *N.J.S.A.* 18A:37-15b.

6. The parties, if they so choose, may present witnesses and other documentary evidence during the remand hearing.

7. Nothing in this agreement will preclude Mr. Kastner from further appealing the Board's determination.

8. The terms of this Settlement Agreement represent the compromise of disputed claims between the parties. The Agreement will not be treated as an admission that any of the parties have engaged in any wrongdoing or that any of the parties have failed to act in accordance with the law.

9. The parties recognize and affirm that each has been represented by legal counsel and that they sign this within Settlement Agreement and Release as their own voluntary act and deed, and that they understand the duties and obligations enumerated herein. The parties further state that they are fully satisfied with the legal representation provided by their respective counsel.

10. The drafting and negotiation of this Settlement Agreement and Release have been participated in by each of the parties and their respective counsel and, for all purposes, this Settlement Agreement and Release will be deemed to have been drafted jointly by each of the parties. No ambiguity will be resolved against any party based upon authorship.

11. Neither party will be considered a prevailing party under any statute, common law, or otherwise as a result of this Settlement Agreement and Release.

12. Each party will bear their own attorney's fees, costs, expert witness fees, and/or costs of evaluations and expert reports for the entirety of any matter or matters related to the subject matter of this Settlement Agreement and Release.

13. This Settlement Agreement and Release will be subject to the laws of the State of New Jersey.

14. This Agreement is subject to approval by North Arlington Board of Education and shall have no force or effect if it is not approved by the Board.

15. This Agreement shall be submitted to the Honorable Monaco, A.L.J. as evidence of the parties' resolution of the pending dispute.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year set forth below.

NORTH ARLINGTON BOARD OF EDUCATION

CHRISTOPHER KASICH

NORTH ARLINGTON BOARD OF EDUCATION

222 Ridge Road • North Arlington, NJ 07031
Phone: (201) 991-6800 Ext. 3064 | Fax (201) 991-8226

Samantha Dembowski
School Business Administrator/Board Secretary
sdembowski@navikings.org

I, Samantha Dembowski, School Business Administrator/ Board Secretary of the North Arlington Board of Education, herby certify that the following resolution is a true excerpt of the official minutes of the July 7, 2021 Special Public Meeting of the North Arlington Board of Education.

MOTION TO APPROVE A SETTLEMENT AGREEMENT AND RELEASE.

WHEREAS, the Superintendent of Schools recommends that the North Arlington Board of Education approve a Settlement Agreement and Release (between parties whose names are on file in the Superintendent's Office.)

BE IT RESOLVED, that the North Arlington Board of Education hereby approves a Settlement Agreement and Release (between parties whose names are on file in the Superintendent's Office.)

On Motion by Mrs. Higgins, second by Mrs. Gilgallon. There was no discussion. On Roll Call four Board Members present voted in the affirmative and Mr. McDermott voted in the negative, it was so ordered.

Respectfully yours,

Samantha Dembowski

Samantha Dembowski
SD:at

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180-21
OAL Dkt. No. EDU 10103-20
Agency Dkt. No. 96-5/20

New Jersey Commissioner of Education

Final Decision

C.E., on behalf of minor child, S.E.

Petitioner,

v.

Board of Education of the City of Plainfield, Union County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In so doing, however, the Commissioner notes with respect to paragraph 5 of the Agreement that the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.* in regard to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential. The parties are also reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 1, 2021
Date of Mailing: September 1, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10103-20

AGENCY DKT. NO. 96-5/20

C.E., ON BEHALF OF MINOR CHILD, S.E.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,

Respondent.

C.E. on behalf of minor child, S.E., petitioner, pro se

Ramon E. Rivera, Esq., for respondent (Scarinci & Hollenbeck, LLC, attorneys)

Record Closed: July 28, 2021 Decided: July 29, 2021

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 20, 2020 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement and Mutual Release indicating the terms thereof. A copy of the Settlement Agreement and Mutual Release is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 29, 2021
DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: 7-30-21

Mailed to Parties: 7-30-21

/sej

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Attorneys for Respondent Plainfield Board of Education

C.E. AND F.E. ON BEHALF OF MINOR CHILD S.E.

PETITIONER, V.

CITY OF PLAINFIELD BOARD OF EDUCATION, UNION COUNTY,

RESPONDENT.

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

AGENCY DOCKET NO.: 96-5/20

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this _____ day of May 2021 between Petitioners C.E. and F.E. on behalf of minor child S.E. ("Petitioners"), and Respondent, Plainfield Board of Education ("Board") (collectively the "Parties").

WHEREAS, Petitioner S.E. is a student of the Respondent School District; and

WHEREAS, the Board is a body corporate and politic responsible for the administration and operation of the public schools in Plainfield, New Jersey; and

WHEREAS, Petitioner S.E. was involved in altercations on October 8th and 16th, 2019 ("October Incidents"), for which she was subsequently suspended; and

WHEREAS, the Parties have been engaged in certain litigation involving the October

Incidents including, inter alia, claims related to N.J.S.A. 18A:37-13 et seq., specifically a harassment, intimidation, and bullying ("HIB") investigation ("Litigation"); and

WHEREAS, the Parties, wishing to avoid the time, effort and expense of litigation and desiring to reach an equitable resolution, have reached a mutual agreement to settle the above Litigation with prejudice; and

NOW WHEREFORE, in consideration of covenants, agreements and representations contained herein, the Parties hereto, subject to the terms and conditions hereof and intending to be legally bound, hereby, agree as follows:

1. TERMS:

a) The Board will remove all references to the October Incidents from Petitioner S.E.'s file including, without limit, all references to the related suspension and discipline. b) The Board will lift the ban prohibiting Chinelta Edwards from entering Plainfield High School and property.

c) Upon request, Respondent shall provide Petitioner with a written recommendation to a specific college.

d) Petitioner shall withdraw, with prejudice, the Litigation pursuant to the terms outlined herein.

2. COMPLETE RELEASE.

In further consideration of the settlement contained herein and to the extent permitted by law, Petitioners, their heirs, assigns and agents (hereinafter referred to collectively as "Releasors") voluntarily enter into this Agreement, and certify that Releasors have not been threatened or coerced into signing this Agreement, on the terms which follow:

a) Except for the right to enforce any and all terms of this Agreement, Releasors hereby release, waive and discharge the Board, its affiliated members, agents, employees, successors and

assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, expense, compensation or action or writ of any kind,

nature, character or description that Releasors had, now have, or may in the future have against the Releasees including those that were, or that could have been, asserted in the Litigation. This complete release includes, but is not limited to, any claim, demand, cause of action, obligation, damage, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorneys' fees and costs arising from the above acts ("Complete Release").

b) Releasors shall not hereafter, seek money damages against the Board or the Releasees in any matter lodged within any Federal, State or local court or agency which has been settled herein. Nothing herein shall be construed as limiting any individual's right to file a charge of discrimination should they feel that they were a victim of unlawful discrimination.

If Releasors violate this Complete Release by filing any claim, charge or complaint on account of, or arising out of, the Litigation as prohibited herein, Releasors agree to pay all costs and expenses of defending against the suit incurred by the Board and/or the Releasees, including reasonable attorneys' fees. To the extent that any claims are not covered by complete release, the Parties agree to refer them to binding arbitration.

It is expressly understood that the arrangement herein shall not be construed to represent any policy or procedure of the Board except as may be otherwise provided herein. **3.**

NON-ADMISSION.

This Agreement is executed, and all consideration is given in, final settlement of disputed

claims related to the Litigation, and is not intended to be, nor shall it be construed as an admission of any allegation, or of liability, by the Parties. Any such obligation or liability is expressly denied by the Board.

4. NO DISPARAGING STATEMENTS.

Petitioners agree that they will not make any statement(s) whether verbal or in writing, or cause or induce others to make any statement(s), relating to the subject matter of this Litigation that has, have or can be expected to have the effect of disparaging the Board or any of its representatives, agents and employees.

5. CONFIDENTIALITY

Petitioners shall keep the terms and conditions of this Agreement completely and strictly confidential, unless the disclosure is mandated by a court order, subpoena, or enforcement of this Agreement. Neither the terms or conditions of this Agreement nor the fact of its existence shall be disclosed by the Parties to any person or entity, legal or natural, except for members of Petitioners' attorneys, if any.

6. STIPULATION OF DISMISSAL WITH PREJUDICE.

Within five (5) days of receipt of the execution of this Agreement by all parties, the Board's counsel shall provide Petitioners with a stipulation of dismissal, with prejudice. Petitioners agree to execute and return to the Board's counsel such stipulation within five (5) days of receipt of same. The Board's counsel shall thereafter promptly file the stipulation with the Court on notice to Petitioner.

7. NON-ADMISSION OF LIABILITY.

The execution of this Agreement and the settlement made hereunder shall not be construed as

an admission of liability by any party in the Litigation. Nor is this document admissible as evidence in any proceeding other than for enforcement of the provisions of this Agreement.

8. CONSULTATION WITH ATTORNEY.

Petitioners, proceeding in this Litigation *pro se*, represent and warrant that they had the opportunity to consult with an attorney with respect to this Agreement.

9. COMPLETE AGREEMENT.

This Agreement contains the entire agreement between Petitioners and the Board, and each of them, with respect to the subject matter and supersedes all prior agreements or understandings dealing with the same subject matter. There is no agreement on the part of the Board to do anything other than as is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced, and governed by the Laws of the State of New Jersey without respect to conflict of law principles.

10. MODIFICATION.

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the Party or Parties to be charged.

11. SEVERABILITY.

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not to be a part of this Agreement.

12. PETITIONERS ATTEST.

Petitioners represent and warrant that they have carefully read each and every provision of this Agreement and that they fully understand all of the terms and conditions contained in each provision of this Agreement. Petitioner represents and warrants that they enter into this Agreement voluntarily, of their own free will, without any pressure or coercion from any person or entity including, but not limited to, the Board and the Releasees.

13. GOVERNING LAW.

This Agreement and all provisions hereof shall be governed by, and construed under, the laws of the State of New Jersey.

14. EFFECTIVE UPON APPROVAL OF THE PLAINFIELD BOARD OF EDUCATION.

This Agreement is subject to the final approval of the Board of Education and will only become effective upon the final approval of the Board of Education. Any disapproval by the Board of Education shall not interfere with the rights of either party to pursue this matter. **NOW THEREFORE,** the Parties sign below, intending to be legally bound hereby.

Board of Education of the City of Plainfield

By: Diane Mitchell 7/27/21
Dr. Diana L. Mitchell, Superintendent

C.E. ON BEHALF OF MINOR CHILD S.E.

By: Chinelta Edwards
Chinelta Edwards

F.E. ON BEHALF OF MINOR CHILD S.E.

By: *Frank Edwards*
Frank Edwards

Dated: May 25, 2021

181-21

181-21

New Jersey Commissioner of Education

Final Decision

J.L., on behalf of minor child, J.L.,

Petitioner,

v.

Board of Education of the Upper Freehold Regional School District, Monmouth County,

Respondent.

Synopsis

Pro se petitioner filed an appeal on behalf of his son, J.L., challenging the respondent Board's removal of J.L. from three national honor societies following a finding that J.L. had committed plagiarism on a homework assignment in October 2020. Petitioner sought immediate reinstatement via a motion for emergent relief, which was denied in April 2021. The underlying petition remained pending before the OAL.

The ALJ found, *inter alia*, that: subsequent to the denial of emergent relief, both parties participated in a telephone prehearing conference on May 6, 2021, during which the parties agreed to a schedule for prehearing discovery; that schedule was subsequently adopted pursuant to *N.J.A.C.* 1:1-10.4; under the schedule, the respondent was to serve discovery requests on the petitioner no later than May 7, 2021, and the petitioner was to respond to those requests no later than May 21, 2021, but failed to do so; in a subsequent telephone conference, petitioner indicated that he no longer wished to pursue this matter and provide discovery to the Board, but he did not want to withdraw either; the Board indicated that they would file a motion to dismiss based on petitioner's failure to provide discovery. The ALJ concluded that the petitioner effectively abandoned his claim in this matter; further, petitioner's refusal to provide discovery impaired the respondent's ability to properly prepare and present a defense to the petitioner's claims, and such conduct justifies dismissal of the petition due to these procedural deficiencies. Accordingly, the ALJ granted the Board's motion to dismiss with prejudice.

Upon review, the Commissioner concurred with the ALJ's determination that the petition of appeal should be dismissed due to petitioner's failure to respond to the Board's discovery requests. Accordingly, the Board's motion to dismiss was granted, and the petition of appeal was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

181-21

OAL Dkt. No. EDU 02939-21
Agency Dkt. No. 37-3/21

New Jersey Commissioner of Education

Final Decision

J.L., on behalf of minor child, J.L.,

Petitioner,

v.

Board of Education of the Upper Freehold Regional School District, Monmouth County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge that the petition of appeal should be dismissed due to petitioner's failure to respond to the Board's discovery requests.[1] Accordingly, the Board's motion to dismiss is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelina Allen McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 1, 2021
Date of Mailing: September 1, 2021

[1] The Commissioner also notes that petitioner's child turned 18 following the filing of the petition of appeal. Once the child has reached the age of majority, any claim is his – and not petitioner's – to pursue. *See N.J.A.C.* 6A:3-1.3(a)(2). The record does not include any authorization from petitioner's child permitting petitioner to pursue this matter on the child's behalf.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENT'S
MOTION TO DISMISS
OAL DKT. NO. EDU 02939-21
AGENCY DKT. NO. 37-3/21

J.L. ON BEHALF OF
MINOR CHILD J.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
UPPER FREEHOLD REGIONAL SCHOOL
DISTRICT, MONMOUTH COUNTY,
Respondent.

J.L., petitioner, pro se

Patrick J. Madden, Esq., for respondent (Madden & Madden, P.C., attorneys)

Record Closed: June 29, 2021 Decided: July 27, 2021

BEFORE **DAVID M. FRITCH, ALJ**:

STATEMENT OF THE CASE

The petitioner, on behalf of his son, J.L., initiated the present action by filing a pro se petition of appeal with the State of New Jersey Department of Education,

seeking relief on an emergent basis against respondent, the Board of Education of Upper Freehold Regional School (BOEUFRS), seeking immediate reinstatement of his son into three national honor societies following the respondent's removal of J.L. from these honor societies upon finding J.L. committed plagiarism on a homework assignment he submitted in October 2020.

PROCEDURAL HISTORY

The petition for emergent relief was received by the New Jersey Department of Education on March 4, 2021. The matter was transferred to the Office of Administrative Law (OAL), where it was filed on March 30, 2021. N.J.S.A. 52:14F-5(e), (f), and (g) and N.J.A.C. 1:6A-1 through 18.5. The emergent relief motion was heard on April 5, 2021, and the motion was denied in a recommended order dated April 6, 2021. That recommended order denying emergent relief was adopted by the New Jersey Commissioner of Education in an order dated April 27, 2021.

Following the denial of emergent relief, the underlying petition to appeal BOEUFRS' action remained pending before the OAL. A telephone prehearing conference was held with the parties on May 6, 2021, where the parties agreed to a schedule for prehearing discovery which required the respondent to serve discovery requests on the petitioner by May 7, 2021, and for the petitioner to provide responses to the respondent's discovery requests by May 21, 2021. At the request of the respondent, a subsequent telephone prehearing conference was held with the parties on June 4, 2021, to address discovery issues. At that conference, the respondent indicated that it had not received discovery responses from the petitioner. The petitioner did not deny failing to respond to the respondent's discovery requests and indicated that he may not wish to proceed further with the matter but did not wish to withdraw his petition at that time. The respondent indicated that, if the petitioner did not withdraw his petition, it would be filing the present motion to dismiss the petition. On June 9, 2021, the respondent filed the present motion to dismiss the petition for failure to respond to discovery. The motion was served on the petitioner via mail and email on June 9, 2021. The petitioner filed opposition to the respondent's motion on June 23,

2021. The respondent filed a reply brief in further support of their motion on June 29, 2021, and the record on the motion closed on that date.[1]

FACTUAL DISCUSSION

A summary of the pertinent facts is undisputed and largely procedural, and I **FIND** the following **FACTS**:

1. The petitioner's motion for emergent relief was denied on April 6, 2021. Following denial of his emergent relief motion, both parties to this matter participated in a telephone prehearing conference with the undersigned on May 6, 2021.

2. During the telephone prehearing conference on May 6, 2021, the parties agreed to a schedule for prehearing discovery which was subsequently established by the undersigned pursuant to N.J.A.C. 1:1-10.4.

   a. Under that schedule, the respondent was to serve discovery requests on the petitioner no later than May 7, 2021, and the petitioner was to respond to those requests no later than May 21, 2021. (Madden Cert. at ¶ 3.)

   b. Consistent with this schedule, the respondent served discovery requests on the petitioner on May 7, 2021. (Id. at ¶ 4. See also id. at Ex. 2.)

3. The respondent did not receive a response to its discovery requests from the petitioner. (Id. at ¶ 5.) Counsel for the respondent contacted the petitioner on May 25, 2021, to address the petitioner's failure to respond to the outstanding discovery requests. (Id. at ¶ 6. See also id. at Ex. 3.)

4. The respondent is not delinquent in any of its discovery obligations. (Id. at ¶ 15.)

[1] Although, pursuant to the provisions of N.J.A.C. 1:1-12.2(b), the petitioner's response was due no later than ten days after receipt of the moving papers, which would have been June 21, 2021, the respondent did not object to receipt of the petitioner's untimely response to their motion, and filed a reply brief in further support of their motion on June 29, 2021.

5. On May 25, 2021, the respondent contacted the undersigned to request a telephone conference to address the discovery issues pursuant to N.J.A.C. 1:1-10.4(d). (Id. at Ex. 1.)

6. On June 4, 2021, a telephonic status conference was held with the parties. (Id. at ¶ 10.) During that conference, the petitioner did not contest the claim that he had not responded to the respondent's discovery requests nor did he file any timely objections to the respondent's discovery requests with the OAL pursuant to N.J.A.C. 1:1-10.4(d). The petitioner indicated that he did not wish to further pursue this matter and provide discovery responses to the respondent, however, he did not want to withdraw the matter either. (See Pet. Resp. (stating "at this time there is really no point in moving forward with this matter").) On that conference, the respondent indicated that it wanted to file a motion to dismiss the petition due to the petitioner's failure to respond to discovery. (Madden Cert. at ¶ 11.)

LEGAL DISCUSSION

Discovery requests must be responded to within fifteen days of notice and service, and discovery must be completed no later than ten days before the first scheduled evidentiary hearing or by such date ordered by the judge. N.J.A.C. 1:1-10.4. Here, the respondent served discovery requests on the petitioner on May 7, 2021. (Madden Cert. at ¶ 4. See also id. at Ex. 2.) It is factually undisputed that these requests were not responded to in a timely manner, which is the basis for the present motion. While the petitioner, in his response brief, attempts to characterize the respondent's discovery requests as "a mountain of discovery which had nothing at all to do with proving or denying whether [the respondent was] right or wrong" (Pet. Resp. Br.), it is undisputed that the petitioner did not file any timely objections to the respondent's discovery requests within ten days of receiving them as required by N.J.A.C. 1:1-10.4(d). To raise such vague objections in their response to the present motion is untimely and justifies denying the petitioner's present objections to the respondent's discovery requests. Id.

An ALJ may dismiss a petition for a party's failure to comply with procedural requirements under N.J.A.C. 1:1-14.14(a)(1). J.G. v. Paramus Bd. of Educ., 2008 U.S. Dist. LEXIS 30030, *9 (D.N.J. April 11, 2008). While dismissal should be imposed sparingly in the case of discovery rule violations, it is nonetheless appropriate where a party's "ability to defend his case is seriously impaired." Zaccardi v. Becker, 88 N.J. 245, 253 (1982). In his petition seeking emergent relief on this matter, the petitioner made a number of factual assertions including a claim that there were other students in J.L.'s class who committed offenses "much more severe and worse" but were allowed to join the school's honor societies. (Id.) The petition further asserted that the respondent's actions placed J.L.'s "total academic future in peril," as J.L. was seeking "to go to an Ivy League School or other prestigious university next year" and that if the respondent's actions were not reversed, the outcome would "affect that as well as future scholarships, internships, jobs, etc." (Pet. Statement of Facts to Accompany Pro Se Petition of Appeal. See also Madden Cert. at ¶ 18.) The petition also assures that the petitioner "can supply documentation to back up" the claims made in the petition. (Id.) Among the discovery sought by the respondent was information regarding the petitioner's college admissions and scholarships applied to. (Id.) In the absence of the petitioner's discovery responses, the respondent claims that it "cannot adequately address the factual bases of the [petitioner's p]etition." (Id. at ¶ 19.) The respondent further avers that it is "prejudiced by [the p]etitioner's failure to respond to discovery. (Id. at ¶ 17.)

As the underlying charges of plagiarism and violation of the school's Code of Conduct and Honor Code are not factually disputed in this matter (see April 6, 2021, Order Dismissing Petition for Emergent Relief at 5), the crux of the petitioner's case is that the respondent's actions in response to these violations were "inconsistent, discriminatory, and FAR TOO EXCESSIVE." (Pet. Statement of Facts to Accompany Pro Se Petition of Appeal (emphasis in original).) The discovery being sought in this matter is directly relevant to the petitioner's claims and the respondent's ability to form a defense to those claims. It is uncontested that the petitioner failed to answer the respondent's discovery requests and, based upon the petitioner's representations during the June 4, 2021, telephonic status conference, and in his subsequent response

to the respondent's motion, it is clear that the petitioner's failure to respond to the respondent's discovery requests is not a mere oversight or neglect. Savoia v. F.W. Woolworth Co., 88 N.J. Super. 153, 160 (App. Div. 1965). (See Pet. Response Br. (acknowledging failure to respond to "a mountain of discovery" from respondent and that "a dismissal may be warranted" but seeking dismissal of matter without prejudice).) I **CONCLUDE**, therefore, that the petitioner has effectively abandoned his claim in this matter. Such dilatory conduct from the party who initiated the claim as an emergent matter constitutes behavior that "thwarts persistent efforts to obtain the necessary facts" and justifies a claim's dismissal with prejudice. Abtrax Pharmaceuticals, Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 515-16 (1995). I **FURTHER CONCLUDE** that the petitioner's refusal to provide discovery in this matter impairs the respondent's ability to properly prepare and present a defense to the petitioner's claims, and such conduct justifies dismissal of the petition due to these procedural deficiencies. J.G., 2008 U.S. Dist. LEXIS 30030 at *11. See also H.F. obo Minor Child D.F. v. Bd. of Educ. of Teaneck, Bergen County, EDU 20234-15, Initial Decision, (September 28, 2016) http://lawlibrary.rutgers.edu/oal/search.html.

ORDER

Based on the foregoing, the respondent's motion to dismiss the petition is **GRANTED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 27, 2021
DATE

DAVID M. FRITCH, ALJ

Date Received at Agency: July 27, 2021

Date Mailed to Parties: July 27, 2021

/dw

184-21

ARBITRATION PROCEEDINGS
BEFORE ARBITRATOR GARY T. KENDELLEN

In the Matter of the Tenure Hearing Gregory Janicki School District of the Township of Washington, Gloucester County Agency Docket No. 52-2/20	**ARBITRATOR'S OPINION AND AWARD**

COUNSEL:

For the District	Joseph F. Betley, Esq. Capehart Scatchard, P.A.
For Gregory Janicki:	Matthew B. Wieliczko, Esq. Zeller & Wieliczko, LLP

INTRODUCTION

On February 3, 2020, the School District of the Town of Washington, Gloucester County, ("the District") served Gregory Janicki ("Respondent" or "Janicki"), a tenured Music Teacher in the District at its High School, with Tenure Charges ("Tenure Charges" or "T/C") and a Statement of Evidence alleging eight counts of unbecoming conduct and other just cause in accordance with N.J.S.A. 18A:6-10. On February 21, 2020, Janicki served upon the District a Written Response to the Tenure Charges, a certified Statement of Position and a certified Statement of Evidence. On February 26, 2020, the District filed with the Commissioner a Certificate of Determination crediting the evidence in support of the Tenure Charges and suspended Janicki for 120 days with pay in accordance with N.J.S.A. 18A:6-14.[1] On March 12, 2020, Janicki filed with the Commissioner a Written Response to the Tenure Charges, along with his Statement of Position and Statement of Evidence.

On March 20, 2020, the Undersigned contacted counsel for the District and Janicki and advised that on March 17, he had been referred the instant matter by the Commissioner's Office of Controversies and Disputes ("Office") and convened a conference call on April 3 to discuss

[1] Since the expiration of Janicki's 120 day suspension with pay, he has been and continues to be on a suspension with pay.

procedural issues including the impact of New Jersey Governor Phil Murphy's executive stay at home order due to the Covid-19 health crisis.

On July 24, 2020, Janicki produced his responses to the District's Interrogatories and served his Request to the District for Answers to his Interrogatories.

Various pre-hearing motions were filed by the parties, including motions by Janicki to preclude the District from presenting Washington Township Education Association ("WTEA") representatives as witnesses; to preclude the District from supplementing its evidence with an April 1, 2020 grievance arbitration decision by Arbitrator Arnold H. Zudick ("Zudick Award");[2] and to quash the balance of a subpoena issued by the District seeking certain evidence from Janicki, including recordings made by him.

On August 24, 2020, the Undersigned issued his Determinations of these Pre-Hearing Disputes. The parties and the Undersigned also returned to their attempts to schedule Hearing dates in the context of Covid-19 and its impact upon the Hearing process. During these efforts, Janicki sought to have the proceeding delayed until such time as an in-person hearing could be safely conducted and objected to remote Hearings; on September 25, 2020 the Undersigned issued his Response and Determinations to Reject Janicki's Demand to Hold In-Person Hearings. Thereafter, Janicki sought relief under the Family First Coronavirus Response Act (FFCRA) as to the scheduling of particular Hearing dates; on October 14, 2020, the Undersigned issued his Determination Re: Janicki's employee status under the FFCRA.

Hearings

On October 16 and 19, 2020, the Undersigned issued Orders and Notices of Hearings by Zoom remote videoconference.

On October 20, 2020, Janicki produced his List of Potential Witnesses with Summaries of their Testimony, along with evidence that may be relied upon at the time of the arbitration hearing.[3]

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[2] I.e., after the Commissioner had forwarded this matter for arbitration and the District had forwarded Janicki its Statement of Evidence.

[3] Produced separately via email on October 23, 2020 to District counsel and the Arbitrator, but within the 10 day timeframe as provided by N.J.S.A. 18A:6-17.1(b)(3), was the audio file of the January 21, 2020 voicemail message of Superintendent Bollendorf to Respondent Janicki.

Thereafter, Janicki sought that the Zoom Hearings be public and the District asserted the preclusive nature of the Zudick Award, subjects that on December 1, 2020, the Undersigned resolved in his Determinations thereon.

Following the Covid-19 related delays, and because of Covid-19, remote Hearings were held via Zoom on November 6, 12, and 13 and December 2, 9, 11, and 15, 2020. Thereafter, additional scheduled hearing dates of January 21 and 28, 2021 were adjourned because the District filed Amended/Supplemental Tenure Charges.

The Amended/Supplemental Tenure Charges

On December 21, 2020, the District certified Amended/Supplemental Tenure Charges, and transmitted them to the Commissioner. On December 28, the Commissioner's Office issued a Notice of Filing of Amended/Supplemental Tenure Charges in Agency Dkt. No. 256-12/20 ("A/STC 256-12/20"). On January 11, 2021, Janicki filed a Motion to Dismiss the Amended/Supplemental Tenure Charges (MTD) in A/STC 256-12/20 and on February 8, the Office referred the amended charges and pending MTD in A/STC 256-12/20 to the Undersigned; it further advised the parties that following receipt of Janicki's MTD in A/STC 256-12/20, the District's filing in A/STC 256-12/20 had been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to the Undersigned's decision on the MTD therein. On March 25, 2021, the Undersigned granted Janicki's MTD in A/STC 256-12/20.

Court Order

On February 12, 2021, based upon an earlier filing by the District of a Verified Complaint and Order to Show Cause in the Superior Court of New Jersey Chancery Division,[4] Judge Robert Becker, J.S.C., issued an Order to Confirm Arbitration Award (Court Order) in which the Judge (1) granted the District's application to confirm the Zudick Award; (2) precluded Janicki from repudiating, rejecting, disclaiming, renouncing, contesting and/or challenging the factual findings, credible findings and determination of just cause in Arbitrator Zudick's Award, either through direct examination, cross examination, offering of documentary evidence or arguments of counsel, in the pending tenure arbitration hearing or any other subsequent administrative, judicial or

[4] *"The Washington Township Board of Education v. The Washington Township Education Association and Gregory Janicki, Docket No. GLO-C-55-20."*

arbitration proceedings;[5] and (3) ordered the Undersigned to give preclusive effect to the Zudick Award in the instant proceeding.

Resumed Hearings in T/C 52-2/20 and Post-Hearing

The tenure hearings in T/C 52-2/20 resumed on May 12, 2021 for presentation of Janicki's case therein, at which Hearing he reported his decision not to testify. Accordingly, the Hearing herein closed.

On May 27, 2021, the Undersigned issued his Determination of the parties' dispute regarding tape recordings assertedly made by Mr. Janicki that the District had subpoenaed.

Briefs were submitted by the parties on July 2, 2021.[6] Therein, the District asserts that Janicki was guilty of all of the Tenure Charges it filed against him and should be dismissed, whereas Janicki asserts that the Tenure Charges must be dismissed because the District failed to meet its burden of proving just cause for any discipline and, even if the underlying allegations were proven, the penalty of removal from his tenured position was disproportionate to the alleged conduct.

INITIAL CONSIDERATIONS

District Contentions

Impact of Court Order

As the Undersigned reported in Fn. 5, the District accompanied its brief with Appendix I in which it listed "Items to be stricken from the record pursuant to Judge Becker's February 16, 2021, Order." Accordingly, in the District's brief, it first asserts that based upon the Court Order, significant portions of the record, particularly the cross examination of certain Board witnesses,

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[5] In connection therewith, the District accompanied its brief herein with an Appendix I in which it listed "Items to be stricken from the record pursuant to Judge Becker's February 16, 2021 Order."

[6] On July 27, 2021, the District submitted a Reply Letter in which it provided a report on a post-brief case, Kluge v. Brownsburg Community School Corp., 2021 U.S. Dist. LEXIS 129122 (D. In., July 12, 2021) ("Kluge"), that it considers relevant to its tenure charges. The District also requested the Undersigned's leave to offer a response to three points of concern it had with Janicki's brief and Statement of Material Facts.
On July 28, Janicki objected to the District's Reply Letter, arguing that it should not be considered in that the parties' agreement reached at Hearing and the Undersigned's directive issued concerning post hearing submissions were that the issue of reply briefs was to be addressed by the Undersigned, if requested by the parties and deemed necessary by him, whereas the District's Reply Letter brief was unilaterally submitted without leave.
The Undersigned finds, in accord with Janicki's argument, that the District's Reply Letter was submitted in the absence of the District obtaining the Undersigned's determination that the parties would be permitted to file post-brief replies. Accordingly, the District's Reply Letter will not be considered herein.

and certain documents offered into evidence or otherwise filed by Janicki, must be stricken in that he is prohibited from "repudiating, rejecting, disclaiming, renouncing, contesting and/or challenging the factual findings, credible findings" rendered in the Zudick Award. Therefore, the District further asserts, Janicki cannot challenge the factual underpinnings of his own prior discipline and the findings made by arbitrator Zudick when that discipline was put before him, nor can Janicki's counsel conduct much of the cross examination in which he engaged because they were all prohibited under the Court Order. As a result, the District argues, the Undersigned must give those portions of the cross examination, and of the evidence, pleadings, and exhibits, no probative weight and strike them from the record, as well as give preclusive effect to the Zudick Award. To wit, the District notes, Janicki's counsel devoted significant portions of his cross examination on issues covered in the Zudick Award, including the March 2016 reprimand letter issued by Business Administrator/Board Secretary Margaret Meehan; Janicki's April, 2019 failure to attend the Gay Straight Alliance[7] ("GSA") faculty meetings; and the live-shooter (lock-down) drill in June 2019 during the testimony of Principal Jonathan Strout, Assistant Principal John Savarese and Superintendent Joseph Bollendorf - all of which were matters already resolved against Janicki in the Zudick Award. In addition, the District further argues, Janicki attempted to put documents into the record that he believed vindicated his actions and made statements in his responses to the Tenure Charges that contradict findings in the Zudick Award, all of which the Court Order has since prohibited him from doing. As a result, the District asserts, the Undersigned must give those portions of the cross examination, and of the evidence, pleadings, and exhibits, no probative weight and strike them from the record.

Impact of Janicki's Refusal to Testify

The District next argues that Janicki's refusal to testify or present any witnesses on his behalf in support of his case is fatal to his defense to the Tenure Charges or to any claim to a lesser penalty. The District points out that Janicki acknowledged under oath on the last day of the hearing that he understood that the Undersigned will make credibility judgments and assess the testimony of the District's witnesses and proofs without having the ability to hear from Janicki. Accordingly, the District argues, in circumstances in which the employee and/or union has called no witnesses in defense, arbitrators have upheld the disciplinary action based on the employer

[7] A District-recognized student group at the High School

simply making out a *prima facie* case to support the discipline, shifting the burden to the accused employee to rebut the employer's proofs. If unsuccessful in this rebuttal, the disciplined employee must accept the consequences. Here, the District argues, Janicki knowingly accepted the risk of his decision.

Accordingly, the District argues, given the decision by Janicki not to testify in his own defense nor present any witnesses in rebuttal of the Tenure Charges, as well as the appropriateness of the penalty, the documentary evidence and testimony presented by the Board's witnesses are unrefuted and establish just cause for Mr. Janicki's termination as a tenured teacher. The District asserts it has not only met its burden of establishing a *prima facie* case in support of all eight of the Tenure Charges by a preponderance of the evidence, but has also shown that Janicki has continuously engaged in unprofessional and discriminatory behavior and, moreover, shows no evidence of interest of changing his intolerant attitude toward gay and transgender students and colleagues.

The District next argues that Janicki's failure to present testimony in support of his case has a further negative impact on his defense: there is nothing in the record to support the assertions and denials that Mr. Janicki made in his Statement of Position in response to the Tenure Charges, and in his Statement of Evidence with exhibits, and that the entire Statement of Position is inadmissible hearsay, since the representations are coming from a piece of paper and not from a witness testifying at the hearing with the opportunity to judge credibility, and whose perception, memory and truthfulness as to the document cannot be tested and who has not offered testimony about the documents he provided as attachments to his Statement of Evidence; more importantly, has provided it no opportunity to cross examine him about said documents and the denials asserted therein. Further, the District argues, absent any testimony from Janicki, the claims in his Statement of Position amount to nothing more than bald assertions wholly lacking in probative value, denials the District asserts that should not be considered by the Undersigned.

Janicki's Comments

The Undersigned notes that in the Statement of Facts and the Brief filed by counsel for Janicki, much reliance was placed upon, *inter alia* (1) disputing events and testimony relating to matters covered by the Zudick Award and (2) Janicki's statements in his February 21, 2020 sworn Statement of Position and sworn Statement of Evidence with related Exhibits.

In addition, the Undersigned further notes, in the Brief filed by counsel for Janicki, he noted that the Court Order arose from a proceeding in which the WTEA and he had prepared and filed a motion to dismiss the District's Verified Complaint and Order to Show Cause and after oral argument by the parties, after which a motion for reconsideration of that Order was filed by counsel, that was denied. As recited by counsel for Janicki, the Court Order precluded Janicki from challenging the factual findings, credibility determinations, and determination of just cause of the Zudick Award.

Zudick Award

In Arbitrator Zudick's Award, he found that the District had just cause to withhold Janicki's 2019 increment because Janicki:

- was disciplined in Ms. Meehan's March 2016 letter of reprimand for conduct that included animus towards LGBTQ[8] students;
- skipped the April 2, 2019 faculty meeting that included a presentation from the GSA student club on LGBTQ topics;
- walked out of a make-up meeting on April 4, 2019, for the portion of the meeting delivered by an administrator that dealt with a LGBTQ presentation;
- showed lack of respect for LGBTQ rights in the April 2019 events that was directly related to Ms. Meehan's March 2016 letter of reprimand and in sync with progressive discipline;
- ignored Mr. Bollendorf's request to submit a written acknowledgement of his obligation as a public school teacher to attend all training sessions, no matter what the content, and respect LGBTQ students and staff; and
- was untruthful with Mr. Strout and Mr. Saverase regarding his instructions to his students during the lockdown drill on June 6, 2019

Arbitrator Zudick also found Mr. Bollendorf and Mr. Strout to be credible witnesses under their direct and cross examinations.

Discussion and Determination

The Undersigned finds valid the District's arguments that, as a consequence of the Court's Order to Janicki, he was required to not challenge the factual underpinnings of his prior discipline and the findings made when that discipline was put before arbitrator Zudick, as well as

[8] Lesbian, Gay, Bi-Sexual, Transgender, Queer/Questioning

not make use of the related cross examination herein, because both were prohibited under the Court Order which clearly prohibited him from "repudiating, rejecting, disclaiming, renouncing, contesting and/or challenging the factual and credible findings in the Zudick Award." In that regard, the Undersigned notes that the Court Order arose from a proceeding in which Janicki participated and argued and, following the issuance of the Order, in which he filed a motion for reconsideration of the Order, that was denied.

In those regards, the Undersigned further notes that in Janicki's Brief, he notes all of the above-described information without offering a position or argument as to the impact of the Order upon this proceeding. Therefore, in the absence of any argument by Janicki against the application of the Order in the manner sought by the District, the Undersigned grants the District's request to apply the Court Order to the record evidence herein. As a result, the Undersigned shall not consider any materials presented in Janicki's Statement of Facts and his Brief as to matters determined in the Zudick Award.

In addition, as to other issues raised in Janicki's Statement of Facts and his Brief, in view of his decision not to testify herein, the Undersigned shall consider the materials presented in his Statement of Facts and his Brief that rely upon his Statement of Evidence or his Statement of Position from the perspectives of the absence of testimony by him and the facts that there is nothing in the record evidence herein to support the assertions, denials or other pronouncements in his Statement of Position in response to the Tenure Charges or in his Statement of Evidence with exhibits and that his submissions therein have not been tested by his testimony as to such or by the District having an opportunity to cross examine him regarding his testimony or his submissions.

THE TENURE CHARGES

In the District's brief, it summarized its eight Tenure Charges[9] as follows:

> CHARGE 1 - DISTRIBUTION OF DOCUMENT #3[10] IN THE WORKPLACE ON OCTOBER 15, 2019
>
> CHARGE 2 - EXHIBITING A CONTINUOUS PATTERN OF INTOLERANCE AND/OR ANTAGONISM TOWARD INDIVIDUALS BASED ON THEIR SEXUAL ORIENTATION AS WELL AS GENDER IDENTITY OR EXPRESSION
>
> CHARGE 3 - INTENTIONAL MISREPRESENTATIONS TO ADMINISTRATION DURING INVESTIGATIVE INTERVIEWS
>
> CHARGE 4 - DEFIANCE AND NON-COOPERATION IN LEGITIMATE ADMINISTRATIVE INVESTIGATIONS
>
> CHARGE 5 - ILLEGAL TAPING OF PRIVATE CONVERSATION AMONG ADMINISTRATION AND COUNSEL
>
> CHARGE 6 - RETALIATION AND INTIMIDATION OF WITNESSES
>
> CHARGE 7 - POSTING RELIGIOUS REFERENCES IN LESSON PLANS
>
> CHARGE 8 - COMMENTS TO STUDENTS

TENURE CHARGES 1 AND 2

District's Evidence and Arguments

The District describes its Charge 1 as alleging that on October 15, 2019, Janicki surreptitiously and without authority placed Document #3 in the 11-12 Main Office of the High School in which he taught, next to the frequently visited and highly accessible teacher sign in sheet, creating the false impression that it was an official District handout.

Charge 2 incorporates the events set forth in Charge 1, the District reports, as part of an alleged continuous pattern of intolerance and/or antagonism toward the rights of LGBTQ individuals by Janicki, combined with not being able to separate his personal religious beliefs from his duties as a public school teacher. The District notes further that Charge 2 also references the

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[9] The District, of course, described each Charge more fully, along with the District's Preliminary Statement and Statement of Facts in support of Tenure Charges, when it provided the Tenure Charges to Janicki and forwarded them to the Commissioner.

[10] Document #3 is a document regarding which Janicki denied involvement throughout these proceedings. As to the document itself, the parties stipulated to its conflict with the District's policies and the inappropriateness of both its and presence and its title within the District's premises, as well as to the exclusion from this proceeding of its title because of its provocative nature. Accordingly, the document was designated as Document #3 throughout this proceeding and will be solely described as such by the Undersigned herein.

previous disciplinary actions taken against Janicki - the March 2016 Meehan letter of reprimand and the increment withholding based in part on not attending the April 2019 GSA faculty meetings dealing with LGBTQ issues, as well as his failure to reaffirm in writing his commitment to attend mandatory training on LGBTQ issues, as described in the Zudick Award, upon which the District relies as support for its assertions.

In that regard, the District notes the Zudick Award's description of Janicki being disciplined in Ms. Meehan's March 2016 letter of reprimand for conduct that included animus towards LGBTQ students; skipping the April 2, 2019 faculty meeting that included a presentation from the GSA student club on LGBTQ topics; walking out of a make-up meeting on April 4, 2019, for the portion of the meeting delivered by an administrator that dealt with the LGBTQ presentation; and ignoring Mr. Bollendorf's request to submit a written acknowledgement of his obligation as a public school teacher to attend all training sessions, no matter what the content, and respect LGBTQ students and staff, all of which Arbitrator Zudick found to be a direct line in progressive discipline and that Janicki did not "get the message" regarding his professional duty to respect the LGBTQ rights of students and staff.

The District asserts that in October 2019, just months after Janicki's increment withholding was put in place, he answered Arbitrator Zudick's question - whether Janicki had gotten the message - when his actions centered on Document #3, and other material it asserts he introduced into the workplace, climaxed his pattern and caused the last step of progressive discipline in the Tenure Charges.

Tenure Charge 1

Regarding Charge 1, the District asserts that it has proven it by a preponderance of the evidence through the testimony of High School Executive Principal Jonathan Strout, Business Administrator/District Affirmative Action Officer Janine Wechter, and Superintendent Joseph Bollendorf, as well as the surveillance videos of the High School 11-12 Main Office incident on October 15-16, 2019, which show that Document #3 was placed on the counter by Janicki at 2:37 pm on October 15 and that on the morning of October 16, starting at 6:13 am, when staff started to come in, Document #3 was uncovered. The District asserts that the videos depict a premeditated, deliberate plan by Janicki to furtively leave copies of the Document #3

article in the 11-12 Main Office for staff to see and hopefully take and mistakenly think it was an official District communication.

In that regard, the District asserts, first, that Janicki's explanation to Mr. Strout that he, Janicki, saw Document #3 in the faculty room and it was left there by the psychology department, after first claiming he never saw the document before, was false on its face - there is no psychology department nor any psychology teachers at the High School.

Second, the District asserts, when Janicki first entered the 11-12 Main Office, he initially looked around to see that no one else was there, whereas he had no reason to put the stack/folders of papers in his hands down on the counter to check his mailbox, since he could easily see he had no mail from where he was at the counter, a distance of several feet, and manipulated his fingers and eyes as he carefully picked up the stack and left the copies of Document #3 on the counter from the only papers in his hands that are loose and not in a manila folder.

The District cites Mr. Strout's testimony as to his conclusion, after viewing the video, that Janicki's actions were intentional:

> I believe they were left intentionally for a number of reasons. You know, I'm not sure why he - when you come in, you can see, he looks at the mailboxes, he never actually took anything out of his mailbox, so why he put stuff down to go over to the mailbox is peculiar.
>
> And when he comes back and he kind of looks down to see that he's pulling everything up that he had placed down and he turns and he walks out with everything but the stack of documents that was underneath the folders that he had.

The District further asserts that the timing of the appearance of Document #3, as well as its location, further supports the finding of calculated design: as Mr. Strout noted in his testimony, minutes before Janicki left Document #3 in the 11-12 main office, the High School finished a professional development session on the District's Student Transgender policy that Document #3 undermines. Mr. Strout further explained that putting copies of Document #3 next to the teacher sign-in sheet also was intended to spread Janicki's misinformation to as many staff members as possible:

> It's placed in the most highly visible area, an area that pretty much every staff member walks by that morning. And one could reasonably and most appropriately assume that documents that are left there are really approved by administration; they're documents that, you know, we want our staff to take and they're placed there because of their high level of importance. Teachers, when they enter, they sign in in a book. It was left directly next to the book in plain sight of anyone who signs in each day and signs out each day, it was left in that exact spot. A far more visible place, quite frankly, than documents that were left in the faculty lounge where people may or may not enter. This particular location was the primary spot that everybody has to cross paths with at the start of the day.

The District next notes that the video depicts several staff members unknowingly picking up Document #3 in the normal course of their professional duties, as if it were something left by administration, and Mr. Strout's testimony in which he notes that several staff members at the High School were part of the LGBTQ community and were disturbed, upset and crying upon being exposed to Document #3, which was corroborated by the testimony of Teacher Kristen Meares regarding her experience finding Document #3 that morning, which she said disturbed and upset her, leading her to research the American College of Pediatricians listed thereon as the source, as well as the testimony of Teacher Brittany Mason as to her being very upset in finding the document in the Main Office, all within the context of her personal experiences as a teacher of Humanitarian Studies and Social Justice and having a sister who is part of the LGBTQ community and of knowing students who do not identify with their gender assigned at birth.

The District also notes Mr. Strout's testimony that it did not matter if no student saw Document #3 - the damage to the school environment was paramount and did not make any difference in determining Tenure Charges:

> Even if they weren't in the LGBTQ, just the level of just, you know, tearing down the climate and culture of the school, the intent to do that was the issue. And it didn't matterifa student saw it. It doesn't matter ifanybody saw it, really, because it had the potential to upset and offend people, create a hostile work environment, and staff members did see it, and they were upset.

Mr. Strout further testified that he believed that the repeated unprofessional behavior from Janicki was beyond remedial measures:

> The concern was with the nonstop intent to be insubordinate and act in a way that was completely unprofessional and unacceptable. I just - I had enough. I just couldn't continue to tolerate this anymore. Well, it's yet another example, quite frankly, of insubordination for Mr. Janicki to come and leave a document minutes after I had just delivered required professional development and a review of a Board-approved policy. And to leave it in the manner in which he left it was a purposeful attempt to completely undermine the work that we're doing and the requirements of my position as a leader in the building. I mean content aside, he specifically left something minutes after professional development that was exactly contrary to the professional development that was delivered and left it in a place where it was highly visible and could be perceived by whoever picked it up to have been supported and approved and left there by administration. It was absurd.

The District next notes that Mr. Bollendorf directed Administrator/District Affirmative Action Officer Janine Wechter ("AA Officer") to investigate the incident because the sensitive nature of the documents deserved the attention of the AA Officer. Ms. Wechter issued a December 20, 2019 Investigation and Recommendation ("Wechter Report") wherein she outlined the second interview of Janicki held on November 13, 2019 in which he responded substantively to the allegations of leaving Document #3 in the 11-12 Main Office and her initially asking him if it was still his position that he did not leave Document #3, as he had previously told Mr. Strout and Janicki's Yes response, at which point Gerald Taraschi, the WTEA President, interjected his own question of whether it was true that Mr. Janicki also previously told Mr. Strout that Mr. Janicki had never seen Document #3 before, to which Mr. Janicki also said Yes. Following these two confirmations, Ms. Wechter showed Janicki the video; she testified he replied:

> And then Mr. Janicki said that he could - he said he didn't leave them, but then he said I guess I could have picked them up by mistake in the faculty room and then mistakenly left them on the counter. I don't know.

Ms. Wechter, who watched the video several times, testified her view was that Janicki's explanation was a lie:

> I just felt that if you watch the video - like I said, I watched it a number of times. I think that his actions are deliberate. I think that they were thought out. You know, and the document was left during a time where the school had announced LGBTQ Coming Out Day. There was recently a faculty meeting about a new transgender policy that, you know, we had to put into place. In the past, my investigation showed that he wasn't truthful when he was asked questions. He, you know, was uncooperative.

> Because at - well, as he enters the main office, he's kind of looking around and even looks up at the camera. And he doesn't actually sign out of the sign-in book. He puts down his - the documents next - or his folders he was carrying next to the sign-out book, but leans over to - takes a couple of steps over to check his mailbox. There's nothing in his mailbox. And then when he comes back to get his folders, he kind of looks to the side and picks up everything but the papers that were left.

The District notes that in the Wechter Report, Ms. Wechter recited her conclusions:

> I find Mr. Janicki's initial denial to Mr. Strout of leaving Document 3 in the 11/12 office, and his subsequent explanation to me that he may have inadvertently picked up the material and then inadvertently left it behind, to be totally incredible. I also find that Mr. Janicki's initial refusal to answer my questions during the November 4, 2019 interview Mr. Janicki is in violation of District Policy 3281, Inappropriate Staff Conduct. My reasoning is as follows:
> It must be noted that several days prior to [Document #3] being introduced into the 11/12 main office, and Document I and Document 2 were found in the faculty room, the High School publicly acknowledged "LGBTQ Coming Out Day." Subsequent to this announcement, Mr. Janicki is seen on the video from the security camera in the main office entering the office with a stack of folders under his arm. He first looks around the office. He places the folders next to the staff sign in sheet on the counter and then moves off camera to the left, presumably to check his mailbox. The first question I have is why Mr. Janicki had to put the stack of papers down on the counter to check his mailbox?
> Putting that aside, Mr. Janicki returns to the counter after a few seconds to pick up the stack of papers. As he does this he leans over and looks at the side of his pile, and then inserts his hand toward the bottom of the stack of folders and documents so that he ends up leaving behind the document that the staff members uncovered the next day. Based on the above, Mr. Janicki's actions were deliberate and premeditated, and may have been done in reaction to the High School's celebration of LGBTQ Coming Out Day. No matter what the motive, Mr. Janicki put the stack of papers on the counter with the specific intent to leave behind the material from [Document #3]. His initial defensive posture with Mr. Strout, his denial, and then his story that this was all a mistake, are not worthy of belief.

The District argues that the Wechter Report and Ms. Wechter's testimony establish that Janicki violated numerous District policies: 1) Policy 5756, Transgender Students; 2) Policy 1140, Affirmative Action Program; 3) Policy 1530, Equal Employment Opportunities; 4) Policy 3281, Inappropriate Staff Conduct; 5) Policy 3211, Code of Ethics; and 6) New Jersey Department of Education, Transgender Student Guidance for School Districts.

In the Wechter Report, Ms. Wechter recommended to Mr. Bollendorf that he consider disciplinary action up to and including Tenure Charges based upon Janicki's insubordination, untruthfulness and creation of a hostile work environment and violation of the affirmative action policy and other District policies, citing repeated violations of its policies and New Jersey statutes protecting gay and transgender students, noting that the March 2016 Meehan letter of reprimand and the increment withholding in 2019 were partially based on not attending the LGBTQ faculty meeting presentation, as well as the offensiveness of the message from Document #3:

> Well, I thought, first and foremost, that the purpose of the investigation was, you know, that incident because it was reported by staff members who were upset. So, I did determine that he did leave the document on the counter and where he left it was - it was left next to a staff sign-in book so it was in a place where staff would see it. And, also, as you could tell from the video, in that area on the counter, that's where administration tends to leave things out that they want the staff to see or pick up, you know, especially if it's, you know, a half-day schedule or an assembly schedule something that they would need for that day. So, it was left out as if, you know, it could be perceived as District documents that were left out.
>
> And type of document that was left out, in - in my opinion, could have left the District open for somebody filing a hostile work environment claim or - and then again staff members were rightfully upset and - and that's what basically what led to the investigation.

The District notes that Mr. Bollendorf echoed these concerns:

> Because anybody who found this, not knowing where it came from, finding it on the counter of our 11-12 Main Office could have incorrectly deduced that it came from the District, and certainly had the very strong potential for creating a hostile work environment, particularly by those that are protected - a protected class in this area, and/or those that are extremely sensitive to those in that protected class.

Mr. Bollendorf accepted the Wechter Report and testified that as a previously long-term Principal of the High School who knew the 11-12 Office well, he had concluded that Janicki had an intentional design to leave the papers in that office:

> The mailbox location to the right where you walk into that room has a large counter right below it. Some papers are kept on that counter, things like professional day forms,you know, personal day forms. There is a lot of room on that counter. The notion that somebody who was simply coming in to do a visual inspection of their mailbox having to take a pile of papers

> and lay them on the counter across from the mailbox next to the sign-in book to me defies logic. If you're doing a visual inspection, there is no reason to put the papers down at all. You walk over, you look in your mailbox. If something is there that you need to reach in and get, there is a counter directly there right under your mailbox. You set the papers down, you reach your hand in, you take your mail, you pick up your papers and you go. I think it was very calculated that those papers were left on that counter directly next to the sign-in book where they would be left. And I think it's also apparent when he picks the papers back up, that he visually inspects what he's picking up and visually sees what was left behind. There is no doubt in my mind that was done intentionally.

Mr. Bollendorf met with Janicki on January 16, 2020 and informed him of the findings in the Wechter Report and gave him the opportunity to explain his actions, but reports that Janicki sat in silence and did not speak.

Tenure Charge 2

As to Tenure Charge 2, the District asserts that Janicki was motivated to continue his pattern of intolerance and antagonism toward LGBTQ issues when he left Document #3. In that regard, the District notes that Arbitrator Zudick described Janicki's discipline in Ms. Meehan's March 2016 letter of reprimand for conduct that included animus towards LGBTQ students; skipping the April 2, 2019 faculty meeting that included a presentation from the GSA student club on LGBTQ topics; walking out of a make-up meeting on April 4, 2019, for the portion of the meeting delivered by an administrator that dealt with the LGBTQ presentation; and ignoring Mr. Bollendorf's request to submit a written acknowledgement of his obligation as a public school teacher to attend all training sessions, no matter what the content, and respect LGBTQ students and staff, all of which Arbitrator Zudick found to be a direct line in progressive discipline and to show that Janicki did not "get the message" regarding his professional duty to respect the LGBTQ rights of students and staff.

The District also notes that Janicki's October 2019 Document #3 actions followed only months after his increment withholding and, in its view, answered Arbitrator Zudick's question - whether Janicki had gotten the message - when his actions regarding Document #3 served as a climax of his earlier pattern of conduct and caused the last step of progressive discipline in the Tenure Charges.

Janicki's Evidence and Arguments

Tenure Charge 1

Janicki asserts that the District failed to establish through the testimony of its witnesses and proofs that he engaged in conduct unbecoming a teacher on October 15, 2019 in that neither the District's witness testimony nor the video evidence presented supported the District's allegation that Janicki "distributed" the document or that he purposely left the document in the 11-12 Main Office at the High School to create the false impression that it was an official District handout.

In those regards, Janicki argues that it is uncontested that no District witnesses testified that they thought it was an "official District handout" and there was no testimony to support that the alleged leaving of the article in the Main Office caused any significant disruption to school operations. To the contrary, Mr. Strout testified that the security video depicted only a few staff members taking a copy of the article at issue within the one hour and thirty nine minutes the documents were in the Main Office and both he and Mr. Bollendorf testified that there was no evidence of any students seeing the document, nor was the document distributed to staff, other than the few individuals who picked it up. Further, Janicki notes, Ms. Mears testified that the stack of papers looked like a pile of copies someone had made and inadvertently left behind and Ms. Mason that there is not a past practice of documents or notices from the principal being left next to the sign-in sheet, that it is "not a place where there would be important information." Ms. Mason testified "[T]ypically, there's no documents next to the sign-in sheet," and when asked if the counter is a normal place where official documents or notices from the principal or School District are left, she responded, "Not typically. usually we get either an email...it's distributed through some type of portal like that. So, it's typically not a place where there would be important information."

Janicki further notes that Mr. Taraschi testified, with regard to Document 3, that "to my knowledge at least, [the District] never conclusively proved that it was left there by Mr. Janicki," based upon Mr. Taraschi's review of the video. Janicki also notes that Ms. Wechter testified that if it was a mistake that Document 3 was inadvertently left, there would be no violation of District policies. Mr. Bollendorf testified with regard to individuals placing personal material on the main office desk in a temporary fashion, "[I]t would be fair to say that people have set things down on the counter, sure."

Accordingly, Janicki asserts that, as he stated in his sworn Statement of Position at ¶31, the documents were left behind unknowingly and inadvertently, in conjunction with his checking a personal mailbox, placing a stack of documents and material on a tabletop and then retrieving that same stack of documents and material, inadvertently and unknowingly leaving several pages behind. The District has failed to prove that he left the document in the Main Office, or that the article was left for the purpose of distribution to staff and/or students in violation of District policy and referenced authority.

Janicki also asserts that the District's failure to present evidence that he "distributed" the document and/or that he purposely left the document to create the false impression that it was a District-issued handout also means it has not established that he violated policies 1140 Affirmative Action Program; 1530 Equal Employment Opportunity; 3211 Code of Ethics; 3233 Political Activities; 5756 Transgender Students; and 2260 Affirmative Action Programs for School and Classroom Practices or violated of the New Jersey Department of Education Guidance on Transgender Students; the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq.; the New Jersey Administrative Code, N.J.A.C. 6A:7-1 et seq.; and/or Title IX of the Education Amendmentsof 1972 as alleged.

Tenure Charge 2

As to Charge 2, in which the District alleges that Janicki repeatedly exhibited a continuous and ongoing pattern of intolerance and/or antagonism toward individuals based on their sexual orientation, gender identity or expression, he asserts that it has failed to set forth any evidence of his purported intolerance or antagonism of individuals in the LGBTQ community in his role as a public school teacher and that while the District has made the sweeping allegation against him that he is "incapable of complying with his duties as a public educator to be impartial, supportive and respectful to all students and staff members regardless of their sexual orientation or gender identity," it has not produced one instance of his exhibiting an outward animus toward a student or other staff member due to their sexual orientation or evidence in support of this alleged "pattern" for the time when Mr. Strout was employed elsewhere, whereas there is an undisputed history of animosity between Mr. Strout and Janicki. In addition, the District has not established that Janicki is incapable of complying with his duties as a public school teacher to be impartial, supportive and respectful to all students and staff members.

Discussion and Determinations - Tenure Charges 1 and 2

The Undersigned finds that the District has supported its Tenure Charges 1 and 2 with the overwhelming preponderance of the record evidence provided by the parties.

Tenure Charge 1

The District's first Tenure Charge is focused upon its assertion that Janicki was responsible for placing Document #3 on the counter in the 11-12 Main Office during the afternoon hours on October 15, 2019 such that staff noted it on the next morning upon their arrival at work and entry into the 11-12 Main Office area. As noted earlier, the inappropriate and provocative nature of Document #3 in the District workplace was stipulated by the parties, based upon which the Undersigned determined at Hearing that it should receive the neutral designation in the record as "Document #3." Accordingly, the only disputed issue in this proceeding is whether Janicki was responsible for the document being placed where it was found.

The District's investigation of Document #3 was initiated because of the document's discovery by staff on the morning of October 16, 2019 and started with a review of the video recording of the preceding evening events in the same area. That review showed Janicki in the vicinity, which led to his being interviewed, initially by Mr. Strout and then by Ms. Wechter. As a result, the Undersigned further notes, a second issue arose beyond the first - Tenure Charge 1's question of whether Janicki was responsible for the document - the second issue being Tenure Charge 3's concerns about his conduct during the interview process.

The interview process started with a review of the video recording showing Janicki's appearance in the 11-12 Main Office on the afternoon of October 15, 2019 for several minutes, during which he placed some papers on the counter at 2:37 pm. During Janicki's interviews with the District's witnesses, they report that Janicki changed his reports of his actions at around 2:37 pm on October 15 a number of times, from at first, with Mr. Strout, ignorance of the papers - "he never saw the document before" - to speculation about the papers - it was left in the faculty room by the psychology department. Then, with Ms. Wachter, who initially asked Janicki whether it was still his position that he did not leave Document #3 - as he had previously told Mr. Strout - and received Janicki's Yes response.[11] Following these two confirmations, Ms.

[11] At which point Mr. Taraschi interjected his own question: was it true that Janicki also previously told Mr. Strout that Janicki had never seen Document #3 before - to which Janicki also said Yes.

Wechter showed Janicki the video and testified he replied "he could - he said he didn't leave them, but then he said I guess I could have picked them up by mistake in the faculty room and then mistakenly left them on the counter. I don't know."

In Janicki's arguments he notes that leaving the article in the Main Office did not cause any significant disruption to school operations and there was no evidence of any students seeing the document, nor was the document distributed to staff, other than the few individuals who picked it up. Further, Janicki notes, the stack of papers looked like a pile of copies someone had made and inadvertently left behind and there is not a past practice of documents or notices from the principal being left next to the sign-in sheet, that it is "not a place where there would be important information and usually employees get either an email or a distribution through some type of portal like that. Janicki also notes that Mr. Bollendorf testified with regard to individuals placing personal material on the main office desk in a temporary fashion, "[I]t would be fair to say that people have set things downon the counter, sure."

Accordingly, Janicki asserts that as he stated in his sworn Statement of Position at ¶31, the documents were left behind unknowingly and inadvertently, in conjunction with his checking a personal mailbox, placing a stack of documents and material on a tabletop and then retrieving that same stack of documents and material, inadvertently and unknowingly leaving several pages behind.

The Undersigned notes the extensive and detailed analyses of the video - and Janicki's responses - that the District's witnesses, which also included Mr. Bollendorf, provided in their testimony, analyses that the Undersigned, also after his own many extensive reviews and careful studies of the video recordings, fully adopts. The witnesses and the Undersigned analyses leave no doubt that Janicki left Document #3 on the counter in the 11-12 Main Office and did so intentionally and deliberately, notwithstanding Janicki's protestations that the District's evidence is insufficient to so establish.

In addition, the Undersigned notes that he agrees with the District that whether Document #3 was ever seen by a student or otherwise received wide distribution or caused any significant disruption to school operations are not the material issues herein in that a failure to accomplish student viewing or wide distribution or significant disruption does not excuse or mitigate an effort to accomplish those goals. Similarly, lack of success in having employees pick up papers by

putting them in an unusual location is not the test of the propriety of making an effort to get the employees to pick up those papers. Accordingly, the Undersigned concludes that Janicki's assertion that his sworn Statement of Position at ¶31 - that the documents were left behind unknowingly and inadvertently - carries negligible weight and is not persuasive, compared to the evidence provided by the District's witnesses to the contrary.

Therefore, in the absence as well of any testimony by Janicki that offered any alternative explanations of his actions and/or his intent during the afternoon on October 15 in the 11-12 Main Office, the Undersigned concludes that the evidence provided by the District that Janicki intentionally and deliberately left Document #3 on the counter is sufficient to establish support for its Tenure Charge 1.

Tenure Charge 2

In Tenure Charge 2, the District asserts that Janicki acted in continuance of his pattern of intolerance and antagonism toward LGBTQ issues when he left Document #3 and in furtherance of his prior conduct that, as found in the Zudick Award, included animus towards LGBTQ students; skipping the April 2, 2019 faculty meeting that included a presentation from the GSA student club on LGBTQ topics; walking out of a make-up meeting on April 4, 2019, for the portion of the meeting delivered by an administrator that dealt with the LGBTQ presentation; and ignoring Mr. Bollendorf's request to submit a written acknowledgement of his obligation as a public school teacher to attend all training sessions, no matter what the content, and respect LGBTQ students and staff, all of which showed that Janicki did not, as Arbitrator Zudick said, "get the message" regarding his professional duty to respect the LGBTQ rights of students and staff. In the District's view, Janicki's actions centered on Document #3 climaxed his earlier pattern of conduct.

Janicki responds that the District has not produced one instance of his exhibiting an outward animus toward a student or other staff member due to their sexual orientation or evidence in support of its alleged pattern and has not established that he is incapable of complying with his duties as a public school teacher to be impartial, supportive and respectful to all students and staff members.

However, notwithstanding Janicki's assertions that the District has not produced one instance of his exhibiting an outward animus toward a student or other staff member due to their

sexual orientation, the Undersigned finds that Janicki ignores the Zudick Award findings recited above and, of course. precede the Undersigned's findings herein as to Janicki's role in Document #3. Accordingly, the Undersigned instead concurs with the District's assertions that Janicki's role in Document #3 showed a continuing pattern by Janicki of intolerance and antagonism toward LGBTQ issues and constituted another example of that conduct. Part of the reasons for the Undersigned's conclusion is how futile, self-destructive and poorly executed Janicki's actions were regarding Document #3, as well as his conduct during his interviews over it, all of which contribute to the Undersigned's conclusion that Janicki was motivated to continue his pattern of intolerance and antagonism toward LGBTQ issues with Document #3 by his outrage and his out-of-control zeal to respond to the recent High School announcement of a LGBTQ Coming Out Day and a faculty meeting about a new transgender policy that Ms. Wachter noted in her Report. The Undersigned finds Janicki's actions were futile in that, as soon as Document #3 was seen, it was removed, not circulated, a totally foreseeable outcome, and self-destructive and poorly executed because he ignored the fact that his actions in the Main Office would be recorded, leading investigators quickly to him seeking an explanation for them. Janicki's conduct during his interviews were similarly futile, also reflecting his poor planning regarding his Document #3 exploit. Therefore, in the view of the Undersigned, Janicki's response of leaving Document #3 manifested his deep and ongoing hostility to the recognition that the announcement of a LGBTQ Coming Out Day and the new transgender policy were receiving from the District, based upon his self-destructive and poorly executed actions arising nearly mindlessly out of that hostility. Accordingly, the Undersigned also concludes that the evidence provided by the District that Janicki intentionally and deliberately left Document #3 on the counter, combined with his earlier pattern of intolerance and antagonism toward LGBTQ issues found in the Zudick Award, is sufficient to establish support for its Tenure Charge 2 - that he repeatedly exhibited a continuous and ongoing pattern of intolerance and/or antagonism toward individuals based on their sexual orientation, gender identity or expression.[12]

[12] The District also asserted that Janicki was involved in additional Documents #1 and #2 that further supported its Tenure Charge 2. However, in view of the Undersigned's findings as to Document #3, he finds it unnecessary to determine the significance herein of the additional Documents #1 and #2.

TENURE CHARGE 3

District's Evidence and Arguments

The District describes its Charge 3 as alleging that Janicki engaged in unbecoming conduct by repeatedly making intentional misrepresentations to administration when conducting investigations in order to hide and/or mitigate his misconduct and first cites the references in the Zudick Award to his being untruthful with Mr. Strout and Mr. Saverase regarding his instructions to his students during the lockdown drill on June 6, 2019, as well as the testimony of Mr. Strout, Mr. Saverese and Ms. Wechter during the investigation of Document #3.

In support of the District's assertion, it first notes that Mr. Strout conducted his second interview with Janicki during the investigation of Document #3 on October 22, 2019 after, during Mr. Strout's first interview with Janicki on October 16, Mr. Strout testified that Janicki stared at Mr. Strout and refused to answer questions. On October 22, Janicki responded, but, the District asserts, his answers were lies. Mr. Strout's testimony in this regard is that:

> So as I always do in interviewing someone, whether it's a staff member or a student, I start it open ended. He was not forthcoming, he was not honest in his responses in my opinion. So I continued to craft my questions in such a way to give him a change to come clean. And, you know, even in his answers in that moment when he finally met and agreed to answer the questions, there was dishonesty even in all of that.
>
> It was: No, I never saw this document. And then it's: Oh, yeah, I did see it. I think it's something from the psychology department. So it was just another example of Mr. Janicki being dishonest.
>
> Q Did you ask him specifically whether he left document number three in 11-12 Main Office counter?
>
> A. Yes.
>
> Q. What did he say about that?
>
> A. First he said he had never seen it. Then he said that it was something that he had seen, but he said no, he did not leave it in the 11-12 Main Office.
>
> Q And then you referred to some type of interaction about the word "purposely." Couldyou tell us more in detail about that? How did that communication arise and who said what?

> A. Yeah I actually backed the word "purposefully" out. I said, you know, did you purposefully leave these documents? And then, you know, I had seen the video, I knew he left them. So I took the word "purposefully" out and specifically stated to him and said: Let me clarify by removing the word purposefully, did you leave this document in the 11- 12 Main Office? Whether purposefully or not, did you leave it there? And his response was no.

The District asserts that Janicki's dishonesty continued during his interview with Ms. Wechter on November 13, 2019, outlined in Charge 1, and regarding which she noted that his untruthfulness was inviolation of Policy 3211, Code of Ethics that mandates District educators "believing in the worth and dignity of each human being, recognizes the supreme importance of the pursuit of truth, devotion to excellence, and the nature of democratic principles." The District notes that Ms. Wechter also highlighted in her testimony and in her Report the changing stories by Janicki, that went from not leaving Document #3, then, to maybe seeing it in the faculty room by the Psychology Department that does not exist, then back to not leaving the document, then confirming Mr. Taraschi's interjection that he previously told Mr. Strout he never saw Document #3, and then, after seeing the video, claiming he picked up the copies by mistake and left them by mistake.

Mr. Bollendorf agreed:

> Well, [Janicki] continued with the story that he had no idea where the papers came from. And then all of a sudden the notion that oh, well, maybe I picked them up accidentally in the faculty work room and then left them behind accidentally emerges is inconsistent and not credible. You know, now we're changing our story. That's, you know, that's a tell sign there that we're not being honest about the events.
>
> What changed is initially indicating that he had no knowledge of the document, didn't recognize the document. And then when the question was rephrased and removed the word "purposeful," he indicated that he had seen the document in the faculty room and, in fact, it was left there by the psychology department. So he went from not being familiar with the document, not having seen it, to now having seen it, having knowledge of it and, in fact, the knowledge was acute that he knew what department it came from.

In short, the District asserts, Janicki has lied to every administrator who has interviewed him as part of an investigation for misconduct.

Janicki's Evidence and Arguments

Janicki asserts that the District has failed to produce sufficient evidence in support of its allegation that he repeatedly made intentional misrepresentations to administration when conducting investigations in order to hide and/or mitigate his misconduct in its allegation that he "repeatedly lied" to administration regarding his leaving the referenced document in the 11-12 Main Office at the High School.

Moreover, Janicki notes, the District has already imposed discipline through withholding of his increment based on prior lying allegations. Therefore, Janicki asserts, the District is seeking duplicative and punitive punishment through the filing of Tenure Charges, based only on the new assertion that Janicki allegedly lied about leaving a document in the 11-12 Main Office. Janicki asserts that the only allegation which was not considered in conjunction with the increment withholding action is that Janicki "lied" during the District's investigation into the documents found in the Main Office and this remaining allegation does not give rise to a basis for termination from his tenured employment. See In re TenureHearing of Barbara Emri, OAL Dkt. No. EDU 457-00, Agency Dkt. No. 18-6/00, 2002 WL 31042788, initial decision (Aug. 30, 2002), 2002 WL 32590922, Comm'r. decision (October 21 2002 discipline final decision (Dec. 5, 2003);)(racially inappropriate comments andmultiple acts of inappropriate behavior involving students, colleagues and parents, insubordination, failure to follow progressive discipline).[13]

Janicki next notes that he has shown compliance with his 2016 discipline by completing the required training and that, with the limited exception of the 11-12 Main Office investigation, the allegations set forth in Tenure Charge 3 have all been addressed in the context of the increment withholding proceeding in a decision which was not issued until after the Tenure Charge process was initiated. Therefore, Janicki asserts, Tenure Charge 3 should be dismissed - the District has failed to produce evidence that Janicki has made intentional misrepresentations to administration. Furthermore, termination would be disproportional to the District's allegation that Janicki made intentional misrepresentations in conjunction with the District's investigation.

[13] Janicki's additional arguments regarding progressive discipline and its impact upon the District's determination to dismiss him are discussed herein under Penalty.

Discussion and Determinations - Tenure Charge 3

The Undersigned finds that the District has supported its Tenure Charge 3 with the overwhelming preponderance of the record evidence provided by the parties.

The Undersigned first notes that the record herein is rife with examples of Janicki's intentional misrepresentations to administration, in addition to those found in the Zudick Award. For example, the Undersigned notes that in the discussion above of Tenure Charge 1, the evidence presented by the District's witnesses established that, the Undersigned now finds, Janicki was not forthcoming or truthful in his responses to the District's witnesses during the Document #3 interview process. In that regard, the Undersigned also notes as to that process, Mr. Bollendorf's summary of what Mr. Strout and Ms. Wachter had encountered while interviewing Janicki: Janicki continued with the story that he had no idea where the papers came from, then all of a sudden, well, maybe he picked them up accidentally in the faculty work room and then left them behind accidentally, changing from initially indicating he had no knowledge of the document and didn't recognize the document. Mr. Bollendorf continues: when the question was rephrased to remove "purposeful," Janicki indicated that he had seen the document in the faculty room and, in fact, it was left there by the psychology department - so he went from not being familiar with the document, not having seen it, to now having seen it, having knowledge of it and, in fact, the knowledge was acute that he knew what department it came from. Ms. Wachter's encounter was that Janicki repeated that he never saw Document #3, and then, after seeing the video, claimed he picked up the copies by mistake and left them by mistake.

Once more, the Undersigned is compelled by the record evidence to find that Janicki's assertions - that the District has failed to produce sufficient evidence in support of its allegation that he repeatedly made intentional misrepresentations to administration when conducting investigations in order to hide and/or mitigate his misconduct in its allegation that he "repeatedly lied" to administration regarding his leaving the referenced document in the 11-12 Main Office at the High School - are not supported. Rather, the Undersigned instead again concurs with the District's assertions - that Janicki repeatedly made intentional misrepresentations to its administrators when they were conducting investigations of his conduct - as evidenced in the Zudick Award, and again during the District's investigation of Document #3, with Mr. Strout and Ms. Wechter, as recited above by the Undersigned.

Accordingly, the Undersigned also once more concludes that Janicki's assertion that his sworn Statement of Position at ¶31 - that he left the documents behind unknowingly and inadvertently - carries negligible weight and is not persuasive, compared to the evidence provided by the District's witnesses to the contrary in their recitations of his shifting stories during their investigations.

Further, again, in the absence as well of any testimony by Janicki that offered any alternative explanations as to the reasons for his shifting stories during the District's investigations of his actions and intent during the afternoon on October 15 in the 11-12 Main Office, the Undersigned concludes that the evidence provided by the District's witnesses supports the conclusions they made that Janicki repeatedly made intentional misrepresentations to them when they were conducting their investigations. Accordingly, the Undersigned concludes that the evidence provided by the District is sufficient to establish support for its Tenure Charge 3.

TENURE CHARGE 4

District's Evidence and Arguments

The District describes its Charge 4 as alleging that Janicki engaged in conduct unbecoming by displaying defiance in not responding to legitimate questions by administration during investigative interviews surrounding his leaving copies of Document #3 in the 11-12 Main Office, in particular in the Wachter Report's summary:

> Mr. Janicki has been defensive and non-cooperative through this process. Mr. Strout and I spent a significant amount of time trying to prepare for meetings with Mr. Janicki only to have him either call out sick or refuse to answer the questions. Both Mr. Strout and I explained the purpose of our investigations and that he did not have the right to refuse to answer. He was warned that such action would be considered insubordination.

Mr. Strout added:

> That meeting was - that was, you know, that was unlike any other meeting I had ever had with him because there seemed to be this refusal to answer questions. When I say that he stared at me for a period of about a minute multiple times when I asked him a question, I literally mean a minute, I mean 60 seconds. It was incredibly bizarre and disturbing ...
>
> Yeah, they asked for a recess, if we could step out. Mr. Savarese and I could step out so they could speak privately and I gave them that opportunity. When I came back, I even remember rephrasing the

> question, like did you purposely leave them, leave any documents? And he-you know, again this staring, as if looking through me, which was incredibly disturbing.
>
> I have never been involved in an interview like that where there was complete and utter refusal to answer questions. And furthermore, like if someone doesn't understand a question, they'll say can you repeat that or they'll say I'm not comfortable answering that until I talk to my representative. This was very different. This was staring at - just staring at me.

Mr. Bollendorf reported similar behavior during his meeting with Janicki on January 16, 2020, which Ms. Wechter described as disrespectful and unprofessional.

Janicki's Evidence and Arguments

Janicki denied the allegation by the District alleged that he engaged in conduct unbecoming a teaching staff member in that he repeatedly exhibited defiance and did not cooperate with legitimate administrative investigations by refusing to answer questions posed to him and staring blankly at administration when asked to offer explanationsfor his conduct. Respondent Janicki's Statement of Position, ¶43.

Janicki notes that it is uncontested that he never refused to attend a meeting with administration. In one instance, with the acknowledgment and approval of administration, Janicki's union representative attended on his behalf and in following the advices of his union representative, he at times did not provide substantive responses given pending grievances and pending arbitrations and not wanting to prejudice his position in conjunction with them.

Janicki also denied the "staring blankly" characterization, explaining that there were instances where he would look ahead or to the side, and not offer a substantive response, given the advices that he received concerning not wanting to prejudice his ongoing contest of disciplinary action being taken against him, which was the basis of his grievance and a pending arbitration. Respondent Statement of Position ¶44.

In several instances, Janicki reports he deferred answering based on advices of legal counsel and reported that on advice of his personal legal counsel he would rather not answer the question at that time. Respondent Statement of Position, ¶44. Invocation of the Fifth Amendment privilege against self-incrimination is not per se conduct unbecoming a teacher. See Laba v.

Newark Board of Education, 23 N.J. 364 (1957). See also Lowenstein v. Newark Bd. of Education, 35 N.J. 94, 99 (1961). Accordingly, Janicki argues that Charge Four should be dismissed as the District has failed to produce evidence that he exhibited defiance and/or did not cooperate by refusing to answer questions.

Discussion and Determinations - Tenure Charge 4

The Undersigned finds that the Janicki conduct cited by the District during its witnesses' testimony does not rise to the level of defiance and non-cooperation to an extent that the conduct would support Tenure Charge 4. The Undersigned agrees that the District's investigative interviews were legitimately conducted and included high levels of frustration with Janicki. Nonetheless, the instances of conduct by Janicki cited by the District were so intertwined with his right to representation and his assertions thereof, as well as his reliance upon counsel's advice, and with what the Undersigned finds may have been normal reactions to his receiving negative news that, while uncomfortable and unpleasant for all involved, and while certainly at times impeding his ability to cooperate with the investigatory process, that Janicki's conduct during those interviews did not rise to a level that it should be considered defiance. Accordingly, the Undersigned concludes that the evidence provided by the District is not sufficient to establish support for its Tenure Charge 4.

TENURE CHARGE 5

District's Evidence and Arguments

The District describes its Charge 5 as alleging that Janicki engaged in conduct unbecoming on November 13, 2019 when he intentionally tape recorded a private conversation between Ms. Wechter and Assistant Superintendent of Curriculum and Instruction Jack McGee, as well as their conversation with counsel.[14] The District contends that the Charge is supported by the testimony of Supervisor Casey Corigliano in which he reported that Janicki had reported to Mr. Corigliano that he had taped meetings with administration in the past, particularly meetings with Mr. Strout. In addition, Janicki reported to Mr. Taraschi that Janicki had left a recording device in the room with Ms. Wechter and Mr. McGee while talking to counsel, with Janicki and Mr. Taraschi waiting outside. In addition, on November 14, 2019 Janicki communicated

[14] Janicki concedes the conversation was recorded and contends such was inadvertent and not willful.

to Mr. Corigliano that Janicki had secretly taped the private conversations among Ms. Wechter, Mr. McGee and the District's counsel while Janicki was out of the interview room on November 13, 2019. In that regard, Mr. Corigliano described Janicki as first approaching him as a friend, long-time colleague and confidant with the conversation starting with Janicki stating "I don't know if I can trust you," indicating, the District asserts, that Janicki was about to reveal inculpatory information to a trusted friend that he did want anyone else to know about. Mr. Corigliano testified that Janicki went on to state "I got it all right here" as he patted his pocket to indicate a cell phone/recording device to indicate he had hard evidence of the District targeting him, smiling the whole time. The District concedes that Janicki did not utter the word "intentional" during this admission, nor did he indicate the recording was inadvertent, but argues that Mr. Corigliano believed Janicki was expressing that the recording was purposeful.

> I was left with the idea, based upon the conversation that we had, based upon the action of Mr. Janicki, that he had secretly recorded the conversation between Ms. Wechter and Mr. McGee.
>
> Q. That was your impression? So is that your answer now, sir, that your impression and your takeaway was that he did it intentionally, but he never said that?
>
> A. The way in which all - you put all of the evidence together, that's what my impression was, yes.

After some admitted confusion, the District notes, as to whether Mr. Corigliano heard "inadvertent" or "intentional," when questioned, he cleared up the ambiguity by testifying that he had "every reason to believe that Mr. Janicki left the - knowingly left his phone in the room when he and Mr. Taraschi were asked to leave. That's my impression." T 1111, lines 24-25 and 1112, lines 1-2, and

> Based upon how his - and I believe I testified to this on day one, on the demeanor which he said to me "I got it all right here," he had a smile on his face about it, was patting his pants pocket. And then also the other - you know, the history that he has told me in the past that he has recorded meetings. I had every reason to believe that he knew full well what he was doing. T. 1112 lines 6-13.

As to Janicki's claim that the tape recording of the Wechter/McGee/Counsel discussion was inadvertent, the District argues it is belied by the undisputed record that he is experienced in surreptitiously tape recording investigative meetings with administration. The District

further notes that even if recording the private conversation among Ms. Wechter, Mr. McGee and counsel by Janicki was unknowing at first, his failure to correct an alleged mistake, admit to the recording, and hand over the tape and copies, continue the path of non-disclosure and cover-up, which establishes that he is guilty of unbecoming conduct on those bases.

Janicki's Evidence and Arguments

Janicki asserts that the District has failed to meet its burden of proof that he engaged in conduct unbecoming a teaching staff member by allegedly tape recording a private conversation between Administration in which he was not a party during an investigative interview on November 13, 2019 and that he did not willfully record any private conversations and had no intention to record others when asked to leave the room where the investigation was being conducted, but inadvertently left his phone behind. Respondent Janicki's Statement of Position, ¶46. As to Mr. Corigliano's testimony, it was only his "impression" that Janicki had secretly tape recorded the conversation and that Janicki never used the word "intentionally." "It was my understanding, yes, it was my understanding that he left the phone there inadvertently." T. 1109:1-11.

Discussion and Determinations - Tenure Charge 5

The Undersigned finds that the District has provided sufficient evidence that Janicki engaged in conduct unbecoming on November 13, 2019 when he intentionally tape recorded a private meeting by leaving his recording device behind, and operating, when he left the meeting for the known purpose of the remaining participants in the meeting consulting with counsel before resuming the meeting. In that regard, the Undersigned finds that Mr. Corigliano's explanations during his testimony of the reasons he so concluded sufficiently support his determinations, in the absence, once more, of an alternative explanation by Janicki as to the meanings that Mr. Corigliano placed upon the exchanges that Mr. Corigliano described with Janicki about the recording. Mr. Corigliano's testimony made clear that when Janicki said he "got it all right here," smiled and patted his pants pocket, given Janicki's history - he had told Mr. Corigliano in the past that he had recorded meetings - Mr. Corigliano had every reason to believe that Janicki knew full well what he was doing.

While Janicki attempts to parse Mr. Corigliano's use of the word "impression" in Janicki's assertions that Mr. Corigliano's testimony is unreliable, the Undersigned finds that

Janicki's failure to provide explanations of his actions, upon which Mr. Corigliano relied, leaves Mr. Corigliano's explanations persuasive. Moreover, the transcript excerpt relied upon by Janicki as to whether Mr. Corigliano testified that Janicki acted intentionally was superseded by Mr. Corigliano's later testimony clarifying that he did find Janicki's actions intentional. Accordingly, the Undersigned concludes that the evidence provided by the District is sufficient to support its Tenure Charge 5 that Janicki intentionally tape recorded the November 13, 2019 administrators' meeting with counsel, an action that clearly constituted conduct unbecoming.

TENURE CHARGES 6, 7 AND 8

District's Evidence and Arguments

The District describes its Tenure Charges 6, 7 and 8 as intrinsically intertwined and arising from events that unfurled on January 21, 2020, after Janicki's meeting with Mr. Bollendorf on January 16, when the latter advised Janicki of the findings of the Wechter Report and that tenure charges will be pursued by the District, followed the next day by Janicki's receipt of the formal notice from Mr. Bollendorf.

The District first notes that at Janicki's January 16, 2019 meeting with Mr. Bollendorf, Janicki did not provide any explanation for his behavior or rebuttal to the charges and simply stared back in silence; further, it notes that the information in the Wechter Report, as to the earlier admission by Janicki to Mr. Corigliano of Janicki's tape recording of the private conversation on November 13, 2019 with administration and counsel, was provided byMr. Corigliano.

Tenure Charge 6

In connection with Tenure Charge 6 re: retaliation and intimidation of witnesses, the District notes that on Tuesday, January 21, 2020, the next day back to school after Janicki's January 16, 2019 meeting with Mr. Bollendorf, Janicki engaged in intimidating conduct toward Mr. Corigliano, having been informed that Mr. Corigliano had told administration of the admission Janicki had made to Mr. Corigliano of the secret tape recording and that a referral was made to the Washington Township Police Department, as well as Janicki's engaging in

intimidating conduct during his interaction with Washington Township Police Officer Thomas DiTullio, the High School's School Resource Officer.

As to the District's assertion that Janicki intimidated Mr. Corigliano, it notes that Mr. Janicki went to Mr. Corigliano's office unannounced, stared at him for a few seconds from the doorway, backed up, then came forward again, looked at Mr. Corigliano again, and then sarcastically said, "Thanks" and walked away, an encounter Mr. Corigliano described as:

> The manner in which he came into my office, again unannounced, and then the way in which he was looking at me and also looked like he had more words to say, but only said thanks and walked away very dejected looking, you know. There was a - it was - it left me with a very uneasy feeling.
>
> Q. Could you tell us why you felt intimidated by the actions of Mr. Janicki on January 21,2020?
>
> A. Because of the history that had been happening, knowing that there were some concerns about his professionalism, there had been ongoing, you know, meetings with administration and then for the simple fact that I knew at some point the memo that I wrote in November would come to his information as part of that whole proceeding. You know, having him appear in my office unannounced and the way in which he carried himself made me feel the way I felt that day. T 1028.
>
> Q. Why did you feel intimidated?
>
> A. Given the demeanor, given the reports that he had been depressed, given that he has had a history of, you know, discipline issues that were ongoing, and, you know, whether it's relevant or not, unfortunately pre-Covid we live in a world that school violence was on the forefront of our minds and mental health was on the forefront of our minds. And it was that basis and the basis of which he came into my office and acted in the manner in which he did that led me to that feeling of being intimidated. T 1114.

The District further notes that although Mr. Corigliano admitted during cross examination that he believed that Janicki would not attempt to intimidate him because of their friendship and long standing working relationship, Mr. Corigliano remained steadfast that Janicki's actions in coming to his office unannounced, staring him down and sarcastically saying, "Thanks" was an act of intimidation.

A. When you put all of that together, in that particular case I did feel that was an act of intimidation.

A. In the moment I felt intimidated, yes.

A. That was in the moment how I felt.
T. 1055.

As to the District's assertion that Janicki intimidated Officer DiTullio, it notes testimony that Janicki approached his office, stared for 20-30 seconds and asked - "Do I have you to thank for this?"in reference to the Wechter Report that a referral to local law enforcement was in place for a possible violation of the wiretapping laws. The District concedes that Officer DiTullio was not physically threatened, but notes that he felt the need to stand up and address Janicki, who appeared angry.

Tenure Charge 7

In connection with Tenure Charge 7 re: the posting of religious references in lesson plans, the District alleges, via the testimony of Mr. Strout and Mr. Corigliano, that Janicki engaged in unbecoming conduct by posting religious references in quotes from Dr. Martin Luther King in his lesson plans on January 20, 2020 that had no relevance to instruction in the classroom, actions Mr. Strout found bizarre and out of character.[15]

Tenure Charge 8

In connection with Tenure Charge 8 re: comments to students, the District alleges that Janicki, in his third period music theory class, made a comment to students that his supervisor "snitched" on him, as supported by the testimony of Mr. Strout, Mr. Corigliano and Mr.

[15] The District argues that what Mr. Strout described as Janicki's bizarre and out of character posting of religious references in quotes from Dr. Martin Luther King in his lesson plans on January 20, 2020 - that had no relevance to instruction in the classroom - is relevant herein in that the posting corroborates some testimony of Mr. Bollendorf as to Janicki's religious beliefs and his role as a public school educator; the District also concedes that since Janicki did not testify, it can only speculate and make observations about these issues. The Undersigned also notes that in Janicki's reference in his response to Tenure Charge 7, he cites Mr. Bollendorf's testimony that there were not any quotes Mr. Bollendorf was concerned with and that he was not overly concerned about these quotes.
Accordingly, under the totality of the circumstances described to this point with regard to Tenure Charge 7, the Undersigned finds that the District's admittedly speculative observations as to Janicki's posting of religious references in quotes from Dr. Martin Luther King in his lesson plans on January 20, 2020 do not have a material role to play in this proceeding. Therefore, the Undersigned declines to consider the matters involved in Tenure Charge 7 further.

Bollendorf, after Janicki found out via the Wechter Report that his admission to Mr. Corigliano of the tape recording was reported up the chain of command to the administration, and, while he was teaching, held his head down in his hands and told his students that he was depressed and that he may not be teaching past February, his supervisor snitched on him, conduct that the District asserts was "highly inappropriate," whether framed as "betrayed" or "snitched."

Janicki's Evidence and Arguments

Tenure Charge 6

Janicki argues that the evidence offered by the District re: retaliation and intimidation of witnesses is insufficient to support the allegation that he "engaged in conduct unbecoming a teaching staff member by engaging in retaliation and intimidation of potential witnesses on January 21, 2020 by confronting the Washington Township High School SRO (School Resource Officer) and Mr. Corigliano, after [he] became aware of a referral to law enforcement...." in that the testimony of Officer DiTullio and Mr. Corigliano does not support the allegation that Janicki "confronted" either individual. Statement of Position of Gregory Janicki ¶51.

Janicki notes that Mr. DiTullio testified that he did not feel threatened and was not concerned for his safety when Janicki stopped by his office and that he invited Janicki into his office to talk and he did "not at all" feel intimidated during their "perfectly cordial conversation," consistent with Janicki's representations that he has known Officer DiTullio for years and they have had prior discussions on all types of topics. Given the representations in the District's Affirmative Action report of "investigation by law enforcement of possible criminal activity," it is not inconceivable that Janicki would seek out the advice of a known colleague who is a law enforcement officer.

Likewise, Janicki notes Mr. Corigliano's testimony on cross examination that he believed Janicki's statement that he "would never attempt to intimidate or retaliate against him for any reason." T. 1051:25-1052:3, 1053:2-3. Janicki further notes that Mr. Corigliano testified to his office open door policy and noted that it did not come as a surprise that Janicki came to his office on that particular day. On these bases, Janicki argues that Mr. Corigliano's testimony that he was somehow "intimidated" by his longtime colleague is inconsistent with his agreement that Janicki did not raise his voice and seemed dejected and defeated during their exchange. Accordingly,

Janicki argues that the first hand testimony provided by the actual individuals involved in these exchanges with Janicki does not support the District's allegation that Janicki engaged in "retaliation and intimidation of potential witnesses."

Tenure Charge 8

Janicki argues re: comments to students that the District has alleged that he engaged in conduct unbecoming by relaying to his students that his supervisor, Mr. Corigliano "snitched" on him and that Janicki told his students that Mr. Corigliano "snitched" on him, further speculating "by telling administration of Mr. Janicki's admission to Corigliano that Mr. Janicki secretly tape recorded the private Wechter/McGee/Solicitor conversation." Again, Janicki asserts, the District is seeking to sustain tenure charges on assumptions without supporting evidence and offered no first hand testimony of this alleged incident, relying solely on the testimony of Mr. Corigliano and Mr. Bollendorf. Janicki also asserts that while both witnesses testified to student(s) report of the word "snitched," limited context was provided. Therefore, Janicki argues that the District has failed to present sufficient evidence in support of this de minimus allegation and accordingly, Charge Eight should be dismissed.

Discussion and Determinations - Tenure Charge 6, 7 and 8

Tenure Charge 6

As to the District's intimidation and retaliation assertions in its Tenure Charge 6, the Undersigned finds the District's arguments overreach the record evidence.

In the District's own arguments, it concedes Officer DiTullio was not intimidated and that Janicki provided no reason for Officer DiTullio to be intimidated.

Mr. Corigliano testified on cross examination, as Janicki argues, that he believed Janicki would never attempt to intimidate or retaliate against him for any reason and that it did not surprise him that Janicki came to his office on that particular day and did not raise his voice and seemed dejected and defeated during their exchange. In that regard, the Undersigned compares Mr. Corigliano's testimony on direct examination in response to indisputably leading questions by District counsel,[16] Mr. Corigliano responded with extensive explanations that lasted 175

[16] Q. "Could you tell us why you felt intimidated by the actions of Mr. Janicki on January 21, 2020?" and Q. "Why did you feel intimidated?"

words, until finally himself saying the word "intimidated," in view of all the preceding considerations he had just discussed.[17]

The Undersigned next notes that being or not being intimidated is a personal response, whereas the basis for whether one might be found to have been intimidated by events is somewhat subject to reasonable analysis. Based upon all of the above considerations, the Undersigned finds that the factual context surrounding the conversation between Janicki and Mr. Corigliano, as described by Mr. Corigliano in his testimony and Janicki in his arguments, was more conducive to a conclusion that Janicki's somewhat muted actions did not provide Mr. Corigliano with reasonable bases to be intimidated, given Mr. Corigliano's testimony on cross examination as to his belief that Janicki would never attempt to intimidate or retaliate against Mr. Corigliano for any reason. Accordingly, the Undersigned concludes that the evidence provided by the District is not sufficient to establish support for its Tenure Charge 6.

Tenure Charge 7

In Footnote 15, the Undersigned reported his bases for declining to consider the matters involved in Tenure Charge 7.

Tenure Charge 8

The Undersigned agrees with Janicki's description that his allegedly inappropriate snitched and or betrayed comments to his students on January 21, 2020 were de minimus, especially within the parameters of comparison involved in the numerous other matters under consideration herein. In addition, as Janicki argues, his comments to students were reported based upon hearsay by Mr. Strout and Mr. Corigliano without context. Accordingly, the Undersigned concludes that the evidence provided by the District in support of its Tenure Charge 8 does not provide material bases for finding merit to a Tenure Charge.

Penalty for Meritorious Tenure Charges

The District

The District urges dismissal for Janicki and argues that the record is replete with examples of him failing to comply with applicable laws, regulations, and school policies, and

[17] The Undersigned acknowledges that on cross examination, Mr. Corigliano repeatedly stood by his testimony that Janicki's actions were acts of intimidation.

lying about it afterwards. Whether based upon some of the individual Tenure Charges that would independently warrant termination, or as a group, the District argues that they demonstrate conduct unbecoming under the applicable legal standards and just cause for Janicki's dismissal, more particularly because he continues to engage in conduct in the workplace that is antagonistic and discriminatory toward students and coworkers in the LGBTQ community, causing turmoil with staff members, and putting the District at risk for violating state and federal anti-discrimination laws and directives from the US and New Jersey Departments of Education.

The District cites the dismissal standard in N.J.S.A. 18A:6-10 as inefficiency, incapacity, unbecoming conduct, or other just cause, with unbecoming conduct being any conduct which adversely affects the morale or efficiency of the [government unit]... [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services Karins v. Atlantic City, 152 N.J. 532,554 (1998), i.e., a teaching staff member's fitness to discharge the duties and functions of one's office or position Laba v. Newark Bd. Of Educ., 23 N.J. 364, 384 (1957), predicated not upon the violation of any particular rule or regulation, but based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Bound Brook Bd. Of Education v. Ciripompa, 228 N.J. 4, 19 (2017) quoting In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960); unbecoming conduct is generally recognized as behavior adversely affecting morale or weakening respect for the teaching profession. Karins, supra. The District further notes that outrageously inappropriate behavior, combined with lack of remorse or contrition and a likelihood of repeating the behavior are facts that may be taken into account in assessing a penalty. *I/MIO* Lesley Etheridge and Passaic County Vocational School District, Agency Dkt. No. 120-6/15 (Denenberg, 2016).

From the record herein, the District then first cites the Zudick Award as confirming its prior disciplines of Janicki, and points to a quote from the cross examination of Mr. Bollendorf as to why the District believed Janicki's dismissal was warranted.

I have a responsibility to ensure the integrity of what we do in a public education setting and, you know, obviously through these circumstances I've grown very concerned about, you know, where he's at with regard to his ability to do that. He's not demonstrated an abilityto separate his personal feelings towards his responsibilities as an educator. That doesn't change my opinion of his qualities as a guitarist and his ability to teach guitar to kids. It certainly doesn't change my opinion of him as a human being. I have no personal animus towards Mr. Janicki. I know he's a good father and he's a good family man and I don't have any issue with that.
This is a question of whether or not he can divorce himself of those convictions that he has to be able to do the job that he's paid to do in a public education setting.

Q. And in that regard, you reached the conclusion that he was unable to divorce himself, is that correct?

A. I wouldn't say unable. In fact, he's demonstrated an unwillingness through his actions.

Q. An unwillingness in his actions related to leaving document three in the main office?

A. Yes.

Q. And his unwillingness related to not attending the April 2 faculty meeting and the makeup April 4 faculty meeting?

A. Yes.

Q. And his unwillingness related to the incident identified in the homeroom by Ms. Meehan in 2016?

A. I don't know that that was an unwillingness, that was an action that he committed on the spur of the moment. I don't think that fits into unwillingness. I think the one major aspect that you haven't asked me about, if I can, is -

Q. The unwillingness component of it, we detailed that for you the unwillingness component of it, what you relied upon in making that determination that he was just simply unwilling to separate himself from his own belief was that he left this document in the main office and that he didn't attend the faculty meetings on April 2nd and April 4th. Is there anything else?

A. Yes. His unwillingness to agree in writing to me that he understood his obligations as a public educator and his need to attend any and all trainings. That would have prevented the increment withholding. That would have stopped the gradual discipline in this particular case in its tracks at that particular point in time. He had an opportunity at that moment to take control of the situation and indicate his understanding of his responsibilities and do so.

And I think that if that had occurred, had he come to that understanding and been willing to admit to that and do that, we would probably not be here today. And more importantly,you know, this latest incident that led to the filing of the tenure charges was not as a result of something he was being asked to do by the District. There was no training that he was refusing to go to. He, in the absence of any of that, decided to carry, you know, what I can only describe as his mission to address his concerns as related to the goings on of public education and the recognition of an LGBTQ environment and an LGBTQ curriculum and LGBTQ students and staff members that worked in that building. He was not -you know, he was not reacting to anything he was asked to do, he took that upon himself to do that.

Q. Okay. So we got three things then.

A. Yeah.

Q. Okay. So the unwillingness. Your conclusion that tenure charges, as you said, is that you're at the point of no return, is that it was clear to you that Mr. Janicki was unwilling to separate his personal beliefs from his ongoing duties and responsibilities as a public educator?

A. Correct.

Q. An unwillingness related to him purposely leaving documents, document number three specifically, not attending the faculty meetings on - or the portions of the faculty meetings on April 2 and April 4 relating to diversity training and also his unwillingnessto give you a written document representing that he would continue to go to training, diversity training, in lieu of taking an increment?

A. Correct.

Q. Accurately summarized?

A. For the most part. where you're, you know, doing incremental discipline, this all begins with the initial write-up and the comment that was made in the homeroom. That becomes step one and is directly related to the LGBTQ

> and the District's initiatives to recognize and have those kids and staff feel comfortable in our school setting.
>
> That comment by him as it relates to his religious feelings regarding that population was not appropriate and he was written up. And a write-up is a write-up. And, you know, any intended discipline is always with the intention of helping someone understand and hoping that they'll do better moving forward, not that you want to start laying the groundwork for something.
>
> At that moment in time it was an isolated incident that had not happened before and the hope was that there was something valuable to learn from it. The letter is in your file and nothing more comes of it if somebody does, in fact, learn something positive and does nothing more.
>
> But when something else happens, you go to the next level. Clearly something wasn't understood as a result of the first write-up and now we move on to something else. And then you apply incremental discipline as it relates to that case. And that's what led to the increment withholding, which was still within his control to do away with and he elected not to. And then eventually the incident involving the leaving behind of the transgender - anti-transgender material in the office. And it was to me a clear demonstration on his part that he was not going to abide by the District's initiatives and what it is that we were trying to do. And it wasn't enough that he could just live in his own classroom and not worry about it and not feel like he had to do anything about it, but now he was going to take his feelings, his thoughts to others in the building by leaving those documents behind - it shifted the whole dynamic. T. 1659-1664.

The District further argues that, with Document #3, Janicki's discriminatory behavior toward a protected class was unfettered and getting worse, as well as intentional and accompanied by his continued false claims of inadvertence, the kind of unprofessional, divisive, disrespectful and discriminatory conduct directed toward gay and transgender students that Ms. Meehan first cited in her March 2016 letter of reprimand and repeated during the increment withholding proceedings. In the District's view, there was no sign of remorse, no apology or defense, but simply incorrigibility that could not be rehabilitated by workshops, professional development courses, corrective action plans or interventions and as Arbitrator Zudick noted, Janicki did not learn any lessons from Ms. Meehan's letter of reprimand, the sensitivity workshop he had to attend, Mr. Strout's letters that threatened tenure charges if his misconduct continued, the efforts of conciliation and mitigation offered by Mr. Bollendorf, the withholding of his increment, and the language of the Zudick Award itself.

The District argues that there is no disciplinary action other than dismissal available to a school district after a letter of reprimand and the withholding of increment. Here, the District asserts, Janicki has revealed an inability to adhere to fundamental standards of professional conduct required within a public educational institution and has no intention of complying with any future mandatory training on LGBTQ issues and will likewise be non-compliant with new legislation (N.J.S.A. 18A:35-4.35 et. seq.; P.L.2019, c.6) that specifically requires a board of education to provide instruction on the political, economic, and social contributions of persons with disabilities and LGBTQ individuals in an appropriate place in the curriculum of middle school and high school students as part of its implementation of the New Jersey Student Learning Standards. Janicki never submitted any statement of assurance to Mr. Bollendorf in response to his offer as outlined back on May 15, 2019. Therefore, the District argues, the Undersigned can infer from Janicki's lack of response to Mr. Bollendorf's invitation for written assurance, Janicki's continued silence during the arbitration hearing on the increment withholding, and Janicki's muteness in these proceedings, that the assurance will never be given.

The District also points to examples in Tenure Charge 3 of Janicki's repeated dishonesty that erodes the requisite bond of professional trust in the employer-employee relationship, such that his return to his teaching position poses an unacceptable risk of harm to the District based upon his continuous intentional disregard of the basic duty of honesty and good faith dealing with his employer, which strikes at the heart of the employment relationship. In addition, the District considers Janicki's tape recording of the private conversation between administrators that was protected by privacy concerns, wiretap laws and the attorney client privilege, to be inexcusable, whether intentional or not, as was his disdain toward Mr. Corigliano because he did his supervisory duty of reporting the admission of illegal taping.

Janicki

Janicki denies that any of the Tenure Charges herein has merit and urges that all be dismissed because the District has failed to meet its burden of proving just cause for any discipline and, even if the underlying allegations were proven, the penalty of removal from his tenured position is disproportionate to the alleged conduct. Nonetheless, above, in the preceding sections of this Opinion, the Undersigned has found merit to what are clearly the four most serious and

substantive of the eight Tenure Charges. Under that circumstance, the Undersigned turns to arguments made by Janicki in the course of arguing the merits of the Tenure Charges even if they were meritorious.

Janicki notes that in matters under N.J.S.A. 18A:6-10, the fact-finder in a tenure hearing involving allegations of misconduct should consider the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system when determining the appropriate remedy. In re Fulcomer, 93 N.J. Super. 404, 422 (App. Div. 1967). In addition, the impact of the penalty on [the respondent's] teaching career; the respondent's teaching record and teaching ability; and whether the respondent had been disciplined in any manner by the board prior to the date of the incident[s] involved in [the] charges are other factors to be considered. Id.

Pursuant to N.J.S.A. 18A:6-17.2(d), the board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met based upon a preponderance of the credible evidence. Pugliese v. State-OperatedSchool District of the City of Newark, Essex County, 2016 N.J.AGENLEXIS 19, 9 citing In re Polk License Revocation, 90 N.J. 550 (1982). See also Atkinson v. Parsekian, 37 N.J. 143 (1962). The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275(1958). The preponderance may also be described as the greater weight of credible evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Tenure was designed to protect employees from dismissal for unfounded, flimsy or political reasons. Wright v. Bd. of Educ. of E. Orange, 99 N.J. 112, 118 (1985) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 71 (1962) cert. denied 371 U.S. 956, 83 S.Ct. 508 (1963).

In that context, Janicki noted that he has shown compliance with his 2016 discipline by completing the required training and that, with the limited exception of the 11-12 Main Office investigation, the intentional misrepresentations allegations set forth in Tenure Charge 3 have all been addressed in the context of the increment withholding proceeding in a decision which was not issued until after the Tenure Charge process was initiated. Therefore, Janicki asserts, Tenure Charge 3 should be dismissed as the District has failed to produce evidence in support thereof;

further, termination would be disproportional to the District's allegation that Janicki made intentional misrepresentations in conjunction with its investigation. Therefore, Janicki argues, the District is seeking duplicative and punitive discipline through the filing of Tenure Charges based on new assertions herein that do not give rise to a basis for termination from his tenured employment. See In re Tenure Hearing of Barbara Emri, OAL Dkt. No. EDU 457-00, Agency Dkt. No. 18-6/00, 2002 WL 31042788, initial decision (Aug. 30, 2002), 2002 WL 32590922, Comm'r. decision (October 21 2002 discipline final decision (Dec. 5, 2003);)(racially inappropriate comments and multiple acts of inappropriate behavior involving students, colleagues and parents, insubordination, failure to follow progressive discipline).

Janicki further argues that progressive discipline is a foundational principle of public sector discipline in New Jersey. West New York v. Bock, 38 N.J. 500, 522 (1962). The District, through the filing of these Tenure Charges, has failed to afford Janicki the opportunity to correct the alleged problematic behavior before increasing the sanction for failing to do so. In that regard, Janicki notes that the increment withholding decision was issued on April 1, 2020, after Janicki had been served with the Tenure Charges herein. Therefore, Janicki argues, the discipline of discharge is too harsh a penalty relative to the alleged offense. See In the Matter of the Tenure Hearing of Joseph Archible, Lenape Regional High School District, Burlington County, Dkt. No. 25-21, decided 1/29/2021 ("Archible") (holding "The fact that Respondent had his increment withheld once does not require that any discipline that may be issued to the teacher in the future - no matter how many years may pass - must be termination... Just Cause requires the corrective action of progressive discipline in all but the most egregious circumstances. As a consequence, just cause requires that management exercise judgment-under-the-specific-circumstances to determine whether discipline could reasonably be relied upon to correct an employee's conduct or performance." Here, as in Archible, Janicki asserts, he has a long record of good performance and has expressed a strong interest in continuing his role as a guitar teacher.

Discussion and Determinations - Penalty for Meritorious Tenure Charges

Parties' Arguments

The parties have presented accurate descriptions of the standards under N.J.S.A. 18A:6-17.2(d) and numerous relevant cases for the Undersigned's determinations herein. However, the Undersigned finds that he cannot accept Janicki's assertions that under those standards, the

District has failed to meet its burden of proving just cause for any discipline and, even if the underlying allegations were proven, the penalty of removal from his tenured position is disproportionate to the alleged conduct.

As the Undersigned has already noted just above, he has found in the preceding sections of this Opinion merit to the four most serious and substantive of the District's eight Tenure Charges. As a result, we turn then to Janicki's alternative argument - that even if the underlying allegations were proven, the penalty of removal from his tenured position is disproportionate to the alleged conduct. In that regard, the Undersigned also finds that the District's arguments to the contrary are far more persuasive and that it has established that the penalty of dismissal is appropriate.

In those regards, the Undersigned rejects as unpersuasive Janicki's argument, that his removal is disproportionate to his conduct, in that the District's proofs have established that, contrary to Janicki's assertions, he has not shown compliance with his earlier found Zudick Award disciplines. Rather, the District's evidence has established that Janicki has, as it argues, failed to comply with applicable laws, regulations, and school policies; compounding his misconduct, he then lied about it afterwards, to extents that he has demonstrated conduct unbecoming under the applicable legal standards and just cause for his dismissal. Moreover, as the District also argues and the Undersigned has found, Janicki continued to engage in conduct that is antagonistic and discriminatory toward students and coworkers in the LGBTQ community, causing turmoil with staff members, and putting the District at risk for violating state and federal anti-discrimination laws and directives

The Undersigned also rejects Janicki's arguments that the District failed to afford him the opportunity to correct the alleged problematic behavior before increasing the sanction for failing to do so in that the Zudick Award's increment withholding decision was issued on April 1, 2020, after Janicki had been served with the Tenure Charges herein. Therefore, Janicki argues, the discipline of discharge is too harsh a penalty relative to the alleged offenses in the earlier issued Tenure Charges. In that regard, Janicki argues that Archible's holding should be applied:

> The fact that Respondent had his increment withheld once does not require that any discipline that may be issued to the teacher in the future - no matter how many years may pass - must be termination... Just Cause requires the corrective action of progressive discipline in all but the most egregious

> circumstances. As a consequence, just cause requires that management exercise judgment-under-the-specific-circumstances to determine whether discipline could reasonably be relied upon to correct an employee's conduct or performance."

Therefore, Janicki asserts that, as in Archible, he has a long record of good performance and has expressed a strong interest in continuing his role as a guitar teacher.

However, the Undersigned finds, Archible, by its own terms, involves applying discipline based upon a years ago increment withholding without the District exercising "judgment-under-the-specific-circumstances to determine whether discipline could reasonably be relied upon to correct an employee's conduct or performance," while clearly also providing termination for just cause in the most egregious circumstances. Herein, the Undersigned notes, the District followed progressive discipline, and yet, merely months, not years, later, found itself with Janicki nonetheless relentlessly dedicated to continuing his misconduct: being hostile to ideas with which he disagreed; lying about such; and surreptitiously taping an administrators' meeting with counsel, about which he boasted to a co-worker - egregious circumstances each. The Undersigned also finds that whether Janicki did so before or after receiving the Zudick Award issued is immaterial. Until receiving the Award, Janicki was on notice from the District as to its policies and its disciplining of him for violating them. If Janicki chose to continue violating those policies prior to possibly being vindicated by Arbitrator Zudick in his Award, Janicki did so strictly at his peril and cannot complain about his lack of knowledge that Arbitrator Zudick would rule against vindicating Janicki.

Accordingly, the Undersigned finds that Janicki's arguments against a dismissal penalty are of no merit herein.

Impact of Tenure Charges

The Undersigned next notes that while he has rejected four of the District's eight Tenure Charges, each of the rejected Charges is of modest or no material significance, compared to the four substantive and most serious Tenure Charges to which he has found merit. The Undersigned's determinations above as to the four Tenure Charges he found meritorious describe them and their outcomes fully and do not require repetition here. Accordingly, the Undersigned turns next to reporting his agreement with the District's description, in its discussion of the appropriate penalty, that with Janicki's involvement with

Document #3, his Zudick Award-found discriminatory behavior toward a protected class got worse, instead of better, as well as clearly intentional, and that it was also accompanied by his making false claims of inadvertence, which indicated no sign of remorse or apology by him, but simply incorrigibility as to the seriously concerning conduct involved. The Undersigned also agrees with the District, that Janicki's conduct - motivated by his out-of-control zeal and outrage, in responding to the recent High School announcement of a LGBTQ Coming Out Day and a faculty meeting about a new transgender policy that Ms. Wachter noted in her Report by attempting to distribute Document #3 - demonstrates that he could not be rehabilitated by workshops, professional development courses, corrective action plans or interventions. Or, as the District aptly describes: as Arbitrator Zudick noted, Janicki did not learn any lessons from Ms. Meehan's letter of reprimand, the sensitivity workshop he had to attend, Mr. Strout's letters that threatened tenure charges if his misconduct continued, the efforts of conciliation and mitigation offered by Mr. Bollendorf, or the withholding of his increment.

The Undersigned also finds Mr. Bollendorf's concluding comments regarding his analysis of Janicki's final serious misconduct telling:

> And [Document #3] was to me a clear demonstration on [Janicki's] part that he was not going to abide by the District's initiatives and what it is that we were trying to do. And it wasn't enough that he could just live in his own classroom and not worry about it and not feel like he had to do anything about it, but now he was going to take his feelings, his thoughts to others in the building by leaving those documents behind - it shifted the whole dynamic.

CONCLUSION

As a result of all the considerations discussed herein, the Undersigned finds the District's determination compellingly correct: Janicki's incorrigibility required it to move beyond its rehabilitation efforts to severance of its employment relationship with Janicki.

AWARD

The District had just cause to issue its Tenure Charges 1, 2, 3 and 5.

The District's Tenure Charges 4, 6 and 8 were not supported by sufficient evidence and Tenure Charge 7 did not have a material role herein.

The District's Tenure Charges 1, 2, 3 and 5 were of sufficient seriousness that the District had just cause to dismiss Gregory Janicki.

DATE: August 31, 2021

GARY T. KENDELLEN

STATE OF NEW JERSEY:

SS:

COUNTY OF UNION:

I hereby affirm pursuant to CPLR Sec. 7507 that I am the individual described in and who executed this instrument, which consists of my Decision.

DATE: August 31, 2021

GARY T. KENDELLEN

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DATE: August 31, 2021

GARY T. KENDELLEN

186-21

186-21

New Jersey Commissioner of Education

Final Decision

Robin Scheffler,

Petitioner,

v.

Board of Trustees of the Sussex County
Charter School for Technology, Sussex County,

Respondent.

Synopsis

Petitioner – formerly employed by the respondent Board as a non-tenured teacher – filed an appeal on September 11, 2020 in which she challenged the non-renewal of her employment and alleged violation of tenure rights. The Board contended that petitioner's appeal was untimely and should be dismissed pursuant to *N.J.A.C.* 6A:3-1.3; alternatively, the Board argued that petitioner never attained tenure. Petitioner asserted that her appeal is not untimely because her claim was not ripe until the end of the school year, on June 23, 2020, and argued that she was entitled to streamline tenure. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner became employed by the Board as a teacher on September 1, 2015 and remained employed under annual employment contracts through the 2019-2020 school year; in March 2020, petitioner was verbally advised by the superintendent that she would not be recommended for renewal for the 2020-2021 school year; on May 12, 2020, petitioner was served with a written notice of non-renewal; petitioner continued teaching through the end of the 2019-2020 school year; pursuant to *N.J.A.C.* 6A:3-1.3(i), a petition must be filed no later than the 90th day from the date of receipt of the notice of a final order or action that is the subject of the appeal; there is no dispute that petitioner was verbally notified in March 2020 that she would not be offered a contract for 2020–2021, nor that petitioner was served with a written notice of non-renewal on May 12, 2020, which clearly stated that her employment would not be renewed. The ALJ concluded that petitioner received adequate notice on May 12, 2020 that she was not being offered a contract for the 2020–2021 school year; the fact that the notice of non-renewal came during her fifth year is immaterial, as her status upon receipt of the notice was still that of a non-tenured teacher; and petitioner did not timely file her appeal. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon comprehensive review of the record, the Commissioner concurred with the ALJ that the petition of appeal was untimely and that summary decision is appropriate. In so deciding, the Commissioner noted that the Appellate Division's decision in *Nissman v. Bd. of Educ. of Twp. of Long Beach Island, Ocean Cty.*, 272 N.J. Super. 373 (1994) is controlling. In that case, the court rejected the same argument petitioner made here, that her appeal could not be filed earlier because she did not acquire tenure until the completion of the required years of service; the court in *Nissman* ruled that the 90-day limitations period begins to run on the date of the board's action, not on the date when a petitioner claims that a substantive right accrued. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 09785-20
AGENCY DKT. NO. 200-9/20

ROBIN SCHEFFLER,
Petitioner,
v.
BOARD OF TRUSTEES OF THE SUSSEX COUNTY CHARTER SCHOOL FOR TECHNOLOGY, SUSSEX COUNTY,
Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld Cohen, P.C., attorneys)

Patricia C. Melia, Esq., for respondent (Weiner Law Group, LLP, attorneys)

Record Closed: April 2, 2021 Decided: July 20, 2021

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

Petitioner Robin Scheffler, a teacher, appeals the non-renewal of her employment by respondent, the Board of Trustees of the Sussex County Charter School for Technology, Sussex County (Board or SCCST), alleging violation of tenure rights.

PROCEDURAL HISTORY

On or about September 11, 2020, Scheffler filed a Petition of Appeal (Petition) with the Interim Commissioner of Education. On or about September 29, 2020, the Board filed Respondent's Answer to Petition of Appeal and Separate Defenses (Answer). The Office of Controversies and Disputes of the Department of Education (Department) transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on October 6, 2020.

On January 27, 2021, with the intention of filing cross-motions for summary decision, the parties submitted a joint Stipulation of Facts with nine exhibits. On March 12, 2021, petitioner and respondent filed cross-motions for summary decision. Petitioner's motion was accompanied by a brief. Respondent's motion was accompanied by a letter brief and Certification of Patricia Melia, Esq., with two exhibits. On April 1, 2021, petitioner filed a reply letter brief. On April 2, 2021, respondent filed a reply brief.

FACTUAL DISCUSSION AND FINDINGS

Per the Joint Stipulation of Facts, the parties have stipulated to the following pertinent **FACTS**:

On or about September 1, 2015, Robin Scheffler (petitioner) became employed by the Sussex County Charter School for Technology (respondent) as a teacher.

Petitioner worked for respondent as a teacher from September 1, 2015, until the last day of school in June 2016.

On or about December 1, 2016, petitioner and respondent entered into an employment contract for the 2016–2017 academic year. (Joint Exhibit A.)

Petitioner worked for respondent for the 2016–2017 academic year as a teacher.

On or about April 10, 2017, petitioner and respondent entered into an employment contract for the 2017–2018 academic year. (Joint Exhibit B.)

Petitioner worked for respondent for the 2017–2018 academic year as a teacher.

On or about May 7, 2018, petitioner and respondent entered into an employment contract for the 2018–2019 academic year. (Joint Exhibit C.)

Petitioner worked for respondent for the 2018–2019 academic year as a teacher.

On or about April 8, 2019, petitioner and respondent entered into an employment contract for the 2019–2020 academic year. (Joint Exhibit D.)

Petitioner worked for respondent for the 2019–2020 academic year.

The last day of school for the 2019–2020 school year was June 16, 2020.

In or about March 2020, petitioner met with superintendent Noreen Lazariuk (superintendent), at which time petitioner was verbally advised that the superintendent would not be recommending that her employment be renewed for the 2020–2021 academic year.

On or about May 12, 2020, petitioner was served with a written Notice of Non-Renewal by way of email and certified mail, return receipt requested. (Joint Exhibit E.)

Petitioner did not request a statement of reasons.

Petitioner did not request a Donaldson hearing.

On April 6, 2020, the Board voted on a list of employees approved for reappointment for the 2020–2021 academic year. Petitioner's name was not included in the Board's list of reappointments for the 2020–2021 school year. (Joint Exhibit F.)

On or about August 13, 2020, New Jersey Education Association field representative John Ropars (Ropars) requested from the Board specific information and documentation relating to petitioner's employment and non-renewal. (Joint Exhibit G.)

On or about August 27, 2020, counsel for respondent answered Ropars' request for specific information. (Joint Exhibit H.)

On September 1, 2020, counsel for respondent received correspondence (dated August 27, 2020) from petitioner's counsel. (Joint Exhibit I.)

Petitioner did not report for work for Teacher In-Service on September 1, 2020, and she did not report for work for the students' start of school on September 8, 2020.

On or about September 11, 2020, petitioner filed the instant appeal with the Commissioner of Education (the Commissioner).

LEGAL ANALYSIS AND CONCLUSIONS

The Board argues that Scheffler's appeal is untimely and should be dismissed pursuant to N.J.A.C. 6A:3-1.3, and alternatively argues that Scheffler did not attain tenure. Conversely, Scheffler argues that her appeal is not untimely because her claim was not ripe until the end of the school year on June 23, 2020,[1] and argues that she was entitled to streamline tenure.

N.J.S.A. 18A:36A-1 to -18 is known as the "Charter School Program Act of 1995" (the Act), and pursuant to N.J.S.A. 18A:36A-18, the State Board of Education adopted rules and regulations pursuant to the "Administrative Procedure Act" necessary to effectuate the provisions of the Act, which are codified at N.J.A.C. 6A:11-1 et seq. A charter school is a public school operated under a charter granted by the Commissioner, which is operated independently of a local board of education and is managed, supervised, and controlled by a board of trustees. N.J.S.A. 18A:36A-3(a). Unless

[1] Per the Joint Statement of Facts, the last day of school was June 16, 2020.

exempted by the Commissioner, a charter school operates in accordance with its charter and the laws and regulations that govern other public schools. N.J.S.A. 18A:36A-11(a).

To initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws, a petitioner must prepare a petition of appeal conforming to the requirements of N.J.A.C. 6A:3-1.4 and serve it upon each respondent, together with any supporting papers. N.J.A.C. 6A:3-1.3(a). N.J.A.C. 6A:3-1.3(i) provides as follows:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation, or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

On or before May 15 in each year, each non-tenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either a written offer of a contract for employment from the board of education for the next succeeding year or a written notice from the chief school administrator that such employment will not be offered. N.J.S.A. 18A:27-10. An employee whose employment contract is not renewed has the right to a written statement of reasons for non-renewal and to an informal appearance before the board. N.J.S.A. 18A:27-4.1(b); see also N.J.S.A. 18A:27-3.2. The purpose of the appearance shall be to permit the staff member to convince the members of the board to offer reemployment. Ibid.

There is no dispute that in March 2020 Scheffler was verbally notified by Superintendent Lazariuk that she would not be offered a contract for 2020–2021, or that on April 6, 2020, the Board voted on the list of teacher contracts for the 2020–2021 school year, and Scheffler's name was not on the list. Further, there is no dispute that Scheffler was served with a written Notice of Non-Renewal by way of email and certified mail, return receipt requested. The May 12, 2020, Notice of Non-Renewal states:

> Please be advised that you will not be offered reemployment for the 2020–2021 school-year. Please be advised that you have a right to request a statement of reasons for your nonrenewal within fifteen (15) days of your receipt of this notice, as well as the right to an informal appearance before the Board for the purpose of trying to convince the Board to offer you reemployment. If you are inclined to request a statement of reasons or an informal appearance before the Board, please communicate your request in writing to me at the above address.

Accordingly, Scheffler had notice sufficient to trigger the ninety-day time period. Ninety days from May 12, 2020, would have been August 10, 2020, but Scheffler did not file her appeal until September 11, 2020, a full month late.

Petitioner argues that Scheffler "had no reason to know that SCCST would continue to employ her until she earned tenure, or release her from employment early so that she did not earn tenure"; that SCCST "could have reconsidered its decision or opted to terminate Scheffler, thus depriving her of her tenure rights"; and that "[i]f SCCST had terminated her any time before that and issued a termination date before the last day of school, there would have been no wrongful act as to her tenure rights, notwithstanding any wrongful act as to the notice of termination." Petitioner further argues that her "claim only became ripe and subject to a petition once the school year had ended and the Board failed to recognize Scheffler's entitlement to tenure." However, the applicable statute references "receipt of the notice of a final order, ruling, or other action by the district board of education," and does not specify the end of the school year as an operative date.

Scheffler could have requested a statement of reasons for the non-renewal after receipt of the non-renewal notice, but she did not do so. Scheffler likewise could have appeared before the Board to try to convince the Board to offer her reemployment, at which time she could have presented her argument that unless terminated she would acquire tenure at the end of the school year, but she did not do so. Further, if petitioner did not wish to alert the Board to her argument until after the last day of the school year, she still could have filed her petition after the end of the school year, but still within ninety days of the non-renewal notice, but she did not do so.

The Board argues that Scheffler "initially "challenged" her non-renewal on or about July 30, 2020, when she contacted counsel for the Board complaining that the Board had breached her employment contract for the 2019–2020 school year by terminating her employment "without 60-days' notice," and that "[f]or the first time, on August 27, 2020 (107 days after petitioner was provided written notice of her non-renewal), through correspondence written by her counsel, petitioner began asserting that she had received tenure as a teaching staff member," which correspondence was received by the Board on September 1, 2020.

In Kaprow v. Board of Education, 131 N.J. 572, 583 (1993), the New Jersey Supreme Court discussed the ninety-day limitation period and determined that such period "represents a *reasonable* procedural requirement," provides "finality in education matters," and has withstood tangential review. Additionally, the Court opined:

> Adequate notice must be 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. Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs.
>
> [Kaprow, 131 N.J. at 587 (citations omitted).]

Kaprow attempted to resolve his claim through negotiations with the Board. However, the Supreme Court found that such attempt did not negate that he had received adequate notice on a date certain, nor did it toll the running of the limitations period. In the present matter, Scheffler contends that the matter was "not ripe for adjudication" until the last day of the school year because that was when she acquired streamline tenure. However, she received adequate notice on May 12, 2020, that she was not being offered a contract for the 2020–2021 school year, and her attempts to resolve her dispute did not toll the running of the ninety-day limitations period within which she was permitted to file a petition. Had Scheffler been issued the exact same notice of non-renewal in a prior

year, there is no question that the operative date to file a petition would have been the date of her receipt of the notice of non-renewal. The fact that the notice of non-renewal was during her fifth year does not change that, as her status upon receipt of the notice was still that of a non-tenured teacher and she did not timely appeal.

On point is Nissman v. Board of Education of Long Beach Island, Ocean County, 272 N.J. Super. 373 (App. Div.), certif. denied, 137 N.J. 315 (1994), wherein Nissman entered into a contract with a local board to serve as an elementary-school principal for a term of three years. In March and April of the third year of her contract, meetings were held by the board with Nissman and her attorney for the purpose of determining whether Nissman would be offered a contract for the subsequent year. Nissman conceded that she was not tenured in her position as principal at the time of the meetings. In compliance with N.J.S.A. 18A:27-10,[2] the board adopted a resolution on April 23 resolving that Nissman's employment contract expiring August 31 would not be renewed, and she would not be offered a new contract or granted tenure. Nissman received the resolution on or about April 27 and continued working until August 31. On August 31, Nissman's attorney faxed correspondence to the board, stating, inter alia, that Nissman had "served in the position for three consecutive calendar years, she has acquired tenure"; "asserts her right to the position of principal"; and "will report to the principal's office on . . . September 4 . . . to resume her duties." 272 N.J. Super. at 375. In response, the board faxed correspondence to Nissman's attorney stating, inter alia, that Nissman "does not have tenure"; "the Board took formal action at its meeting on April 23"; and that she was "duly notified of this action" and "should not report to work." On September 21, Nissman filed a petition alleging that she acquired tenure on August 31, and that her employment was terminated on September 4.

In Nissman, the court determined that it was not necessary to decide whether the board acted correctly, and that what was important was that "the Local Board had the right to know within 90 days whether its action was going to be challenged" because it would undoubtedly have to contract with another principal to replace Nissman. Id. at 380. The court inferred that "April 30" was selected by the Legislature to provide "sufficient time

[2] At that time, the date in the statute was "on or before April 30," not "on or before May 15."

for a local board to fill vacant positions, and for the terminated teaching staff member to secure other employment," and, citing Kaprow, stated, "[t]o allow a teaching staff member . . . to file a claim after the commencement of a new academic year in these circumstances defeats the principle of 'repose, an essential element in the proper and efficient administration of the school laws.'" Ibid.

Although petitioner argues that "the court in Nissman did not address the ripeness doctrine and how it related to Nissman's claim for tenure," the court in fact rejected Nissman's argument that her petition could not have been filed earlier because she did not acquire tenure until August 31, and specifically stated that such argument "ignores the Rule's provision that the 90 days begin on the date on which the final action of the Local Board took place . . . not the date on which petitioner claims that a substantive right accrued." Id. at 381.

Summary Decision

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Further, "[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. This standard is substantially similar to that governing a civil motion under R. 4:46-2 for summary judgment. E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010); Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995).

In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), the New Jersey Supreme Court set forth the standard governing a motion for summary judgment:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to

> the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
>
> [Citation omitted.]

The parties cross-moved for summary decision. Inasmuch as there is no genuine issue as to any material fact challenged, I **CONCLUDE** that this matter is appropriate for summary decision. On May 12, 2020, Scheffler received adequate notice that her contract would not be renewed, but she failed to file a petition until September 11, 2020, a month after the applicable ninety-day limitations period had expired. Accordingly, I **CONCLUDE** that Scheffler's Petition of Appeal was untimely filed and should be dismissed. As such, the alternative issue of tenure is not addressed herein.

ORDER

It is hereby **ORDERED** that summary decision is **GRANTED** in favor of the Board, and that Scheffler's Petition of Appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 20, 2021

DATE

KELLY J. KIRK, ALJ

Date Received at Agency: July 20, 2021

Date Mailed to Parties: July 20, 2021

db

186-21

OAL Dkt. No. EDU 09785-20
Agency Dkt. No. 200-9/20

New Jersey Commissioner of Education

Final Decision

Robin Scheffler,

Petitioner,

v.

Board of Trustees of the Sussex County Charter School for Technology, Sussex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto, have been reviewed and considered.

Petitioner was employed by the Board as a teacher beginning in the 2015-2016 school year. On May 12, 2020, petitioner was served with a written notice of non-renewal. On September 11, 2020, petitioner filed a petition of appeal, arguing that the Board had violated her tenure rights. Following cross-motions for summary decision, the ALJ granted the Board's motion for summary decision, finding that the petition of appeal was untimely pursuant to *N.J.A.C.* 6A:3-1.3(i), because it was filed more than 90 days after petitioner was served with the notice of non-renewal.

In her exceptions, petitioner argues that she earned tenure after five years of employment, on the last day of the 2019-2020 school year, pursuant to *N.J.A.C.* 6A:11-6.2(a). Petitioner contends that her claim did not accrue and was not ripe for review until she earned tenure

on that date, and that her petition of appeal was timely because it was filed within 90 days of that date. Petitioner claims that tenure is obtained by operation of law at the completion of the statutory period and that a non-renewal notice cannot circumvent that law.

In reply, the Board argues that the ALJ correctly determined that the petition of appeal was untimely. According to the Board, the ALJ was not required to address the question of whether petitioner earned tenure because the petition was untimely. Furthermore, the Board contends that petitioner did not earn tenure on the last day of the school year, because the statute provides that tenure is earned "after" five years of employment, meaning that the teacher must be reemployed following the completion of five years of service.

Upon a comprehensive review of the record, the Commissioner concurs with the ALJ that the petition of appeal was untimely. The Appellate Division's decision in *Nissman v. Bd. of Educ. of Twp. of Long Beach Island, Ocean Cty.*, 272 N.J. Super. 373 (1994) is controlling.[1] In that matter, the board of education voted in April not to renew Nissman's contract. Nissman continued to work through the expiration of the contract on August 31, at which time she had been employed in the position for three years, the applicable time period required for her to earn tenure. Thereafter, she filed a petition of appeal alleging violation of her tenure rights. The board argued that Nissman's petition was untimely because it was filed more than 90 days after she had received the April notice that her contract would not be renewed; she countered that her cause of action did not accrue until she completed three years of work on August 31. The ALJ and the Commissioner agreed with Nissman, finding that by failing to terminate the contract before the three years expired, the tenure statute applied by self-

[1] The decisions cited by petitioner for the proposition that her claim was not ripe until the end of the school year involve differing factual scenarios, while the facts in *Nissman* are substantially similar to the facts here. Furthermore, the cases cited by petitioner are Initial or Commissioner decisions, not appellate decisions. Therefore, petitioner's reliance on those cases over the on-point holding by the Appellate Division in *Nissman* is not persuasive.

effectuation, and Nissman's claim was not time-barred because she challenged the denial of her tenured status and not the non-renewal. The State Board of Education[2] disagreed and reversed the Commissioner's decision, concluding that the only action by the board of education was the termination of her employment in April and the fact that the termination became effective on August 31 did not change the date on which the action was taken, constitute board action, or give rise to a separate cause of action. The Appellate Division affirmed the State Board of Education's decision, finding that it was not arbitrary, capricious, or unreasonable. *Id.* at 379. The court found that Nissman knew in April that she was not going to be offered a new contract, would be required to serve out the remaining time on her existing contract, and would complete three years of service, and that, nonetheless, the board had voted not to grant her tenure. *Ibid.* The court found that it was not necessary to decide whether the board had acted correctly in not renewing the contract, indicating that what was important was that the board had the right to know within 90 days of passing its resolution whether its action was going to be challenged. *Id.* at 380.

While petitioner argues that the *Nissman* decision did not address ripeness, the Commissioner does not find this argument persuasive. Nissman argued that her claim could not have been filed earlier because she did not acquire tenure until the completion of the required years of service – the same argument that petitioner makes here. The court rejected that argument, stating that the 90-day limitations period begins to run on the date of the board's action, not on the date when a petitioner claims that a substantive right accrued. *Id.* at 381. Moreover, the court found that an "agency regulation that focuses on the date of the employer's wrongful act as the accrual date for the cause of action, rather than the date on which the

[2] At that time, appeals of Commissioner decisions were made to the State Board of Education before proceeding to the Appellate Division.

consequences of the act is directly felt by the employee (termination), is not inherently arbitrary or capricious." *Ibid.* While the court did not use the term "ripeness," it specifically indicated that Nissman could have filed her petition within 90 days of receiving her notice of non-renewal, prior to the date on which she would complete the service required for tenure. *Ibid.* This finding directly contradicts petitioner's ripeness argument, which is based on the premise that she could not have filed the petition until she completed the required service.

Like Nissman, petitioner characterizes her appeal as arising not from the Board's action of non-renewing her contract, but from the denial of her alleged tenure status. Applying the *Nissman* holding, it is clear that petitioner was required to file her petition on or before August 10, 2020, 90 days after she received notice of her non-renewal. She did not file her petition of appeal until September 11, 2020, more than a month later. Therefore, her petition was untimely pursuant to *N.J.A.C.* 6A:3-1.3(i).[3]

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board's motion for summary decision is granted and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[4]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 3, 2021
Date of Mailing: September 10, 2021

[3] For this reason, the Commissioner does not reach the issues of whether petitioner earned tenure or whether the Board's notice of non-renewal could prevent any tenure rights from vesting.

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

187-21

187-21

New Jersey Commissioner of Education

Final Decision

C.O., on behalf of minor child, J.S.,

Petitioner,

v.

Board of Education of Lenape Regional High School District, Burlington County,

Respondent.

Synopsis

Pro se petitioner, a resident of Medford, New Jersey, challenged the determination of the respondent Board that his nephew, J.S., a non-resident student, is not eligible to attend school within the Lenape Regional High School District (LRHSD). Petitioner C.O. and his sister, M.L. – a resident of Sioux City, Iowa – filed affidavits in support of J.S.'s application for enrollment in the LRHSD as a non-resident student. Prior to February 2021, J.S. resided in Iowa with his mother, M.L. The Board filed a motion for summary decision, contending that, pursuant to *N.J.S.A.* 18A:38-1 and *N.J.A.C.* 6A:1-1 et. seq., J.S. did not meet the eligibility criteria to attend the LRHSD as an affidavit student; further, the Board sought tuition reimbursement for the period of J.S.'s ineligible attendance.

The ALJ found, *inter alia*, that: there are no material facts at issue here and the case is ripe for summary decision; children aged five to twenty years are entitled to a free public education in the district in which their parent or guardian is domiciled; the domicile of a person is the place where he has his true, fixed, permanent home, to which – whenever absent – he has the intention of returning, and from which he has no present intention of moving; in this case, J.S.'s mother, M.L., stated in her affidavit that she was sending her son to New Jersey to complete his education, that he would return to Iowa upon graduation, and that she has the economic means to support him in Iowa; petitioner failed to establish that M.L. is incapable of supporting or providing care for J.S. due to family or economic hardship, and further failed to establish that Iowa is not J.S.'s permanent home. The ALJ concluded that petitioner failed to satisfy his burden of proof that J.S. is legally domiciled with petitioner at his Medford address and is not entitled to a free public education in the LRHSD. Accordingly, the ALJ granted summary decision in favor of the Board and ordered petitioner C.O. to pay tuition in the amount of $99.44 per day for each day during the 2020-21 school year on which J.S. was enrolled in the LRHSD.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ that petitioner failed to establish that his nephew, J.S., was a domiciliary within the LRHSD and that J.S. met the criteria to be enrolled as an affidavit student. The Commissioner further concurs with the ALJ's conclusion that J.S. was, therefore, not entitled to a free public education in the District's schools, and that C.O. is responsible for the payment of tuition for the period of J.S.'s ineligible attendance. As the Commissioner was unable to discern the number of days that J.S. attended LRHSD during the 2020-21 school year, the matter was remanded to the OAL for calculation of tuition pursuant to *N.J.S.A.* 18A:38-1(b).

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DOCKET NO. EDU 02698-21

AGENCY REF. NO. 31-3/21

C.O. on behalf of minor child J.S.,

Petitioner,

v.

LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, BURLINGTON COUNTY,

Respondent.

C.O. on behalf of minor child **J.S.,** petitioner, pro se

R. Taylor Ruilova, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: May 27, 2021 Decided: July 21, 2021

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF CASE

Petitioner C.O. on behalf of J.S. challenges the decision of respondent, Lenape Regional High School (LRHS) Board of Education, Burlington County (Board) that minor child J.S., a non-resident student, is not eligible to attend school within the LRHS District (District), pursuant to N.J.S.A. 18A:38-1, and its accompanying regulations, N.J.A.C. 6A:1-1 et. seq.

PROCEDURAL HISTORY

On January 29, 2021, petitioner filed a petition with the Commissioner of the New Jersey Department of Education pursuant to N.J.S.A 18A:6-9. On March 12, 2021, respondent filed a motion to dismiss in lieu of an answer. This motion was not decided by the Commissioner and was transmitted with the petition on March 16, 2021, to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

By letter dated April 30, 2021, a briefing schedule was issued and on May 28, 2021, petitioner responded to the motion to summary decision. On June 8, 2021, respondent submitted a reply brief and the motion is now ripe for review.

FACTUAL DISCUSSION AND FINDINGS

The material facts in this matter are not in dispute. Based on the statements made by C.O and M.L. in their affidavits supporting J.S.' application to attend LRHS District as a non-resident student, the statements of C.O. in the petition he filed to appeal the Board's decision to deny J.S.' application, C.O.'s May 28, 2021 letter, and the certification of Matthew Webb, I **FIND** the following **FACTS:**

1. LRHS District is a regional public school district serving eight towns in Burlington County, New Jersey. The District operates four high schools, including Shawnee High School, Medford Township (Shawnee HS).

2. C.O. is a resident of the District, residing in Medford Township.

3. J.S. is C.O.'s fifteen-year old nephew. Prior to February 3, 2021, J.S. resided with his mother, M.L., in Sioux City, Iowa.

4. On February 4, 2021, C.O. submitted an application to respondent for J.S. to attend Shawnee HS in the LRHS District as a non-resident pupil ("affidavit student"). Br. In Support of Respondent's Motion for Summary Disposition (March 15, 2021), Ex. A

[LRHS District Affidavit Application of C.O. on behalf of J.S. (January 28, 2021)]. In this application, C.O. stated that J.S. would reside with him in the District for the duration of the calendar year and "indefinitely [sic]." Id., Ex. A at 2, 4.

5. M.L. submitted an affidavit in support of J.S.'s application in which she stated that J.S. would remain in C.O.'s home "until completion of high school," and would return to her home upon graduation. Id., Ex. B [LRHS District Affidavit of M.L., Non-Resident Parent, on behalf of J.S. (January 29, 2021), at 1, 3].

6. In her affidavit, M.L. states that J.S. is not residing with her due to "schooling, behavior, counseling." Id., Ex. B at 1, 2. Further, she states that she is able to support her son economically. Id., Ex. B at 2.

7. On February 9, 2021, during a telephone conversation with District Assistant Superintendent Matthew Webb (Webb), C.O. stated that in school in Iowa, J.S. was "falling through the cracks"; that school in Iowa was still all-remote [due to COVID-19 emergency measures]; J.S.' Iowa teachers had not kept him up-to-date, he had fallen behind in school and was at risk of repeating ninth grade; and C.O. wanted J.S. to have a good education in New Jersey. Certification of Matthew Webb in Support of Respondent's Motion for Summary Decision (March 12, 2021), at ¶¶ 12, 13.

8. In a letter to the undersigned, C.O. elaborated on the reasons J.S. left his mother's home in Iowa to live with C.O. and his family in New Jersey, stating that J.S. "is not here for an education, [rather J.S.] is here to be held accountable to get an education." Ltr. of Petitioner in Opposition to Respondent's Motion to Dismiss (May 27, 2021) (by electronic mail only).[1] Further, by living with C.O., J.S. will get "the discipline he needs to thrive." Ibid.

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[1] It is noted here that the regulations require an affidavit in response to a motion for summary decision, N.J.A.C. 1:1-12.5(b), and that the regulations permit the judge latitude to take "actions as are necessary for the . . . fair conduct of the . . . proceeding." N.J.A.C. 1:1-14.6(p). C.O.'s undated, unsigned letter in lieu of an affidavit does not prejudice respondent here as the non-corroborated hearsay statements in C.O.'s letter do not raise issues of material fact that must be determined in an evidentiary proceeding.

9. During the February 9, 2021 telephone conversation, Webb informed C.O. that he would not recommend approval of J.S.'s application as he did not meet the legal requirements for eligibility as an affidavit student. Webb Cert., at ¶ 15. In response, C.O. asked Webb to ignore relevant law. Id. at ¶ 16.

10. C.O. requested and was provided a phone conference with District Superintendent Dr. Carol Bimbohm (Dr. Bimbohm). During a telephone conversation on February 10, 2021, Dr. Bimbohm stated that her administration would recommend that J.S. was not eligible as an affidavit student and explained to C.O. the process for appealing the Board's final decision on the matter. Id. at ¶ 25.

11. To date, C.O. has not provided respondent (or this tribunal) proof that he and/or his wife, L.O., have been named temporary or permanent guardian(s) for J.S. by court order.[2] Id. at ¶ 28. C.O. stated that it is his intention to assume full legal custody of J.S. and that he would meet with an attorney on June 1, 2021, to begin the legal process. Ltr. of Pet'r, at 1.

12. On February 17, 2021, the Board adopted the recommendation of the District administration and denied C.O.'s application for J.S. to attend Shawnee HS as an affidavit student and, on February 18, 2021, formal written notice of this decision was sent to C.O. Webb. Certif., Ex. E.

13. The Board's February 18, 2021 notice included the statement that C.O. is responsible to pay tuition for J.S. for any period of ineligible attendance, including the duration of an appeal of the Board's decision. Ibid. Further, C.O. was notified that the approximate rate of tuition at the District's schools for the 2020-2021 school year is $99.44/day. Ibid.

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[2] After his telephone call with Dr. Birnbohm, C.O. submitted to respondent a temporary guardianship agreement signed by M.L. on February 12, 2021. Webb Cert., ¶ 26; Br. of Resp't, Ex. C.

14. On February 23, 2021, C.O. filed an appeal with the Commissioner of Education. Pursuant to N.J.S.A. 18A:38-1, this appeal was filed within twenty-one days of the Board's decision and therefore, J.S. is currently attending Shawnee HS.

15. In this matter, C.O. asks the Commissioner to permit J.S. to attend Shawnee HS as an affidavit student. In his petition, he acknowledged the statements of his sister, M.L., and in his letter to the undersigned, C.O. states his understanding that M.L. "may have worded the affidavit for the school incorrectly." Ltr. of Pet'r., at 1.

LEGAL ANALYSIS AND CONCLUSION

Standard for Deciding Motion to Dismiss

Respondent's motion was filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a motion to dismiss in lieu of an answer. Respondent argued that the "Board is entitled to summary disposition as a matter of law," and then presented arguments for an order granting summary decision under N.J.A.C 1:1-12.5(b). Br. in Support of Respondent's Motion for Summary Disposition (March 12, 2021), at 6. Therefore, respondent's motion to dismiss was treated as a motion for summary decision under N.J.A.C. 1-12.5(b), and petitioner was provided references to the OAL website for guidelines on preparing a response.

Standard for Deciding the Motion for Summary Decision

It is well-established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Brill guides as follows:

> [A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Id. at 540.]

In explaining the standard to be applied in summary motion practice, the Brill Court explained:

> The same standard applies to determine whether a prima facie case has been established by the party bearing the burden of proof in a trial. . . . If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party.
>
> [Id. at 536-3.7.]

As discussed above, I **CONCLUDE** that the parties raise no dispute with respect to material facts and the following issues can be decided as a matter of law:

1. Whether J.S. is eligible to attend Shawnee HS as a non-resident affidavit student, pursuant to N.J.S.A. 18A:38-1.

2. Whether the District is entitled to tuition reimbursement from C.O. for the costs of J.S. attending school in the District and if so, the amount due.

C.O. contends that J.S. is entitled to a free education in the District under N.J.S.A. 18A:38-1, which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See, V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom., Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education). J.S. is fifteen years old and, therefore, I **CONCLUDE** he meets the age requirements to be entitled to a free public education.

A person who meets age requirements and is domiciled within a school district may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). A person may have many residences but only one domicile, and a child's domicile is normally that of his or her parents. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051 (1999).

The acts, statements and conduct of the individual, as viewed in the light of all the circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent, or in this case, petitioner C.O., has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2).

Here, the evidence as to J.S. being domiciled in the District is mixed. J.S. has moved, physically, from Iowa to Medford, and is currently attending Shawnee HS. J.S.' mother and C.O. took steps to register J.S. in the District, including the completion of registration documents and affidavits to support J.S.' enrollment in the District. C.O. is adamant that he and his wife always intended for J.S. to completely transfer his domicile to New Jersey and from the beginning, C.O. has taken that position. But, prior to June 1, 2021, C.O. did not start the process required to obtain legal temporary or permanent custody of his nephew (even though he had notice of this requirement since February 2021).

On the other hand, however, J.S.'s mother does not appear to intend for her son to stay in New Jersey indefinitely. In her sworn affidavit, M.L. stated that she was sending her son to New Jersey to complete his education, that he would return to Iowa upon graduation, and that she has the economic means to support him in Iowa. Even in the temporary guardianship document M.L. signed after learning of the deficiencies in her original affidavit, M.L. states that she is giving legal custody of J.S. to C.O. both "from December 31, 2020 to graduation" and "for as long as necessary." Br. of Resp't., Ex. C (emphasis added).

In this regard, N.J.A.C. 6A:22-3.2, provides in pertinent part as follows:

> (a) A student is eligible to attend the school district pursuant to N.J.S.A. 18A:38-1.b if he or she is kept in the home of a person other than the student's parent or guardian, and the person is domiciled in the school district and is supporting the student without remuneration as if the student were his or her own child.
>
> 1. A student is not eligible to attend a school district pursuant to this provision unless:
>
> i. The student's parent or guardian has filed, together with documentation to support its validity, a sworn statement that he or she is not capable of supporting or providing care for the student due to family or economic hardship and the student is not residing with the other person solely for the purpose of receiving a free public education; and
>
> ii. The person keeping the student has filed, if so required by the district board of education:
>
> (1) A sworn statement that he or she is domiciled within the school district, is supporting the child without remuneration and intends to do so for a time longer than the school term, and will assume all personal obligations for the student pertaining to school requirements[.]

M.L. gave a sworn statement that she is capable of supporting J.S. and noted no economic or family hardship that keeps her from caring for him. While she did not call the education J.S. would receive "free," M.L. essentially swore that she was sending J.S. to New Jersey for the education he would receive. While C.O.'s intention to care for his nephew is clear, including offering J.S. a permanent home, to date C.O. has failed to provide sufficient proof that J.S. is domiciled in the District and/or was so domiciled at the time he was first registered in the District. Petitioner failed to establish that M.L. is incapable of supporting or providing care for J.S. due to family or economic hardship, notwithstanding C.O.'s criticism of M.L.'s parenting. Petitioner failed to establish that Iowa is not J.S.'s permanent home, the place where his mother resides and where he intends (and she expects him) to return.

Accordingly, in light of all of the facts and circumstances, I **CONCLUDE** that J.S. is not entitled to a free public education in the LRHS District. I **CONCLUDE** petitioner failed to satisfy his burden of proof that J.S. is domiciled with petitioner at his address in the LRHS District. I **CONCLUDE** that summary decision in favor of respondent is appropriate.

N.J.S.A. 18A:38-1(b)(1) provides that when the evidence does not support the claim of the resident, the resident shall be assessed tuition:

> [F]or the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.

The record reflects that the actual cost of J.S.'s attendance in-District was $99.44 per day for the 2020-2021 school year, and that J.S. enrolled at Shawnee HS on or about February 23, 2021. Neither party presented evidence of the exact date on which J.S. enrolled or the last day of the 2020-2021 school year, which has certainly passed, and respondent appears to rely on the tribunal to calculate the total number of days for which C.O. will be assessed tuition. See, Ltr. Reply Br. in Support of Respondent's Motion for Summary Disposition (June 8, 2021), at 7-8.

N.J.A.C. 6A:22-6.3(a) provides that,

> Tuition assessed pursuant to this section shall be calculated on a per-student basis for the period of a student's ineligible enrollment, up to one year, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23A-17.1. The individual student's record of daily attendance shall not affect the calculation.

Therefore, I **CONCLUDE** that petitioner is responsible to pay tuition for J.S.' attendance at Shawnee HS in the amount of $99.44/day from the date on which such attendance began, for each day school was in session without regard for days on which J.S. may have been absent, through the end of the 2020-2021 school year or the last day of J.S.' enrollment, whichever is later.

ORDER

I **ORDER** that the motion of respondent **LENAPE REGIONAL HIGH SCHOOL BOARD OF EDUCATION** for summary decision in its favor is **GRANTED** and the pro se residency appeal of petitioner C.O. on behalf of J.S. is **DISMISSED.**

Further, I **ORDER** that petitioner **C.O.** shall pay respondent **LENAPE REGIONAL HIGH SCHOOL BOARD OF EDUCATION** tuition in the amount of $99.44/day for each day during the 2020-2021 school year on which J.S. was enrolled in the Lenape Regional High School District.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration. This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this initial decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 21, 2021
DATE

Tricia M Caliguire
TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nd

187-21

OAL Dkt. No. EDU 02698-21
Agency Dkt. No. 31-3/21

New Jersey Commissioner of Education

Final Decision

C.O., on behalf of minor child, J.S.,

Petitioner,

v.

Board of Education of Lenape Regional High School District, Burlington County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) findings that petitioner failed to sustain his burden of establishing that his nephew, J.S., was a domiciliary of a municipality in the Lenape Regional High School District (District), and that J.S. met the criteria to be enrolled as an affidavit student. The Commissioner further concurs with the ALJ's conclusion that J.S. was, therefore, not entitled to a free public education in the District's schools during that time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in the district. The statute specifically provides that the Commissioner may order tuition "computed on the basis of 1/180 of the total annual per pupil cost to the local district *multiplied by the number of days of ineligible attendance*." *N.J.S.A.* 18A:38-1b (emphasis added.) The record reflects

that the cost of tuition in the district is $99.44 per day, but is devoid of any evidence of the number of days of ineligible attendance. Furthermore, the lack of any evidence in the record of the date on which J.S. began attending school in the district, or any findings by the ALJ on that topic, make it impossible for the Commissioner to compute the number of days of ineligible attendance.

Accordingly, this matter is remanded to the Office of Administrative Law for further proceedings to calculate the number of days of ineligible attendance, as required by *N.J.S.A.* 18A:38-1b.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 7, 2021
Date of Mailing: September 10, 2021

188-21

188-21E
OAL Dkt. No. EDU 06165-21
Agency Dkt. No. 114-721

New Jersey Commissioner of Education

Order on Emergent Relief

Laurie Weber,

Petitioner,

v.

Board of Education of the Village of Ridgewood, Bergen County

Respondent.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 13, 2021
Date of Mailing: September 14, 2021

189-21

189-21E
OAL Dkt. No. EDU 05583-21
Agency Dkt. No. 102-7/21

New Jersey Commissioner of Education

Order on Emergent Relief

EyeMed Vision Care,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County, and National Vision Administrators, LLC,

Respondents.

The record of this emergent matter and the recommended Order of the Office of Administrative Law (OAL) have been reviewed. Upon such review, the Commissioner concurs with the Administrative Law Judge that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

It is well established that irreparable harm is the type of harm that "cannot be redressed adequately by monetary damages." *Crowe, supra,* 90 *N.J.* at 132-33. In addition, the irreparable harm standard contemplates that the harm be both substantial and immediate. *Subcarrier Communications, Inc. v Day,* 299 *N.J. Super.* 634, 638 (App. Div. 1977). As any harm petitioner will suffer can be recovered monetarily, the Commissioner finds that petitioner has failed to demonstrate that it will suffer irreparable harm absent emergent relief. As petitioner must demonstrate all four *Crowe* factors in order to warrant emergent relief, the Commissioner need not make a determination on the remaining three factors.

Accordingly, the recommended Order of the OAL, denying petitioner's application for emergent relief, is adopted. This case shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 14, 2021
Date of Mailing: September 14, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON
EMERGENCY RELIEF
OAL DKT. NO. EDU 05583-21
AGENCY DKT. NO. 102-7/21

EYEMED VISION CARE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY, AND NATIONAL VISION ADMINISTRATORS, LLC,

Respondents.

Kristopher J. Berr, Esq., for petitioner EyeMed Vision Care (Del Duca & Lewis, attorneys)

Robert F. Varady, Esq., and **Christina M. DiPalo**, Esq., for respondent Board of Education of the City of Elizabeth (La Corte, Bundy, Varady & Kinsella, attorneys)

Joseph P. LaSala, Esq. for respondent National Vision Administrators (McElroy Deutsch, Mulvaney & Carpenter, attorneys)

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

EyeMed Vision Care (EyeMed) alleges that the Board of Education of the City of Elizabeth's (Board) award of its vision health insurance contract to respondent National Vision Administrators, LLC (National Vision) for service to employees effective July 1, 2021, was in violation of the New Jersey Public Schools Contract Law and that injunctive relief in its favor must be granted immediately pending a full hearing on the merits.

PROCEDURAL HISTORY

On May 12, 2021, a unanimous resolution was passed by the Board awarding a combined vision and prescription health insurance contract to National Vision for the fiscal year July 1, 2021, through June 30, 2022, for its several thousand employees. For over a decade prior thereto, EyeMed had been the contract service provider of vision health insurance to the Board.

On July 1, 2021, EyeMed filed a petition with associated exhibits and a motion for emergency injunctive relief and a stay with the Department of Education to enjoin the Board from entering into and initiating services with National Vision. On July 6, 2021, the Department of Education transmitted the case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the rules of procedure established by the Department of Education to hear and decide controversies and disputes arising under school laws. N.J.A.C. 6A:3-1.1 to -1.17.

After a short consensual delay, oral argument was heard via Zoom technology on July 14, 2021; however, because EyeMed submitted a certification on the morning of the argument, I gave leave for the Board to submit responsive certification(s) no later than July 26, 2021. With the consent of all parties, I ruled that that interim period would not be considered a prejudicial period of delay by EyeMed in bringing this application. The parties had previously agreed to similar treatment of the accommodation of counsel in the scheduling of the oral argument before me. A date of August 13, 2021 was scheduled

for a continuation of the oral argument if I found, in my sole discretion, same to be necessary. After submittal of the Board's further certifications, EyeMed requested the opportunity to use August 13, 2021, for the taking of testimony from all certifying persons. I denied that request, cancelled the continuation of the oral argument that I determined in my discretion was no longer necessary, and closed the record on the emergent application. The motion is now ripe for determination.

FINDINGS OF FACT

Approved by a Board Resolution dated May 12, 2021, the Board contracted for vision care health insurance effective July 1, 2021, for its more than 4,000 employees for the next four years with National Vision. It is not disputed that EyeMed had provided these services for approximately eleven years prior to this summer.

EyeMed presented its Petition and several exhibits in support of its motion for an emergent stay of the award to National Vision. EyeMed set forth that it was initially asked during December 2020, because of Covid-related delays, to extend its current contract by one year to December 31, 2021, and to offer a discount. EyeMed reduced its rates to $5.76 per member per month, or a 1.5% rate reduction. [Petition ¶¶ 8-9.] It was later informed that the Board intended to undertake a solicitation process to procure a new vision care contract that would coincide with the fiscal year commencing July 1, 2021. [Petition ¶¶ 10-11.] It averred that it had been excluded from competing for the new vision benefits contract. [Petition ¶ 16.]

Following a review of the pricing information submitted by National Vision on or about May 11, 2021, which formed the basis of the Board's termination notice of its services, EyeMed's Jaime Fry presented a proposal by email dated May 18, 2021, reducing its prior rates to $4.62 (Select Network) and $4.52 (Advantage Network). She also requested that the Board's insurance broker, Christopher L. Brazzano, seek independent prescription coverage proposals that could be paired with EyeMed. [Motion, Exh. C.] Yet, it is undisputed that the Board Resolution authorizing the procurement of insurance coverage with National Vision was approved on May 12, 2021.

Christopher L. Brazzano submitted a Certification (Brazzano Cert.) on behalf of the Board in opposition to EyeMed's emergent application. Brazzano is the Regional Vice President for Acrisure, LLC, an insurance brokerage and consultation firm for public entities. In October 2020, Brazzano advised Courtney Ruth, Account Manager of EyeMed, that the Elizabeth Board of Education would like to enter into a six-month extension contract to get a common effective date of July 1, 2021, for all employee benefits. EyeMed was not willing to write a six-month contract. It was agreed that EyeMed would provide vision care insurance for a discounted monthly per member rate of $5.76, where the previous year was $5.85. [Brazzano Cert. ¶¶ 5-6.] While it was referred to as an annual contract extension, Brazzano stated that no agreement was formalized.

Brazzano also stated that respondent National Vision submitted a proposal that starting on July 1, 2021, they would provide equal to or better benefits at $5.40 per member per month. In addition, its prescription service "BeneCard," which was already the Board's prescription carrier, would provide additional savings to the Board and employees of the prescription rate with a proposed 1.65% discount over the four years for the National Vision contract. Thus, in addition to a lower rate for vision benefits, employees would be offered a lower rate for prescription coverage. [Brazzano Cert. ¶ 7.] Brazzano set forth that he provided EyeMed the opportunity to bid on this configuration of combined health insurance products in the fall of 2020, but EyeMed was unable to do so. [Brazzano Cert. ¶ 8.]

Harold E. Kennedy, Jr. also presented a Certification (Kennedy Cert.) in opposition to the relief sought herein by petitioner and in support of the processes used by the Board and its broker to procure, review, evaluate, and present the proposals received for a new four-year health insurance contract. In light of the reasons set forth below, the details of his certification need not be laid out at this time.

On the morning of the oral argument on the within motion, EyeMed filed the Certification of Jaime Fry (Fry Cert.). Therein, Fry set forth that the EyeMed account manager with whom Brazzano dealt during the 2020 renegotiation, Courtney Ruth, had left the firm on or about February 19, 2021. [Fry Cert. ¶ 6.] Central to the within dispute,

Fry stated that she searched the communications between the parties and found that neither Ruth nor anyone at EyeMed had received any request after December 2020 to submit a proposal for the contract period commencing July 1, 2021. [Fry Cert. ¶¶ 12-14.] Fry set forth that neither she nor the new account manager had any emails from Brazzano until the May 11, 2021, notice that another vendor was being accepted. She requested the opportunity to expeditiously submit a proposal, which she said was consented to, and did so with the May 18, 2021, email detailed above. [Fry Cert. ¶¶ 23-24.]

As stated, I permitted the Board to supplement the record on this emergent application with certifications responsive to the Fry Cert. that they had only just seen and disputed. Principally, that second Certification of Christopher L. Brazzano (Brazzano Supp. Cert.) filed on July 26, 2021, countered that EyeMed had been provided with all proposals he had received from other carriers on the four-year contract plan on November 3, 2020, while they were also negotiating the short renewal. [Brazzano Supp. Cert. ¶¶ 10-11.] Brazzano asserted that Ruth acknowledged that EyeMed could not provide a quote on a combined vision-prescription contract. They then continued the EyeMed coverage without a contract with its offer of a slight rate reduction. [Brazzano Supp. Cert. ¶¶ 15-17.]

The Board also submitted another Certification of Harold E. Kennedy, Jr. (Kennedy Supp. Cert.) detailing the steps taken to assure a smooth transition for Board employees on July 1, 2021, and again countering EyeMed's assertion of potential violations by the Board in the procurement process.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

The present matter concerns the prospective award of a four-year vision health insurance services contract for the fiscal year that commenced July 1, 2021. EyeMed filed this emergency application on that same date seeking to enjoin the new service provider National Vision and the Board from implementing it until there can be a plenary hearing on whether its rights were violated by allegedly not being invited and/or permitted to submit a proposal for the forthcoming contract period, and other public school contract provisions. The Board opposes the emergent application of EyeMed on grounds that it

delayed seeking relief, was factually not excluded from the procurement process, and that the public harm of granting this belated application is greater than any private harm to it. National Vision joins in the Board's papers.

It is well established that where the subject matter of the controversy is a particular course of action by a district board of education or any other party subject to the jurisdiction of the Commissioner, the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case. N.J.S.A. 6A:3-1.6(a); N.J.A.C. 1:1-12.6(a). 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;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 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.
>
> [N.J.S.A. 6A:3-1.6(b).]

Further, it is the moving party who bears the burden of proving all of these elements by clear and convincing evidence. See Advance Elec. Co., Inc. v. Montgomery Tp. Bd. of Educ., 351 N.J. Super. 160, 165 (App. Div. 2002). For the foregoing reasons, I **CONCLUDE** that EyeMed Vision has failed to satisfy the required proofs set forth in Crowe.

Here, the parties do not dispute that a school district's health insurance services contract is deemed to be an "extraordinary unspecified service" pursuant to N.J.S.A. 18A:18A-5(a)(10) and has been prior to this fiscal year when EyeMed provided those services for the preceding decade. Local 1081 of Commc'ns Workers of Am., AFL-CIO

v. Essex Cnty., 255 N.J. Super. 671, 680 (App. Div. 1992). N.J.S.A. 18A:18A:4.1 authorizes boards of education to use competitive contracting in lieu of public bidding as follows:

> Notwithstanding the provisions of any law, rule or regulation to the contrary, competitive contracting may be used by boards of education in lieu of public bidding for procurement of specialized goods and services the price of which exceeds the bid threshold, for the following purposes:
>
> * * *
>
> h. At the option of the board of education, any good or service that is exempt from bidding pursuant to N.J.S.A. 18A:18A-5;

N.J.S.A. 18A:18A-5 sets forth multiple exceptions to the requirement for advertising, including that "[a]ny contract, the amount of which exceeds the bid threshold, shall be negotiated and awarded by the board of education by resolution at a public meeting without public advertising for bids and bidding therefor if the subject matter thereof consists of professional services. N.J.S.A. 18A:18A-5(a). The board of education must in such instance state supporting reasons for its action in the resolution awarding each contract and shall forthwith cause to be printed once, in an official newspaper, a brief notice stating the nature, duration, service and amount of the contract, and that the resolution and contract are on file and available for public inspection in the office of the board of education. N.J.S.A. 18A:18A-5(a)(1). There is no dispute that this latter requirement was delayed, but for purposes of this application, I do not consider that to be a major violation of EyeMed's rights necessitating some version of an automatic injunction.

EyeMed asserts herein that its rights under this aspect of settled law were violated because it was not invited or permitted to submit a proposal. Critical factors in my determination that it has failed to support the requested emergent relief are twofold: (1) EyeMed's delay until July 1, 2021, in bringing this petition and motion well after the Board's award of same on May 12, 2021, by which date the National Vision contract had been implemented throughout the district; and (2) genuine and material factual disputes about the opportunities provided to EyeMed to submit a proposal on the new contract.

I **CONCLUDE** that the first of these two factors is supported by the undisputed timeline. The second factor is also plainly evident on the face of the parties' submissions. There are several important issues of both credibility and documentation on "who knew what when" that must abide a period of discovery and a plenary hearing on EyeMed's petition. Finally, while I need not reach this issue in light of petitioner's failure to carry its burden under Crowe on the emergent and irreparable nature of its potential harm caused in large part by its own delay, I **CONCLUDE** that petitioner might struggle to prevail on the merits, based only preliminarily on the limited submissions in this current record. The delay between May 12 and July 1, 2021, attributable wholly to EyeMed, means that the public harm to the Board and its thousands of employees that would be caused by a stay now outweighs the potential harm to the petitioner, and I so **CONCLUDE**.

ORDER

It is hereby **ORDERED** that EyeMed Vision Care's application for emergency relief is and the same is hereby **DENIED**. The underlying petition will be scheduled for case management and an evidentiary hearing.

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

Gail M. Cookson

August 2, 2021
DATE

GAIL M. COOKSON, ALJ

id

190-21

190-21

OAL Dkt. No. EDU 03719-21
Agency Dkt. No. 44-3/21

New Jersey Commissioner of Education

Final Decision

K.D., on behalf of minor child, A.R.,

Petitioner,

v.

Board of Education of the Township of Deptford, Gloucester County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled July 28, 2021 OAL hearing, has been reviewed. Petitioner did not file an explanation for the failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 14, 2021
Date of Mailing: September 14, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

191-21

191-21

OAL Dkt. No. EDU 00829-19
Agency Dkt. No. 280-11/18

New Jersey Commissioner of Education

Final Decision

J.G. on behalf of minor child, A.G.,

Petitioner,

v.

Board of Education of the Township of Vernon, Sussex County,

Respondent.

The record of this matter, the proposed Settlement Agreement with Withdrawal of Petition (Agreement), and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 14, 2021
Date of Mailing: September 14, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00820-19
AGENCY DKT. NO. 280-11/18

J.G. ON BEHALF OF MINOR CHILD A.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWSHIP OF VERNON, SUSSEX COUNTY.

Respondents.

J.G., pro se

Nathanya G. Simon, Esq., for respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: June 21, 2019 Decided: August 19, 2021

BEFORE **ANDREW M. BARON**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on January 14, 2019, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement with Withdrawal of Petition setting forth the terms of their agreement, which is attached and fully incorporated herein.

Having reviewed the record and the Settlement Agreement with Withdrawal of Petition setting forth the terms of the parties' agreement, I **FIND**:

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

August 19, 2021
DATE

ANDEW M. BARON, ALJ

Date Received at Agency: 8-20-21

Date Mailed to Parties: 8-20-21

mm

NATHANYA G. SIMON | Partner
nsimon@sh-law.com
Phone: 201-896-7223 | Fax: 201-896-7224

June 21, 2019

VIA EMAIL & REGULAR MAIL
Hon. Andrew Baron, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: J.G. o/b/o A.G. v. Vernon Township Board of Education
OAL Docket No.: EDU 00820-2019
Agency Reference No.: 280-11/18

Dear Judge Baron,

I am pleased to enclose a copy of the fully signed and approved Settlement Agreement with Withdrawal of Petition for this matter together with the Extract of Board Minutes indicating the Resolution was adopted by the Vernon Board of Education at its Board Meeting of June 13, 2019 approving the Settlement. Accordingly, it would be greatly appreciated if Your Honor would please review and approve the Settlement Agreement with Withdrawal of Petition.

If you require any additional information or have any questions with regard to this matter, please do not hesitate to contact me. Thank you very much for the courtesies extended to the parties in this matter.

Respectfully submitted,

Nathanya G. Simon
For the Firm

NGS/as

cc: Steven Kepnes, School Business Administrator
Karen D'Avino, Superintendent of Schools
Jennifer Giella, Pro Se Parent

VERNON TOWNSHIP SCHOOL DISTRICT
P.O. Box 99/625 Route 517, Vernon, NJ 07462
Phone: 973-764-2900 Fax: 973-764-0033 Web: www.vtsd.com

Karen D'Avino
Superintendent of Schools
kdavino@vtsd.com

Charles McKay, D.Litt.
Assistant Superintendent
cmckay1@vtsd.com

Steven A. Kepnes
BA/Board Secretary
skepnes@vtsd.com

June 14, 2019

Scarinci & Hollenbeck, LLC
1100 Valley Brook Ave.
P.O. Box 790
Lyndhurst, NJ 07071
Attn: Ms. Simon

Dear Mrs. Simon,

Please find enclosed a fully executed copy of the Settlement Agreement regarding the appeal related to a HIB matter. Kindly forward to the office of the Administrative Law Judge.

Thank you for your assistance in this matter.

Sincerely,

Steven A. Kepnes
Business Administrator

Attachments

c: Letter only
Ms. D'Avino
Dr. McKay

VERNON TOWNSHIP SCHOOL DISTRICT
P.O. Box 99/625 Route 517, Vernon, NJ 07462
Phone: 973-764-2900 Fax: 973-764-0033 Web: www.vtsd.com

Karen D'Avino
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kdavino@vtsd.com

Charles McKay, D.Litt.
Assistant Superintendent
cmckay1@vtsd.com

Steven A. Kepnes
BA/Board Secretary
skepnes@vtsd.com

June 14, 2019

Upon the recommendation of the Business Administrator, the Board approved the Settlement Agreement and Withdrawal of Petition in the matter of OAL Docket No.: EDU 00820-2019 and authorized the Board Secretary to certify the agreement and file it with the Administrative Law Judge assigned to this matter.

Motion by Mr. Sweeney, seconded by Dr. Peek and carried on the following roll call vote: YES: Mrs. Mitchell, Dr. Peek, Mr. Sweeney, Mr. Annunziata, Mrs. Buccieri and Mr. Sparta. ABSTAIN: Mrs. Leuthner and Mr. Cilli.

YES: 6 NO: 0 ABSTAIN: 2 ABSENT: 1

Present: Mr. Annunziata, Mrs. Buccieri, Mr. Cilli, Mrs. Leuthner, Mrs. Mitchell, Dr. Peek, Mr. Sweeney and Mr. Sparta. Absent: Mrs. Scura Coughlin.

* * * * *

STATE OF NEW JERSEY
COUNTY OF SUSSEX

Steven A. Kepnes being first duly sworn on oath, deposes and says:

That deponent is Secretary of the Board of Education of the Township of Vernon, in the County and State aforesaid; and that the above extract from the minutes of the June 13, 2019 Public Meeting held at Lounsberry Hollow School, at 6:00 PM, has been compared by deponent with the original minutes of said meeting recorded in full in the official minute book of said board, and is a true copy thereof of the whole of said original so far as the same relates to the subject matters referred to in said extract.

Subscribed and sworn to before me this 14th day of June 2019.

Steven A. Kepnes

Jennifer N. Smith

JENNIFER N. SMITH
Notary Public of New Jersey
My Commission Expires December 3, 2019

Nathanya G. Simon, Esq.
SCARINCI & HOLLENBECK, LLC
ATTORNEYS AT LAW
1100 Valley Brook Avenue
P.O. Box 790
Lyndhurst, New Jersey 07071-0790
T: (201) 896-4100
F: (201) 896-8660
Attorneys for Respondent, Vernon Township Board of Education

J.G. o/b/o A.G. Petitioners, vs. Vernon Township Board of Education Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OFFICE OF SPECIAL EDUCATION OAL Docket No.: EDU 00820-2019 Agency Ref. No.: 280-11/18 **SETTLEMENT AGREEMENT WITH WITHDRAWAL OF PETITION**

WHEREAS, J.G. is the Parent of A.G. who is a student attending the Vernon Township School District; and

WHEREAS, a determination had been made by the Vernon Township Board of Education (hereafter "Board") of a finding of HIB relating to student A.G.; and

WHEREAS, J.G. o/b/o A.G. appealed said decision to the Commissioner of Education, which matter was transmitted to the Office of Administrative Law before Administrative Law Judge Baron; and

WHEREAS, the Parties have discussed the matter and without admitting any wrongdoing with respect to the handling of this matter, it is the position of the Parties that it is in the best interest to resolve the claims in an amicable way by entering into this Settlement Agreement and Withdrawal of Petition pursuant to the terms as follows:

1. Any and all documents relating to the HIB incident and report and findings involving A.G. shall be collected and retained in the office of the Superintendent of Schools in a separate sealed and confidential file which shall not be available to any other personnel of the District or transmitted to any outside person, entity, agency, or school district.

2. The Administration will ensure that all staff are provided with professional development updating their knowledge of the handling of future HIB complaints and investigations.

3. Any Board member or employee who has a legal conflict regarding this matter shall not participate in any discussion or vote by the Board approving this Settlement.

4. Based on all of the above, the Appeal filed in this matter shall be withdrawn with prejudice with the understanding that by signing this Agreement, J.G. o/b/o A.G. is giving up the right to continue this matter against the School District and an opportunity for a full hearing and judicial determination on the merits.

5. The Parties recognize that the School District has been represented by legal counsel, and that the Parent has proceeded Pro Se, and that each party signing this Agreement as a voluntary act and with understanding all of its content. This Agreement is subject to Board approval and signature. Upon full signature, the Agreement will be submitted to the Administrative Law Court for filing and at such time, this matter shall be considered dismissed, closed, and withdrawn with prejudice.

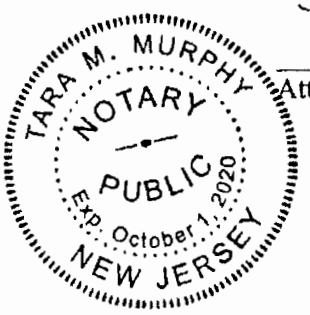
[Remainder of page intentionally left blank]

STATE OF NEW JERSEY)
SS:
COUNTY OF SUSSEX)

I CERTIFY that on May 14, , 2019, J.G., on behalf of A.G.., personally came before me and acknowledged under oath, to my satisfaction, that these persons:

(a) are named in and personally signed this document; and

(b) signed, sealed, and delivered this document as his/her act and deed.



Attorney or Notary Public

IN WITNESS WHEREOF, the Parties have hereinto signed this Agreement on the date and year set forth below.

Vernon Township Board of Education

By: _____

Dated: 6-14-19

_____

J.G. on behalf of A.G.

Dated: 5-14-19

193-21

193-21

New Jersey Commissioner of Education

Final Decision

Michael Conway,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

Synopsis

Petitioner appealed the determination of the respondent State Board of Examiners (SBE), denying his application for teacher and principal certificates based upon Conway's alleged conduct unbecoming a teacher. Petitioner maintains that the SBE's decision was arbitrary, capricious and unreasonable. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no issues of material fact in this case; the petitioner's professional conduct assessment and explanations for his unbecoming conduct which were sent subsequent to the SBE's decision are irrelevant here as that information was not before the SBE to consider at the time of its decision, and there is no evidence that the petitioner availed himself of potential opportunities to present that information via a motion for reconsideration before the SBE; further, there is no impediment to petitioner reapplying for the certificates he seeks, at which time he could present mitigating evidence explaining the conduct at issue and his subsequent job performance; however, based on the present record, the matter is ripe for summary decision; pursuant to *N.J.A.C.* 6A:9B-4.1, the SBE may refuse to issue an applicant's certificate for conduct unbecoming – notwithstanding that a candidate may meet all requirements for certification – if it determines based on the record before it that the candidate is not suitable for employment as a teaching staff member for reasons set forth in *N.J.A.C.* 6A:9B-4.4; it is well settled that teachers are held to a high standard of conduct because of the influence they exercise over students; teachers and principals are professional employees entrusted with the care of school children, and this duty requires a high degree of self-restraint and controlled behavior not always required in other types of employment; in this case, petitioner has not met his burden to prove by a preponderance of credible evidence that the SBE's denial of teaching and principal certificates to him was arbitrary, capricious, or contrary to law; and petitioner's conduct was sufficiently flagrant to warrant the denial of teaching and principal certificates based upon his alleged conduct unbecoming. Accordingly, the ALJ granted summary decision in favor of the SBE, and the petition was dismissed.

The Commissioner concurred with the findings and determination of the ALJ as comprehensively detailed in the Initial Decision. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

193-21
OAL Dkt. No. EDU 08054-20
Agency Dkt. No. 184-8/20

New Jersey Commissioner of Education

Final Decision

Michael Conway,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed and considered. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge, for the reasons set forth in detail in the Initial Decision, that petitioner has failed to meet his burden of demonstrating that the Board of Examiners' decision denying petitioner's application for teaching and principal certifications was arbitrary, capricious, or unreasonable.

Accordingly, the Board of Examiners' motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 16, 2021
Date of Mailing: September 16, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 08054-20
AGENCY DKT. NO. 184-8/20

MICHAEL CONWAY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,
Respondent.

Corinne M. Mullen, Esq., for petitioner (The Mullen Law Firm, attorneys)

Sydney Finkelstein, Deputy Attorney General, for respondent (Andrew J. Bruck, Acting Attorney General of New Jersey, attorney)

Record Closed: July 20, 2021 Decided: August 5, 2021

BEFORE **SARAH H. SURGENT, ALJ**:

STATEMENT OF THE CASE

Petitioner Michael Conway (Conway) appeals from respondent New Jersey State Department of Education (NJDOE), State Board of Examiners' (Board) denial of his

application for teacher and principal certificates based upon Conway's alleged conduct unbecoming a teacher. He maintains that the Board's decision was arbitrary, capricious, and unlawful, which the Board denies.

PROCEDURAL HISTORY

On or about May 12, 2020, Conway submitted his application for teacher and principal certificates to the NJDOE. By letter dated August 11, 2020, the Board denied Conway's application. On August 26, 2020, Conway timely filed a pro se petition of appeal, and subsequently retained private counsel. On August 28, 2020, the Department of Education, Office of Controversies and Disputes, transmitted this case to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -23, and resolution of Conway's motion for emergent relief, (R-A).

On September 4, 2020, a telephonic status conference was conducted with the parties, and a briefing schedule was set, with an emergent hearing to be held on September 9, 2020. At the request of both parties, the emergent hearing was adjourned to September 24, 2020. On September 24, 2020, oral arguments on the emergent motion were heard remotely via videoconference due to the COVID-19 pandemic (pandemic), and the record closed. On September 28, 2020, I denied Conway's motion for emergent relief, (R-C), which I incorporate herein by reference. After four telephone conferences concerning protracted discovery production delays, the matter was scheduled for remote oral arguments on the parties' cross-motions for summary decision. Oral arguments were heard via videoconference on July 20, 2021, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

These salient points are not in dispute. I therefore **FIND** the following **FACTS**.

Conway was a teacher for approximately twenty-four years in Arizona, before relocating to New Jersey in 2020 to become a teacher at the Beloved Community Charter

School (Beloved) in Jersey City. (P-B; R-F). He has been employed by Beloved as a teacher's assistant since the fall of 2020. (P-B; R-F). His contract has been renewed for the 2021-2022 school year, (P-A), and he is said to be doing very well, (P-E), teaching eighth-grade students both in person and remotely, due to the pandemic, (P-B; P-C; R-H).

While still residing in Arizona, Conway was instructed by the Board to submit his New Jersey teaching and principal certificate applications electronically due to the pandemic. (P-B; R-G). In his emailed submissions to the Board, Conway included his photographs of a requisite criminal/offense information form dated May 12, 2020, which plainly depict his legs and lap, clothed only in underwear, and containing outlines of his genitalia. (P-B; P-D; R-I).

Conway has poor eyesight, is not "tech-savvy," and did not realize that the photographs he sent contained inappropriate content, as he only checked the "thumbnails" of his photographs before he submitted them. (P-B; P-D; P-G; P-H; R-F; R-G). He was busy preparing and packing for his transition from Arizona to New Jersey, his house was in disarray, and there were boxes "everywhere." (P-B). He and his partner agreed that they would disrobe upon entering their home due to the pandemic and his partner's asthma. Ibid. He chose to take the photographs on his lap because the kitchen table was "filled with boxes." Ibid. He takes full responsibility for his "error." (R-A).

By letter dated August 11, 2020, the Board denied Conway's applications, stating, in relevant part:

> The photograph[s] of the criminal history information form you submitted to the Board via email contained inappropriate content. Specifically, the image[s] contained male anatomy in underwear. Upon receipt of the image[s], the Board sent an email permitting you to provide an explanation. Your response to the request was that you were "sorry the emailed version has inappropriate content." There was no explanation for the content or how the image[s] [were] sent with the content.

> Pursuant to N.J.A.C. 6A:9B-4.2, "Notwithstanding that a candidate may meet all requirements for certification, the Board of Examiners may refuse to issue a certificate to that candidate if, based on the record before it, the Board of Examiners determines that, for reasons set forth in N.J.A.C. 6A:9B-4.5, the candidate is not suitable for employment as a teaching staff member in the public schools." One of the reasons stated in N.J.A.C. 6A:9B-4.5 for the revocation of a teaching certificate, or, in this case, the refusal to issue one, is "conduct unbecoming a teacher."
>
> In reviewing your application, the Board considered, among other factors, your lack of judgment and/or carelessness in submitting an image with such content. Such poor judgment and/or carelessness is conduct unbecoming an educator. Accordingly, the Board finds that the level and nature of your conduct provide sufficient reason to block your application for certification. Thus, at its July 30, 2020 meeting the Board of Examiners voted to block your application for a Teacher of Social Studies and Principal certificate.
>
> [(R-B).]

Conway maintains that when the Board asked him via email about the inappropriate content of his emailed photographs, he did not understand what the Board was referring to, and assumed that it must have been a reference to a 2011 driving under the influence conviction. (P-B; R-A; R-I). He only understood the issue at hand after he received the Board's denial letter and checked the actual photographs which he had emailed to the Board. (P-B).

LEGAL ANALYSIS AND CONCLUSIONS

The Board argues that its motion for summary decision should be granted because it is undisputed that Conway submitted inappropriate images to the Board with his applications for certifications, that the conduct was unbecoming a teacher or principal, whether intentional or not, and that granting him the certificates would not be in the best interests of students or the public. It also argues that Conway's subsequent "excuses" and a subsequent recommendation by a teacher at Beloved do not mitigate Conway's admitted conduct and are not genuine issues of material fact with respect to the Board's decision at the time it was made.

Conway argues that his cross-motion for summary decision should be granted, and the Board's motion denied, because the Board's decision was arbitrary, capricious, and "prudish[ly] unlawful[]," and because Beloved "strongly [disagrees] with the knee-jerk reaction to deny a competent teacher employment based on an innocent mistake committed during a world-wide pandemic." Conway maintains that the Board's failure to consider the circumstances underlying his conduct, whether his conduct was intentional, and his subsequent successful conduct at Beloved, was "prudish, ill-informed, and completely unexamined." Alternatively, Conway argues that "[a]s a result of the arbitrary, capricious, and unlawful manner in which the Board has chosen to interpret . . . Conway's unintended and entirely accidental actions, the material facts and substantive issues surrounding this case are indeed a matter of great dispute. As such, the motion[s] for summary decision should be denied," and the matter should be set down for a plenary hearing.

I.

A summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). That rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules. See R. 4:46-2; Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

In Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

> [Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).]

In evaluating the merits of the motion, "[a]ll inferences of doubt are drawn against the movant and in favor of the opponent of the motion." Judson, 17 N.J. at 75. However, "[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b).

Having reviewed the parties' submissions and heard their oral arguments, I **CONCLUDE** that no genuine issues of material fact exist which require a plenary hearing to determine whether the photographs which Conway admittedly took and sent were inappropriate and conduct unbecoming, and if so, whether the Board's July 30, 2020 decision to deny him teaching and principal certificates was arbitrary, capricious, or contrary to law. I further **CONCLUDE** that Conway's professional conduct assessment and explanations for the photographs which were sent subsequent to the Board's decision are entirely irrelevant—that information was not before the Board to consider at the time of its decision, and there is no evidence that Conway availed himself of any potential opportunities to present that information by filing a motion for reconsideration before the Board. See, e.g., N.J.A.C. 6A:9B-4.15.

The Board and I are unaware of any impediment to Conway reapplying for the certificates, at which time he might present mitigating evidence explaining his conduct at issue and his subsequent job performance, but on the issues presently before me, I cannot consider it. This matter is therefore ripe for summary decision.

II.

The Board of Examiners is entrusted with the issuance and revocation of certificates to teach pupils and to serve as principals in public schools. N.J.S.A. 18A:6-38. N.J.A.C. 6A:9B-4.1 governs the Board's authority to refuse to issue certificates, and provides:

> Notwithstanding that a candidate may meet all requirements for certification, the Board of Examiners may refuse to issue a certificate to the candidate if it determines based on the record before it that the candidate is not suitable for employment as a teaching staff member in the public schools for reasons set forth in N.J.A.C. 6A:9B-4.4.
>
> [N.J.A.C. 6A:9B-4.1 (emphasis added).]

Thus, the Board may refuse to issue an applicant's certificate for "conduct unbecoming." N.J.A.C. 6A:9B-4.4. Conduct unbecoming includes a broad range of behavior that impacts an applicant's ability to perform their duties or otherwise renders them unfit to have the responsibility for the care of children. See State Bd. of Exam'rs v. Charlton, 96 N.J.A.R.2d (EDE) 18; In re Certificate of Fargo, 91 N.J.A.R.2d (EDE) 1. Although "conduct unbecoming" a teacher, principal, or other public employee is not defined by statute or regulation, it has been described as an "elastic" phrase that includes "conduct which adversely affects the morale or efficiency" of the public entity or "which has a tendency to destroy public respect for . . . [public] employees and confidence in the operation of [public] services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (internal quotation marks omitted). The touchstone of the charge is an applicant's fitness to discharge the duties and functions of their position. See Laba v. Newark Bd. of Educ., 23 N.J. 364, 385-88 (1957).

"That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted." In re Grossman, 127 N.J. Super. 13, 30 (App. Div. 1974) (internal quotation marks omitted). Unfitness to hold a position in a school system may be demonstrated by a series of incidents or a single incident, if sufficiently flagrant. Redcay v. State Bd. of Educ., 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E. & A. 1944).

It is well settled that "teachers are held to a high standard of conduct because of the influence they exercise over the students." Charlton, 96 N.J.A.R.2d (EDE) 18, 21. Teachers "hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils." In re

Tenure Hearing of Tordo, 1974 S.L.D. 97, 98-99. They "are professional employees to whom the people have entrusted the care and custody of . . . school children," and "[t]his heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." In re Tenure of Sammons, 1972 S.L.D. 302, 321. Those principles apply with as much if not more force to school principals, who are high-ranking administrators entrusted with providing educational leadership, directing and supervising all school operations, and evaluating staff, including teachers. N.J.A.C. 6A:9B-12.3(b).

Pursuant to N.J.A.C. 6A:4-4.1:

> (a) In determining appeals from decisions of the State Board of Examiners . . . , the Commissioner shall ascertain whether the decision is supported by sufficient credible evidence in the record and shall not disturb the decision unless the appellant has demonstrated the State Board of Examiners . . . acted in a manner that was arbitrary, capricious, or contrary to law.
>
> [N.J.A.C. 6A:4-4.1(a).]
> Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.
>
> [Bayshore Sewerage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199 (Ch. Div. 1973).]

In this case, Conway has not met his burden to prove by a preponderance of credible evidence that the Board's denial of teaching and principal certificates was arbitrary, capricious, or contrary to law. There is no evidence of any "willful and unreasoning action, without consideration and in disregard of circumstances." Indeed, the Board gave Conway the opportunity to explain the inappropriate content of his photographs, and without bothering to ascertain what that content was and offer his explanations and the circumstances under which the photographs were taken and submitted, Conway merely replied that he was "sorry the emailed version has inappropriate content."

Conway's failure to investigate and appropriately respond to the Board's inquiry, in addition to his "poor judgment and/or carelessness" in photographing and submitting the admittedly "inappropriate content," merely bespeaks of further poor judgment and carelessness on Conway's part. Moreover, Conway's choice to point his camera at his scantily clad lap while taking photographs to be submitted to the Board is the epitome of poor judgment and carelessness. Surely, he could have chosen to put on pants, or to photograph his criminal history form on the top of a moving box, or even on the floor, but he chose not to do so. "While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control." In re the Tenure Hearing of Ostergren, 1966 S.L.D. 185, 186 (internal quotation marks omitted). Conway's conduct fell far short of the mark, even in the midst of our global pandemic.

Under these facts and circumstances, I **CONCLUDE** that Conway has not met his burden to prove that the Board's decision was arbitrary, capricious, or contrary to law. I **CONCLUDE** that the totality of Conway's conduct was alarming conduct unbecoming which raised grave doubt about Conway's fitness to discharge the duties and functions of teaching and principal positions. I further **CONCLUDE** that Conway's subsequent explanations to this Tribunal that he was busy, is not "tech-savvy," and has poor eyesight mitigate against him, as he is still teaching remotely, and another episode of such poor judgment and carelessness could have grave social and psychological consequences for the pupils in his virtual classroom, as well as undermine the public's trust and confidence in him and in the school. I therefore **CONCLUDE** that Conway's conduct was sufficiently flagrant to warrant the Board's denial of teaching and principal certificates based upon his conduct unbecoming.

ORDER

It is therefore **ORDERED** that the Board's motion for summary decision is hereby **GRANTED** and its denial of teaching and principal certificates is hereby **AFFIRMED**; and it is further

ORDERED that Conway's motion for summary decision or a plenary hearing in the alternative is hereby **DENIED**; and it is further

ORDERED that Conway's petition is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." **A copy of any exceptions must be sent to the Judge and to the other parties.**

Sarah H. Surgent

August 5, 2021
DATE

SARAH H. SURGENT, ALJ

Date Received at Agency: August 5, 2021 (emailed)

Date Mailed to Parties:

SHS/mel

APPENDIX

EXHIBITS

For Petitioner:

- P-A Conway's 2021-2022 employment contract with Beloved dated May 19, 2021
- P-B Conway's responses to Board's first set of interrogatories and request for production of documents dated November 23, 2020
- P-C Conway's responses to Board's supplemental interrogatories and request for production of documents dated May 14, 2021
- P-D Conway's answers to Board's requests for admission dated November 14, 2020
- P-E Undated letter of recommendation by Shanay Walker, teacher at Beloved
- P-F Letter of Recommendation for Conway by Susan O'Brien, Arizona school Principal, dated April 14, 2020
- P-G Thumbnail images of application documents from Conway's cell phone
- P-H Thumbnail images of application documents from Conway's cell phone
- P-I Affidavit of Conway dated July 7, 2021

For Respondent:

- R-A Conway's Pro Se Petition of Appeal and letter of "Specific Allegations" dated August 26, 2020
- R-B Board's letter of denial of teaching and principal certificates dated August 11, 2020
- R-C Order denying emergent relief dated September 28, 2020
- R-D Certification of Rani Singh dated September 21, 2020
- R-E Duplicate of P-B
- R-F Board's first request for admissions and Conway's answers dated November 11, 2020
- R-G Undated unsigned certification of Conway

R-H Duplicate of P-C

R-I Two color photographs of Conway's criminal history form depicting his underwear, lap, legs, and outline of male genitalia

R-J Certification of Sydney Finkelstein, DAG, dated June 11, 2021

194-21

194-21

New Jersey Commissioner of Education

Final Decision

Monika Vakulchik,

Petitioner,

v.

Board of Education of the Borough of Dunellen, Middlesex County,

Respondent.

Synopsis

Petitioner, a Speech Language Pathologist employed by the respondent Board from October 2016 through the 2019-2020 school year, received a summative performance report completed on May 1, 2020 by the school district's Director of Special Services which included a statement recommending that petitioner not be renewed for the 2020-2021 school year. Petitioner subsequently filed the within appeal, alleging that the Board failed to provide her with proper notice pursuant to *N.J.S.A.* 18A:27-10 that her non-tenured teaching staff position was recommended for non-renewal for the 2020-2021 school year. Based on her claim that she did not receive proper statutory notice of termination, petitioner requested that she be deemed renewed and issued a new employment contract. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; despite the fact that the District failed to address why there was not strict compliance with the statutory requirements of *N.J.S.A.* 18A:27-10, the Board substantially complied with the statutory notice requirements for non-renewals; the petitioner was not prejudiced by receiving notice through her summative performance report rather than from the superintendent, as she acknowledged receiving the recommendation and asserted her rights to a statement of reasons and a *Donaldson* hearing; further, the Board's 4-3 vote to renew petitioner's contract following the *Donaldson* hearing failed because it did not constitute a majority vote of the full membership of the Board, which would consist of five out of nine votes. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ that summary decision is appropriate but disagreed with the ALJ that the Board substantially complied with the requirements of *N.J.S.A.* 18A:27-10. In so doing, the Commissioner found, *inter alia*, that the doctrine of substantial compliance requires, among other things, that the defaulting party provide a logical explanation for why there was not a strict compliance with the statute; here, the Board failed to provide written notice from the superintendent that petitioner's employment would be terminated and offered no explanation as to why this occurred, in violation of *N.J.S.A.* 18A:27-10. Therefore, by operation of *N.J.S.A.* 18A:27-11, petitioner's employment contract for 2020-2021 was renewed upon the same terms and conditions of her 2019-2020 contract. Accordingly, the Initial Decision of the OAL was reversed; petitioner's motion for summary decision was granted ; and the Board was directed to reinstate petitioner to her position and to pay her the salary that she was entitled to for the 2020-2021 school year, subject to mitigation. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

194-21
OAL Dkt. No. EDU 09348-20
Agency Dkt. No. 159-7/20

New Jersey Commissioner of Education

Final Decision

Monika Vakulchik,

Petitioner,

v.

Board of Education of the Borough of Dunellen, Middlesex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto, have been reviewed and considered.

Petitioner was employed by the Board as a Speech Language Pathologist beginning on October 4, 2016. On May 1, 2020, her summative performance report, which had been completed by the district's Director of Special Services, included a statement that recommended that her contract not be renewed. On May 4, 2020, petitioner emailed the superintendent and the Board, indicating that she was notified of her non-reemployment for the 2020-2021 school year and requesting a written statement of reasons. On May 5, 2020, the Board voted on the superintendent's recommendations for renewals, and petitioner's name was not on the list of renewed staff. On May 18, 2020, petitioner wrote to the Board and superintendent, indicating that – because she had not received written notice from the superintendent of her non-renewal by May 15 – she was accepting the Board's offer of

employment for the 2020-2021 school year. The superintendent responded and indicated that petitioner was aware that her contract was not being renewed, and he subsequently provided a statement of reasons. Petitioner then requested a *Donaldson* hearing,[1] after which the Board voted, with four members in favor of renewing her employment and three against; one member abstained, and one seat was vacant. The Board informed petitioner that the action did not pass, and petitioner appealed.

Following cross motions for summary decision, the ALJ found that the Board substantially complied with the statutory notice requirements for non-renewals and that petitioner was not prejudiced by receiving notice through her summative performance report rather than from the superintendent, as she acknowledged receiving the recommendation and asserted her rights to a statement of reasons and a *Donaldson* hearing. The ALJ further found that the Board's 4-3 vote to renew petitioner's contract failed because it was not by a majority vote of the full membership of the Board, which would consist of five out of nine votes. Accordingly, the ALJ granted the Board's motion for summary decision.

In her exceptions, petitioner argues that the Board cannot prevail based on the doctrine of substantial compliance because it has failed to provide any explanation for its noncompliance with the statutory requirements, and the fact that she was not prejudiced is due solely to her own diligence in following up and is insufficient on its own to support a finding of substantial compliance. Petitioner claims that it would be reasonable for her, or other teaching staff members in similar circumstances, to interpret a recommendation in an evaluation as solely a recommendation and not a notice of non-renewal, and that the loss of time to seek new employment that would result from such an interpretation has a great possibility for prejudice. Petitioner also contends that the

[1] A *Donaldson* hearing is the colloquial name for the informal appearance before the Board during which a teaching staff member may discuss the statement of reasons for non-renewal and attempt to persuade the Board to renew the staff member's contract.

statute does not require a majority vote of the full membership of the Board following a *Donaldson* hearing.

In reply, the Board argues that the purpose of the statutory scheme is to provide teachers with timely notice that they are not going to be reemployed so that they may seek other employment, and so they can seek a statement of reasons and a *Donaldson* hearing. The Board contends that the reason it did not strictly comply with the written notice requirement was that petitioner was clearly aware that her employment was not being renewed, as she wrote to the superintendent stating as much when she requested a statement of reasons. According to the Board, sending petitioner a letter informing her of something she already knew would be illogical. The Board also notes that petitioner's arguments regarding the voting requirements merely restate arguments raised below and properly addressed and rejected by the ALJ.

Upon review, the Commissioner concurs with the ALJ that summary decision is appropriate but disagrees with the ALJ that the Board substantially complied with the requirements of *N.J.S.A.* 18A:27-10. The doctrine of substantial compliance requires, among other things, that the defaulting party provide "a reasonable explanation why there was not a strict compliance with the statute." *Bernstein v. Bd. of Trustees of Teachers' Pension & Annuity Fund*, 151 *N.J. Super.* 71, 76-77 (App. Div. 1997). Here, the Board failed to provide any explanation throughout the proceedings,[2] until a conclusory assertion in its reply to petitioner's exceptions that it would be "illogical" to provide written notice to petitioner when she already was apparently aware of the non-renewal. The Board is not permitted to introduce new evidence in its reply to petitioner's exceptions, and this statement is therefore inappropriate.[3]

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[2] As the ALJ noted, "the District has not addressed why there was not strict compliance with the statute." Initial Decision, page 12.

[3] The statement does not even rise to the level of evidence, as it is unsupported by any documentation, testimony, or certification or affidavit.

Moreover, even if the Board's late explanation were to be accepted, the Commissioner does not find the Board's explanation to be reasonable. While the Board claims that petitioner was on notice of her non-renewal prior to the statutory deadline, petitioner's characterization of the recommendation in her evaluation as a notice of non-renewal is not the determining factor for whether that notice was sufficient. The requirements of a notice are clearly set forth in *N.J.S.A.* 18A:27-10, and they include that the notice be "from the chief school administrator" and indicate that "employment will not be offered." A mere recommendation from an individual other than the superintendent meets neither of these criteria, and it would not be "illogical" for the Board to follow the evaluation with a formal notification that provided definitive information and was compliant with the statute. Nor should petitioner's diligence in requesting a written statement of reasons and a *Donaldson* hearing be used to her detriment. In enacting the notice statute and establishing renewal as the Board's failure to comply with it, the Legislature chose to place the burden of notification on the Board, not on teaching staff members.

Another requirement of the substantial compliance doctrine is that the defending party took a series of steps to comply with the statute. *Bernstein, supra.* The ALJ found that the Board met this requirement because it provided petitioner with her summative report and held a virtual meeting to discuss the report. But the requirement of the statute is written notice from the superintendent, and these steps do not demonstrate any attempt to comply with the statute.

The cases cited by the ALJ and the Board to the contrary are distinguishable. Both *Nissman v. Bd. of Educ. of the Twp. of Long Beach Island, Ocean Cty.*, 272 *N.J. Super.* 373 (App. Div. 1994), and *Jordan v. Bd. of Educ.*, 2017 *N.J. Super. Unpub.* LEXIS 1865 (App. Div. 2017), address the question of what notice is sufficient to trigger the 90-day time limitation for a

non-renewed employee to file a petition of appeal. In both matters, the court notes that the test is when the employee knew or should have known that she was not going to be offered a new contract. *Nissman*, *supra*, at 379; *Jordan*, *supra*, at *6-7. Any reliance on this proposition to support the Board's position in this case is misplaced. The standard for determining whether notice is sufficient to trigger the limitations period is distinct from notice sufficient to comply with the Board's statutory obligations. Contrary to a long history of cases about the filing limitations period that discuss the "knew or should have known" standard – which was applied in *Nissman* and *Jordan* because they were both about the limitations period – there is no comparable case history, nor anything in the notice statute, that suggests that petitioner's knowledge is in any way relevant to whether the Board has met its burden of providing notice.

The Commissioner further notes that the facts of these two cases are distinguishable, as Ms. Nissman received notice that complied with the version of *N.J.S.A.* 18A:27-10 that was in effect at the time, and the alleged technical defect in the notice provided to Ms. Jordan was only that it was signed by the district's director of human resources. However, it was written on the superintendent's letterhead, advised Ms. Jordan that at the upcoming board of education meeting, the superintendent would recommend that the board not renew her employment, and stated that her employment would terminate effective June 30. The form and substance of this notice are significantly closer to the requirements of *N.J.S.A.* 18A:27-10 than the "notice" petitioner received here, which was a short statement at the end of her summative evaluation stating that she was recommended for non-renewal, signed by the district's Director of Special Services. Petitioner's evaluation does not purport to be issued by the superintendent. It does not indicate to petitioner what recommendation the superintendent would make to the Board. It does not provide an end date for petitioner's termination.

Accordingly, the Commissioner concludes that the Board is not entitled to the same finding of compliance as in *Jordan.*

Because the Board failed to provide the required written notice from the superintendent, by operation of *N.J.S.A.* 18A:27-11, petitioner's employment contract for the 2020-2021 school year was renewed upon the same terms and conditions of petitioner's 2019-2020 contract, with any increases in salary as may be required by law or policies of the board of education. [4]

Accordingly, the Initial Decision of the OAL is reversed, and petitioner's motion for summary decision is granted. The Board is directed to reinstate petitioner to her position and to pay to petitioner the salary to which she would have been entitled during the 2020-2021 school year, subject to mitigation from other earnings.

IT IS SO ORDERED.[5]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 16, 2021
Date of Mailing: September 16, 2021

[4] Because the Commissioner has concluded that the contract was renewed by operation of *N.J.S.A.* 18A:27-11, it is unnecessary to reach the issue of whether the Board's vote following petitioner's *Donaldson* hearing was effective.

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 09348-20

AGENCY DKT. NO. 159-7/20

MONIKA VAKULCHIK,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,

Respondent.

Craig A. Long, Esquire, for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Marc H. Zitomer, Esquire, for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: May 10, 2021 Decided: June 22, 2021

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

Petitioner Monika Vakulchik ("Vakulchik") alleges that respondent Dunellen Board of Education (the "Board") failed to provide her with proper notice pursuant to N.J.S.A. 18A:27-10 that her non-tenured teaching staff member position was recommended for non-renewal for the ensuing school year. Accordingly, because Vakulchik claims that she did not receive proper statutory notice, she asks that she be deemed renewed and offered a new teaching contract. Vakulchik further argues that, even if this court finds that she received sufficient notice of non-renewal, the Board subsequently voted to reemploy Vakulchik by a vote of 4-3, with one abstention, and one vacancy, on a nine-member board. Accordingly, Vakulchik argues that a plain reading of N.J.S.A. 18A:27-11 requires the Board to reemploy her and issue a new contract of employment. At issue is whether (1) Vakulchik's summative performance evaluation signed by Dunellen's Director of Special Services constituted proper written notice by the "chief school administrator" that Vakulchik's employment would not be offered for the following school year, and if so, whether (2) the Board's vote of 4-3 to reemploy Vakulchik was effective to reemploy Vakulchik, when there was one abstention, and one vacancy on the nine-member board at the time of the vote.

PROCEDURAL HISTORY

Petitioner filed the instant petition with the New Jersey Commissioner of Education, which was received on July 17, 2020,by the Division of Controversies and Disputes, Department of Education (Department). The matter was transmitted as a contested case on September 16, 2020, to the Office of Administrative Law (OAL).

After several telephone conferences the parties represented that the matter was ripe for decision on a motion for summary decision. The parties filed motions and cross-motions for summary decision. The parties did not request oral argument as the written submissions were sufficient to dispose of the matter.

STIPULATIONS OF FACT

The parties agreed to certain facts that could be stipulated. As such I **FIND AS FACT** the following:

1. Respondent Dunellen Board of Education ("Board") is a pre-K to 12 District located in Middlesex County, New Jersey.

2. Petitioner Monika Vakulchik (hereinafter "petitioner") commenced employment with respondent on or about October 4, 2016, in the position of Speech Language Pathologist, and served in that position until June 30, 2020.

3. On May 1, 2020, petitioner was given her 2019-20 Summative Performance Report signed by Amanda Lamoglia, Director of Special Services for Dunellen Schools. The overall score on said report was 3.333. (Exhibit A.)

4. The summative report concluded with the following statement, "Recommended for Dismissal/Non-renewal. The teacher has failed to make progress on a Corrective Action Plan, or the teacher consistently performs below the established standards, or in a manner that is inconsistent with the school's mission and goal." Id.

5. On May 1, 2020, petitioner submitted a response to the summative evaluation report which is incorporated therein. Id.

6. On May 1, 2020, petitioner participated in a virtual meeting over Google Meet, in which she, the Director of Special Services and her Principal, together with a union representative, discussed her summative evaluation.

7. Petitioner signed the aforesaid Summative Performance report on May 8, 2020. Id.

8. On May 4, 2020, petitioner emailed Mr. Mosley, Superintendent of Schools, and copied the Board of Education. In that email she stated, "On 05/01/2020, I was notified of non-reemployment for the 2020-2021 school year. I am requesting a written statement of reasons for non-reemployment". (Exhibit B).

9. On May 5, 2020, the Board voted on the Superintendent's recommendations for staff renewals for the 2020-21 school year. Petitioner's name was not on the list of staff which was renewed. (Exhibit C).

10. Petitioner was not provided with written notification from the Superintendent by May 15, 2020, that her contract was not being renewed for the 2020-21 school year.

11. On May 18, 2020, petitioner wrote to the Board and copied the Superintendent and stated, "Insofar as I have not received notice from the chief school administrator in accordance with N.J.S.A. l8A:27-l0; 27-11 that employment for the succeeding school year will not be offered, I hereby accept your offer of employment." (Exhibit D).

12. On May 18, 2020, the Superintendent emailed petitioner and stated, "You are well-aware that your contact was not renewed as evidenced by your email to the Board on May 4, 2020 where you stated, 'On 05/01/2020, I was notified of non-reemployment for the 2020-2021 school year.' This was well-before the May 15, 2020 date set forth in the statute that you cited. You will receive my response to your request for a statement of reasons for my decision shortly. However, to be clear, you do not have a contract for the 2020-2021 school year and your name did not appear on the May 7, 2020, Board of Education meeting agenda

renewal motions. I trust that I have clarified any confusion on your part." (Exhibit E.)

13. On May 28, 2020, the Superintendent provided petitioner with a statement of reasons for her non-renewal. (Exhibit F.)

14. Based upon the Superintendent's assertion that petitioner was not renewed, she asserted rights pursuant to N.J.S.A. 18A:27-3.2 and N.J.A.C. 6A:32-4.6 and requested an appearance before respondent ("Donaldson hearing"), which took place at the June 15, 2020, Board meeting.

15. At its meeting held on June 15, 2020, the Board, which, due to a vacancy, consisted of eight members, voted four members in favor of renewing petitioner's employment; three members opposed; and one member abstaining.

16. On June 16, 2020, the Board informed petitioner in writing that "the Board's action to reinstate you following your Donaldson hearing last evening did not pass[,]" and that petitioner's employment would end on June 30, 2020. (Exhibit G.)

17. Board Policy 3142 governs the non-renewal of teaching staff members. (Exhibit H.)

18. Respondent acknowledges that petitioner has reserved her rights to bring separate claims independently of, and unrelated to, the claims at issue in this proceeding, including but not limited to retaliation, wrongful termination, and discrimination. It is understood that petitioner is not making the aforesaid claims in this matter. Respondent reserves its rights to present evidence in those proceedings that petitioner's non-renewal of employment was premised on legitimate non-discriminatory business reasons.

STATEMENT OF FACTS

The following facts are derived from the parties' respective submissions. Some of the facts are repetitive from the Stipulations of Fact but are necessary for continuity of the explanation of the case and as such, **I FIND** them to be the **FACTS** of the case:

The Board is a pre-K to 12 District located in Middlesex County, New Jersey. Vakulchik commenced employment with the Board on or about October 4, 2016, in the position of Speech Language Pathologist, and served in that position until June 30, 2020. On May 1, 2020, Vakulchik was given her 2019-20 Summative Performance Report (the "Summative Report") signed by Amanda Lamoglia ("Lamoglia"), Director of Special Services for Dunellen Schools. The Summative Report reflected an overall score of 3.333 and concluded with the following statement, "Recommended for Dismissal/Non-renewal. The teacher has failed to make progress on a Corrective Action Plan, or the teacher consistently performs below the established standards, or in a manner that is inconsistent with the school's mission and goal."

On May 1, 2020, Vakulchik submitted a response to the Summative Report and participated in a virtual meeting over Google Meet, in which she, the Director of Special Services and her Principal, together with a union representative, discussed her Summative Report.

On May 4, 2020, Vakulchik emailed Mr. Mosley, Superintendent of Schools, and copied the Board of Education. In that email she stated, "On 05/01/2020, I was notified of non-reemployment for the 2020-2021 school year. I am requesting a written statement of reasons for non-reemployment." She signed the Summative Report on May 8, 2020.

In the interim, on May 5, 2020, the Board voted on the Superintendent's recommendations for staff renewals for the 2020-2021 school year. Vakulchik's name was not on the list of staff which was renewed. However, she did not receive a

separate written notification of her nonrenewal from the Superintendent by May 15, 2020.

On May 18, 2020, Vakulchik wrote to the Board and copied the Superintendent and stated, "Insofar as I have not received notice from the chief school administrator in accordance with [N.J.S.A. 18A:27-10 and 18A:27-11] that employment for the succeeding school year will not be offered, I hereby accept your offer of employment." On the same day, the Superintendent responded to Vakulchik by email and stated, "You are well-aware that your contact was not renewed as evidenced by your email to the Board on May 4, 2020 where you stated, 'On 05/01/2020, I was notified of non-reemployment for the 2020-2021 school year.' This was well-before the May 15, 2020, date set forth in the statute that you cited. You will receive my response to your request for a statement of reasons for my decision shortly. However, to be clear, you do not have a contract for the 2020-2021 school year and your name did not appear on the May 7, 2020, Board of Education meeting agenda renewal motions. I trust that I have clarified any confusion on your part." On May 28, 2020, the Superintendent provided Vakulchik with a statement of reasons for her non-renewal.

Based upon the Superintendent's assertion that Vakulchik was not renewed, she asserted rights pursuant to N.J.S.A. 18A:27-3.2 and N.J.A.C. 6A:32-4.6 and requested an appearance before the Board ("Donaldson hearing") pursuant to Donaldson v. Board of Educ. of North Wildwood, 65 N.J. 236, 240-41 (1974). Vakuchik's Donaldson hearing took place at the Board's June 15, 2020, meeting. At the time of that meeting, due to a vacancy, the Board consisted of only eight members. The vote regarding renewal of Vakulchik's employment, was four members in favor of renewal; three members opposed to renewal; and one member abstaining.

On June 16, 2020, the Board informed Vakulchik in writing that "the Board's action to reinstate you following your Donaldson hearing last evening did not pass[,]" and that petitioner's employment would end on June 30, 2020.

LEGAL DISCUSSION

In the case at bar, both sides seek relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." I **FIND** there is no issue of material fact in dispute with regard to the foregoing matter and I **CONCLUDE** the matter is ripe for summary decision.

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Such motion "shall be served with briefs and with or without supporting affidavits" and "[t]he decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). When the motion "is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Id.

Determining whether a genuine issue with respect to a material fact exists requires consideration of whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of Am. 142 N.J. 520, 540 (1995).

I. The Board's motion for summary decision should be granted because the Board substantially complied with the notice

requirements of N.J.S.A. 18A:27-10; although the Summative Report was not signed by the Superintendent, it provided Vakulchik with timely and adequate notice of non-renewal, and Vakulchik was not prejudiced.

The Board's motion for summary decision should be granted because there is no genuine issue of material fact with respect to whether the Board provided Valkuchik with timely, adequate notice that her contract would not be renewed for the 2020-2021 school year.

N.J.S.A. 18A:27-10 provides that [o]n or before May 15 in each year, each non-tenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either:

> a. A written offer of a contract for employment from the board of education for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
> b. A written notice from the **chief school administrator** that such employment will not be offered."
>
> [emphasis added.]

When interpreting a statute, "we begin with its plain language, which is the "best indicator" of legislative intent." State v. Rodriguez, 238 N.J. 105, 113 (2019). A statute's plain language "must be construed 'in context with related provisions so as to give sense to the legislation as a whole.'" Id. (quoting Spade v. Select Comfort Corp., 232 N.J. 504, 515 (2018)). Unless the statutory language is "inconsistent with the manifest intent of the legislature, or 'another or different meaning is expressly indicated,' we ascribe to the Legislature's words and phrases 'their generally accepted meaning, according to the approved usage of the language.'" Finkelman v. Nat'l Football League, 236 N.J. 280, 289 (2019) (quoting N.J.S.A. 1:1-1).

Consequently, if the plain language "leads to a clear and unambiguous result, then our interpretive process is over." Johnson v. Roselle EZ Quick LLC, 226 N.J. 370,

386 (2016) (quoting Richardson v. PFRS, 192 N.J. 189, 195 (2007)). However, "if there is ambiguity in the statutory language that leads to more than one plausible interpretation, we may turn to extrinsic evidence, 'including legislative history, committee reports, and contemporaneous construction.'" DiProspero v. Penn, 183 N.J. 477, 492-93, 874 (2005).

Here, N.J.S.A. 18A:27-10(b) specifically requires that the "chief school administrator" provide written notice, on or before May 15, to the non-tenured teaching staff to inform them that employment will not be offered for the succeeding school year. "Chief school administrator" is defined in N.J.A.C. as "the superintendent of schools or the administrative principal if there is no superintendent." N.J.A.C. 6A:10-1.2. Further, the superintendent of schools has consistently been described as "the chief school administrator for the district." See e.g., Lenape Reg'l High Sch. Dist. Bd. of Educ. v. Lenape Dist. Support Staff Ass'n, 2010 N.J. Super. Unpub. LEXIS 304, *6.

Here, Vakulchik received the Summative Report on May 1, 2020, which was signed only by Lamoglia, the Director of Special Services. This Summative Report concluded with the following statement, "Recommended for Dismissal/Non-renewal." The first written notice that Vakulchik received directly from the Superintendent was on May 18, 2020, three days after the May 15 deadline, when the Superintendent responded to Vakulchik's email reiterating that her contract would not be renewed for the subsequent school year. When the Board voted on the Superintendent's recommendations for staff renewals for the 2020-2021 school year on May 5, 2020, Vakulchik's name was not on the list of staff that were renewed. However, the lack of inclusion on a "renewal list" of teaching staff members approved by the Board for reemployment at a regularly scheduled meeting is not determinative of a teacher's status with respect to employment for the following school year, nor is it sufficient notice of non-renewal to satisfy the statute. See Aitken v. Manalapan Twp. Bd. of Educ., 1974 S.L.D. 207, 210-12.

However, even if I find that the statute's technical requirements were not met, the doctrine of "substantial compliance" should nonetheless allow the Board to succeed on its motion for summary decision. The equitable doctrine of substantial compliance "has

deep roots in English common law and has received repeated recognition in [New Jersey's] own cases as well as in cases elsewhere." Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 353 (2001) (internal citations omitted). Its purpose "is to avoid the harsh consequences that flow from technically inadequate actions that nonetheless meet a statute's underlying purpose." Anske v. Borough of Palisades Park, 139 N.J. Super. 342, 347 (App.Div.1976). It is a doctrine "based on justice and fairness, designed to avoid technical rejection of legitimate claims." Zamel v. Port of N.Y. Auth., 56 N.J. 1, 6 (1970).

In order to successfully invoke the doctrine, a party must demonstrate (1) lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of petitioner's claim, and (5) a reasonable explanation why there was not a strict compliance with the statute. See Bernstein v. Board of Trustees of the Teachers' Pension and Annuity Fund, 151 N.J. Super. 71, 76 (App. Div. 1977).

The failure to provide notice in compliance with N.J.S.A. 18A:27-4.1, N.J.S.A. 18A:27-10, and N.J.S.A. 18A:27-11 did not prejudice Vakulchik. For example, under different circumstances, if a non-tenured staff member is unsure as to whether they have been recommended for non-renewal by the Superintendent, the staff member might fail to exercise their rights to an informal proceeding under N.J.S.A. 18A:27-4.1 or might do so untimely. Here, however, Vakulchik was not prejudiced. On May 1, 2020, the day she received the Summative Report, she e-mailed the Superintendent, and copied the Board, confirming that she was notified that she would be recommended for non-renewal for the 2020-2021 school year and requested a written statement of the reasons. The Superintendent provided her with a statement of the reasons on May 28, 2020. Finally, she asserted her rights pursuant to N.J.S.A. 18A:27-3.2 and N.J.A.C. 6A:32-4.6 and requested a Donaldson hearing before the Board, which took place at the June 15, 2020, Board meeting. Vakulchik was clearly put on notice that she would be recommended for non-renewal, was able to fully assert her rights, and was not prejudiced.

As to the second factor, the Board took a series of steps to comply with the statute. It provided Vakulchik with the Summative Report, signed by Lamoglia, the Director of Special Services, which included the specific language "recommended for non-renewal." Vakulchik also participated in a virtual meeting over Google Meet, in which she, Lamoglia, and her principal, together with a union representative, discussed her Summative Report.

The District was in general compliance with the purpose of the statute. The primary purpose is to provide teachers with timely notice when they are not going to be reemployed so that they may seek other employment. See Wachstein v. Burlington County Bd. of Educ., 1 976 S.L.D. 928, 931; see also Armstrong v. East Brunswick Twp. Bd. of Educ., 1975 S.L.D. 112, modified, St. Bd., 1975 S.L.D. 117 (modified to adjust amount of termination pay granted by Commissioner), aff'd., App. Div., 1976 S.L.D. 1104. The statute also works to ensure that a teacher has notice of a recommendation of non-renewal and can timely request a statement of reasons and a Donaldson hearing.

Here, while the notice Vakulchik received from the Superintendent was after the May 15 deadline, Vakulchik was nonetheless on notice that her contract would be recommended for non-renewal, as evinced by her May 4, 2020, email. As such, while the Board's actions did not conform to the technical requirements set forth in N.J.S.A. 18A:27-10, the primary purpose of the statute was met—Vakulchik was aware that her contract would be recommended for non-renewal, took the appropriate steps to request a list of the reasons and a Donaldson hearing, and had adequate time to seek alternate employment. The District gave Vakulchik "reasonable notice" and she was timely able to assert her rights. As to the final factor, curiously however, the District has not addressed why there was not strict compliance with the statute.

Where, as here, a staff member does not receive "[a] written notice from the chief school administrator that such employment will not be offered[,]" N.J.S.A. 18A:27-10, but the district has "substantially complied" with the underlying purpose of the statute, the staff member should be deemed to have received sufficient notice. For this reason, it is appropriate to grant the Board's motion for summary decision and find that

Vakulchik received timely notice of the Superintendent's recommendation for non-renewal. The failure of the District to comply with the technical requirements of N.J.S.A. 18A:27-10 should not be deemed an offer of continued employment for the next succeeding year (N.J.S.A. 18A:27-11) where, as here, the requirements were substantially met and the District's actions conformed to the statute's underlying purpose.

In Nissman v. Bd. of Educ. of the Township of Long Beach Island, 272 N.J. Super. 373 (App. Div.), certif. denied, 137 N.J. 315 (1994) the Court discussed the notice requirements of N.J.S.A. 18A:27-10 and determined that whether the employee "knew or should have known that [he or] she was not going to be offered a new contract for the following academic year" factored into whether or not a letter that the petitioner had received from the Board was a "final action." Id. at 379. The Board used Nissman to support its contention that, even if the Superintendent had not timely notified Vakulchik in writing that her contract would not be renewed, the fact that she was aware that her contract would not be renewed, as evinced by her May 4, 2020, email, is enough to meet its statutory burden.

While the facts in Nissman differ slightly from the facts of this case, the overarching purpose of the statute remains the same: to give a teaching staff member timely and adequate notice of non-renewal so they can seek new employment elsewhere. In Nissman, petitioner challenged the Board's resolution not to offer the petitioner a new contract or grant her tenure pursuant to N.J.S.A. 18A:27:10. The statute at the time of decision required notice from the local board of non-renewal, rather than the chief school administrator. Petitioner had timely and appropriately received the local board's adoption of a resolution that the petitioner's employment contract, expiring in August of that year, would not be renewed and that she would not be offered a new contract or granted tenure. Petitioner received the resolution and continued to work in her position as principal up to and including the last day of her contract. While the Court never questioned whether the notice requirements had been met, the question the Court answered was whether the board resolution operated as a "final action." The petitioner's knowledge that her contract would not be renewed was a primary factor in that calculus.

The Board also cited Jordan v. Board of Educ., 2017 N.J. Super. Unpub. LEXIS 1865, *6-7, 2017 WL 3091782 to support its position that the Summative Report that Vakulchik received, while not technically in compliance with N.J.S.A. 18A:27-10, was nonetheless adequate. In Jordan, the petitioner received a May 8, 2014, letter on the Superintendent's letterhead, signed by the Director of Human Resources at the high school where she taught,, informing her that at the local board meeting scheduled for May 13, 2014, the Superintendent would recommend that the board not renew petitioner's employment for the 2014-2015 school year. The letter further stated that petitioner's employment would terminate effective June 30, 2014. The Court held that the plain language of a May 8 letter simply did not support petitioner's interpretation that the letter merely *advised* her of the possibility that she would not be offered a new contract. Id. The Court found that "the letter clearly qualifies as written notice that plaintiff's employment will be terminated and [that] she will not be offered tenure." Id.

Similarly, here, Vakulchik was unambiguously aware that she was being recommended for non-renewal to the Board. Not only did her May 4, 2020, email reveal as much, but she also met with Lamoglia and her principal, together with a union representative, to discuss the Summative Evaluation, and signed it on May 8, 2020. As such, **I CONCLUDE** that Vakulchik had proper notice.

II. The Board's 4-3 vote in favor of renewing Vakulchik's contract failed and thus does not require the Board to issue a new contract of employment.

Since I found that Vakulchik did in fact receive proper notice, the Board's vote of 4-3 in favor of renewing Vakulchik's contract did not operate to renew her contract pursuant to N.J.S.A. 18A:27-4.1 because the vote was not by a majority vote of the full membership of the Board. N.J.S.A. 18A:27-4.1(b) states:

> A board of education shall renew the employment contract of a certificated or non-certificated officer or employee only upon the recommendation of the chief school

> administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons. A nontenured officer or employee who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed. Prior to notifying the officer or employee of the nonrenewal, the chief school administrator shall notify the board of the recommendation not to renew the officer's or employee's contract and the reasons for the recommendation. An officer or employee whose employment contract is not renewed shall have the right to a written statement of reasons for nonrenewal pursuant to section 2 of P.L.1975, c.132 (C.18A:27-3.2) and to an informal appearance before the board. The purpose of the appearance shall be to permit the staff member to convince the members of the board to offer reemployment.
>
> [emphasis added.]

When all seats are filled in Dunellen, the Board is comprised of nine members. The majority of the full membership of the Board is five, regardless of the number of members who attend the meeting. However, the statute does not directly state whether a vote from the full membership of the Board after an informal appearance is required to offer reemployment to an employee whose contract is deemed not renewed by the chief school administrator.

Valkuchik argues that, save for N.J.S.A. 18A:27-4.1, none of the provisions cited by the Board that require a vote of the majority of the full membership of the Board (see Respondent's Brief at 8-9) contain the differentiating clause that permits the Board to conduct a vote following an "informal appearance" by the affected staff member. She argues that here, the Legislature declined to specify the number of votes required following an "informal appearance." In contrast, she argues, other scenarios cited by the Board require "the majority of the full membership" of the Board.

As discussed in Section II, the first step in statutory interpretation is to look to the plain language of the statute—if the plain language "leads to a clear and unambiguous result, then the interpretive process should end, without resort to extrinsic sources." State v. D.A., 191 N.J. 158, 164 (2007). Only when the meaning of a statute is not self-evident on its face—"when it is subject to varying plausible interpretations, or the strict application of the words will lead to an absurd result or one at odds with public policy or an overall statutory scheme—"is it appropriate for the Court to "turn to extrinsic sources, such as legislative history." Farmers Mut. Fire Ins. Co. of Salem v. New Jersey Property-Liability Ins. Guar. Ass'n, 215 N.J. 522, 536 (2013).

It is a fundamental rule of statutory interpretation that "no clause, sentence or word [in a statute] shall be superfluous, void, or insignificant." State v. Lefante, 12 N.J. 505, 517 (1953) (quoting Shack v. Dickenhorst, 99 N.J.L. 120 (1923) (emphasis added)). Therefore, a reviewing court should assume that the Legislature did not use "any unnecessary or meaningless language." Patel v. N.J. Motor Vehicle Comm'n, 200 N.J. 413, 418-19 (2009), and should instead "try to give effect to every word of [a] statute . . . [rather than] construe [a] statute to render part of it superfluous," Med. Soc'y of N.J. v. N.J. Dep't of Law & Pub. Safety, Div. of Consumer Affairs., 120 N.J. 18, 26-27(1990) (citations omitted). Every word of a statute must be given full effect. Serio v. Allstate Ins. Co., 210 N.J. Super. 167, 171 (App. Div. 1986)(citation omitted).

N.J.S.A. 18A:27-4.1 clearly states that "[t]he purpose of the appearance shall be to permit the staff member to convince the members of the board to offer reemployment." The Legislature did not qualify this statement to indicate that anything less than a majority vote by the full membership would be sufficient.

Further, "statutes are considered to be in pari materia when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object." Marino v. Marino, 200 N.J. Super. 315, 330. Statutes "in pari materia are to be construed together when helpful in resolving doubts or uncertainties and the ascertainment of legislative intent." In re Return of Weapons to J.W.D., 149 N.J 108, 115 (1997). However, before undertaking an in pari materia analysis to discern

legislative intent, courts "must first decide whether the two statutes in question actually 'concern the same object.'" 2B Sutherland on Statutory Construction § 51:3 (7th ed. 2008). Considerations include whether the statutes are "designed to serve the same purpose and objective." Id.

N.J.S.A. 18A:27-1 states that "[n]o teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him." This aligns with N.J.S.A. 18A:27-4.1(a) and (b), which state that a board may appoint or renew an employee "only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board." In sum, both N.J.S.A. 18A:27-1 and N.J.S.A. 18A:27-4.1 relate to the same purpose—personnel appointments by board approval—both with and without the recommendation of the Superintendent. Both require a recorded roll call majority vote of the full membership of the board and should be read in harmony with one another.

Vakulchik cites Matawan Regional Teachers Ass'n v. Matawan-Aberdeen Regional School Dist. Bd. of Educ., 223 N.J. Super. 504, 507 (App. Div. 1987) to stand for the proposition that where a statute "is silent with respect to the number of votes necessary to adopt rules and to govern and manage the district . . . [i]t must be assumed that by its silence the Legislature intended the common-law rule to apply." Id. More specifically, Vakulchik contends that "a majority vote of the members of the board constituting a quorum shall be sufficient."

However, the statute at issue in Matawan, N.J.S.A. 18A:11-1, is completely devoid of *any* discussion with respect to the number of board votes necessary to adopt rules and to govern and manage the district. Here, the statute is not silent. The entirety of N.J.S.A. 18A:27-4.1 (b) addresses the board's renewal votes based upon the recommendation or non-recommendation of the Superintendent—these votes require a recorded roll call majority vote of the full membership of the board.

Further, the differentiating characteristic of an informal appearance before the board is that it is not "an adversarial proceeding," but rather, takes place for "[t]he purpose of . . . provid[ing] the staff member the opportunity to convince [the] board . . . to offer reemployment." N.J.A.C. 6A:10-8.1(c) and (i). The non-tenured staff member *may* present witnesses on their behalf, who do not need to present testimony under oath and will not be cross-examined by the board. N.J.A.C. 6A:10-9.1. The differentiating aspect is not that it does not require a majority vote of the full membership board, but that it is an informal, non-adversarial appearance.

Finally, "[a]n absurd result must be avoided in interpreting a statute." Gallagher v. Irvington, 190 N.J. Super. 394, 397 (App. Div. 1983). Allowing an interpretation that permits the Board to renew a staff member against the recommendation of the Superintendent with a simple majority vote, while requiring five yes-votes of the full nine-member Board if the renewal recommendation comes from the Superintendent is untenable. A non-tenured staff member could be renewed with only three votes of a five-member quorum against the recommendation of the Superintendent but would require five votes if the recommendation comes from the Superintendent. See Negron v. Board of Educ., 2012 N.J. Super. Unpub. LEXIS 2634, *12. In Negron, the local board was faced with the vote on the reemployment of the Superintendent pursuant to N.J.S.A. 18A:11-11. Because it was the Superintendent up for the vote, it did not require the Superintendent's recommendation. The Court nonetheless determined that the re-employment decision required a recorded roll call majority vote of the full membership of the board of education. The Court noted that it "would indeed be an anomaly in a board of education's powers if a superintendent's contract could be extended for one or two years without an affirmative vote of the full board membership when so many employment decisions require such a majority vote." Such is the case here. I **CONCLUDE** that the Board's vote of 4-3 in favor of renewing Vakulchik's contract did not operate to renew her contract pursuant to N.J.S.A. 18A:27-4.1 because the vote was not by a majority of the full membership of the Board.

ORDER

It is hereby **ORDERED** that petitioner's motion for summary decision be **DISMISSED**. It is further **ORDERED** that respondent Dunellen Board of Education's motion for summary decision be **GRANTED**; it is further **ORDERED** that the foregoing petition of appeal is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



June 22, 2021
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: June 22, 2021

Date Mailed to Parties: June 22, 2021

mph

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IN THE MATTER OF THE TENURE CHARGES AGAINST IAIN PATRIDGE	:	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION Agency Dkt. No. 72-3/20
TRENTON PUBLIC SCHOOLS BOARD OF EDUCATION, MERCER COUNTY	:	*Administrative Action*
	:	Before Ira Cure, Esq. :Statutorily Appointed Arbitrator

For Petitioner Trenton Public Schools Board of Education:
James Rolle, Esq., General Counsel

For Respondent Iain Partridge
Edward A. Cridge, Esq., MELLK O'NEILL

AWARD APPROVING SETTLEMENT AGREEMENT

On March 16, 2020, pursuant to the New Jersey Tenure Employees Hearing Law ("TEHL"), N.J.S.A. 18A:6-10 et. seq., Petitioner Trenton Public Schools Board of Education (the "Board') certified sworn tenure charges against Respondent Iain Partridge ("Mr. Partridge") to the New Jersey Commissioner of Education (the "Commissioner"). Those charges were properly served upon Mr. Partridge, who filed an Answer with the Commissioner, opposing such charges. On May 7, 2020, the charges were referred by the Commissioner to the undersigned Arbitrator, pursuant to N.J.S.A. 18A:6-16. The Commissioner provided to the undersigned Arbitrator copies of the Tenure Charges and accompanying Statement of Evidence certified by the Board, together with Mr. Partridge's Answer.

On September 1, 2021, the parties submitted a document to the undersigned Arbitrator entitled "Settlement Agreement," by which the Board and Mr. Partridge (collectively, the "Parties") have voluntarily resolved the above-captioned tenure charges. The Parties request that the undersigned Arbitrator review and approve the Settlement Agreement, pursuant to his authority under N.J.S.A. 18A:6-9 to "hear and make a final determination on a controversy and dispute arising under subarticle B of article 2 of chapter 6 of Title 18A of the New Jersey Statutes (C.18A:6-10 et seq.)."

The undersigned Arbitrator, pursuant to that authority, and further pursuant to N.J.A.C. 6A:3-5.6, having reviewed the Tenure Charges, Statement of Evidence, and Answer; the terms of the aforesaid Settlement Agreement, and the Board Resolution approving the Settlement Agreement, finds that the terms and conditions of the Settlement Agreement, a copy of which has been provided the Commission which is incorporated by reference herein, meet the standards established by the State Board of Education in the matter entitled *In re Cardonick,* State Board decision of April 6, 1983 (1990 *School Law Decisions* (S.L.D.) (842, 846), and set forth in N.J.A.C. 6A:3-5.6.

Accordingly, the settlement is hereby approved and the tenure matter is dismissed, subject to compliance with the terms of the settlement.

CONSENT AWARD

Accordingly, I approve the terms of the Settlement and memorialize its terms and conditions in a Consent Award.

September 17, 2021

Ira Cure, Esq.
Statutorily Appointed Arbitrator

STATE OF NEW YORK :
COUNTY OF KINGS :

On the 17th day of September 2021 before me came Ira Cure, Esq., to me known as the person who executed the foregoing instrument, which is his Award.

Notary Public

ELIZABETH ORFAN
Notary Public, State of New York
No. 02OR4976601
Qualified in Kings County
Commission Expires April 23, 2023

198-21

198-21

New Jersey Commissioner of Education

Final Decision

R.H. and M.H., on behalf of minor child, A.H.,

Petitioners,

v.

Board of Education of the Borough of Sayreville, Middlesex County,

Respondent.

Synopsis

In this consolidated matter, petitioners appealed two harassment, intimidation and bullying (HIB) findings by the respondent Board involving their daughter, A.H.– an 8th grader at Sayreville Middle School at the time of the incidents discussed here. In the first appeal, petitioners challenged the Board's determination that AH committed an act of HIB pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.*, when she created a social media post depicting a friend with a mud mask on her face with the caption, "When he says he's only into black girls." In the second appeal, petitioners challenged the Board's determination that A.H. was not the victim of HIB after incidents in which A.H. alleged that she had been called a racist by other students at school. The Board contended that its actions were proper and aligned with the Act and the school district's HIB policy.

The ALJ found, *inter alia*, that: the threshold requirement for a finding of HIB is that the conduct is reasonably perceived as motivated by an actual or perceived characteristic enumerated in the Act or another distinguishing characteristic, and that the conduct substantially disrupts or interferes with the rights of other students or the orderly operation of the school; it is well settled that when a Board acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless it is found to be patently arbitrary, without rational basis or induced by improper motives; here, A.H.'s conduct in creating a social media post that any reasonable person should know would have the effect of insulting or demeaning African American students, together with the substantial disruption it created in the operation of the school and the fact that A.H. was aware of the racist nature of the post when she created it, met the criteria for a finding of HIB; regarding A.H.'s claim that her classmates bullied her and called her a racist, the Board's subsequent HIB investigation found no evidence to support these allegations. Accordingly, the ALJ affirmed the decisions of the Board in both of these consolidated matters and dismissed the petition.

Upon comprehensive review, the Commissioner concurred with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determinations in these consolidated cases. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

198-21

OAL Dkt. Nos. EDU 09435-17 and EDU 14833-17 (Consolidated)
Agency Dkt. Nos. 107-6/17 and 209-9/17

New Jersey Commissioner of Education

Final Decision

R.H. and M.H., on behalf of minor child, A.H.,

Petitioners,

v.

Board of Education of the Borough of Sayreville, Middlesex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the petitioners pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto.

In this matter, petitioners challenge the Board's determination that their daughter committed an act of harassment, intimidation and bullying (HIB), as well as the Board's determination that their daughter was not a victim of HIB. This case stems from A.H.'s February 11, 2017 social media post of a picture of a friend with a mud mask on her face with the caption, "When he says he's only into black girls."[1] After several students complained to the school, an HIB investigation was conducted, and the Board determined that A.H. had committed an act of HIB; a one-day suspension was imposed, and A.H. was removed from student council. Thereafter, petitioners filed an HIB complaint, claiming that A.H. was being called a racist after an incident in her multicultural class in which she glanced up after students were asked to put

[1] A second picture posted on social media, which was also racial in nature, was posted by a different student. The matters were investigated together because the complaints happened at the same time.

their heads down and raise them if they had witnessed racism in their home. She also alleged that she was teased in math class when she was asked if she "liked chocolate" – a reference to whether A.H. dated black boys. The Board found that these incidents did not constitute HIB. Following a hearing, the Administrative Law Judge (ALJ) found that even though the social media post occurred outside of school, it constituted HIB because the post caused a substantial disruption at school and met the other requirements of the HIB statute. The ALJ also affirmed the Board's finding that A.H. was not the victim of HIB in the second complaint filed by petitioners.

In their exceptions, petitioners argue that the Board violated A.H.'s first amendment rights to free speech. Petitioners explain that the seminal case involving student speech, *Tinker v. Des Moines Independent Community School District*, 393, *U.S.* 503, 506 (1969), protects student speech except when it "substantially interferes with the requirements of appropriate discipline in the operation of the school." Petitioners argue that A.H.'s social media post did not cause a substantial disruption sufficient to overcome her first amendment rights because it only offended students and the school simply had to monitor the cafeteria to make sure there were no physical altercations. Petitioners also discuss a Supreme Court of the United States opinion that came out the day before the Initial Decision, *Mahanoy Area School District v. B.L.*, 594 *U.S.* ____ (2021), in which the Supreme Court found that a school district violated a student's first amendment rights when it disciplined her for an off-campus Snapchat post criticizing the school's cheerleading squad that used vulgar language and gestures. In that case, the Court did not find evidence of a substantial disruption to the school as "the record shows that discussion of the matter took, at most, 5 to 10 minutes of an Algebra class 'for just a couple of days' and that some members of the cheerleading team were 'upset' about the content of B.L.'s

Snapchats." *Id.* at 10. Petitioners argue that, similar to *Mahanoy*, the impact of A.H.'s posts on the school did not rise to the level of "substantial disruption."

Petitioners also contend that A.H.'s posts had no nexus to school as the post was made off-campus, on a weekend, and did not mention any student or employee of the school or any classes or school activities. Petitioners explain that in *Mahanoy*, the Court discussed that three factors distinguish a school's efforts to regulate off-campus speech from its ability to regulate on-campus speech: (1) a school will rarely encroach on parental responsibility by standing *in loco parentis* (in place of a student's parents when parents are unable to discipline the student) with off-campus activities; (2) when a school attempts to regulate speech for 24-hours of the day, a student cannot engage in protected speech at all; and (3) schools have an interest in protecting unpopular expression as part of the "marketplace of ideas." Petitioners argue that, here, the school was not acting *in loco parentis* because the speech occurred outside of school and was unrelated to school. Petitioners also contend that by punishing A.H. instead of educating her about how such speech could be interpreted by others, the school is failing its mission of building a "marketplace of ideas." Accordingly, petitioners urge the Commissioner to reject the ALJ's conclusion that A.H. committed an act of HIB.

Petitioners also argue that the ALJ erred in finding that A.H. was not the victim of HIB when classmates targeted her as a racist because the conduct meets the definition of HIB. Petitioners explain that the comment about "chocolate" was motivated by race as it is a reference to African Americans. Petitioners further maintain that the conduct happened in class, violated A.H.'s right to be free from racial discrimination at school, and created a hostile environment for A.H. – so much so that she chose to leave the District. Petitioners, therefore, request that the Commissioner reject the affirmance of the Board's denial of A.H.'s HIB claim.

In reply, the Board argues that the ALJ properly upheld the Board's HIB determinations. The Board maintains that the photo in "black face" with the caption "When he says he's only into black girls" is offensive and A.H. admitted during the investigation that it was racial in nature. The Board further argues that the social media post caused a substantial interference and disruption to the school environment. The school principal testified that three students who came into the main office were very upset about the racist content in A.H.'s post – as well as a separate racist post by another student – and planned on confronting the students who created the posts. Further, multiple students approached her in the cafeteria in the days following these posts, requiring her to spend a lot of time speaking with them regarding the serious nature of the incident; many teachers also reported that students had come to them expressing concerns about the posts. Additionally, despite the recent *Mahanoy* decision, the Board maintains that its actions passed constitutional muster. With respect to A.H.'s HIB complaint, the Board contends that A.H.'s rights were not violated when she was asked if she "liked chocolate." Additionally, the Board argues that any opinion of A.H. that students may have had was a result of her prior conduct and was not motivated by an actual or perceived characteristic. Accordingly, the Board urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner agrees with the ALJ that, based on the evidence in the record, petitioners did not establish that the Board acted in an arbitrary, capricious, or unreasonable manner in finding that A.H. committed an act of HIB, nor did the finding that A.H. was not a victim of HIB demonstrate arbitrary, capricious or unreasonable action on the part of the Board. The Commissioner will address both of the HIB determinations beginning with the Board's finding that A.H. committed an act of HIB.

The Anti-Bullying Bill of Rights Act (the Act) defines HIB as follows:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> *N.J.S.A.* 18A:37-14.

Therefore, a finding of HIB requires three elements. First, the conduct must be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. The third condition is that one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex County*, Commissioner Decision No. 51-20 (decided February 4, 2020). The statute also requires that the conduct take place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3.

Regarding the first element, in defining HIB as an action "that is *reasonably perceived* as being motivated either by any actual or perceived characteristic . . .", *N.J.S.A.*

18A:37-14 (emphasis added), the statute requires an analysis of how the actor's motivation is perceived and whether that perception is reasonable. It does not require an analysis of the actual motivation of the actor. *Wehbeh, supra.* Here, it was not arbitrary, capricious, or unreasonable for the Board to conclude that a reasonable person would consider A.H.'s social media post depicting a white person in "black face" to be motivated by the distinguishing characteristic of race.

Regarding the second element, there is ample evidence in the record that the social media post caused a substantial disruption to the orderly operation of the school. The school principal testified that three students came into the office very upset about the racist picture posted by A.H., as well as a second offensive post by another student; these students wanted action to be taken immediately and planned to confront those involved in making the posts. The principal further testified that she had concerns that there could be an altercation in a crowded hallway since matters can escalate very quickly with 1,300 students in the building. The principal explained that because of the tension in the school, she had monitored the 8th grade lunch period on that day and for weeks after so that she could prevent matters from erupting in the cafeteria. She testified that multiple students approached her in the cafeteria concerned about racism in the school and wanting to know what was going to happen to the offender. The principal testified that A.H.'s post with the "black face" picture spread through the school, there were murmurings in the hallway, and teachers heard students talking about the matter. The Commissioner finds that – given the social media post spread throughout the school, causing many students to become angry and upset, and resulting in the principal changing her schedule to be present among students to calm the situation and prevent an altercation – the Board was

certainly not arbitrary, capricious or unreasonable in finding a substantial disruption of the ordinary operation of the school.

Regarding the third element, an act of HIB is one that "a reasonable person *should* know, under the circumstances, will have the effect of physically or emotionally harming a student," "*has the effect* of insulting or demeaning a student," or "*creates* a hostile educational environment . . .". *N.J.S.A.* 18A:37-14(a) (emphasis added). There is no doubt here that a reasonable person would know that A.H.'s social media post involving a "black face" photograph would cause emotional harm and insult or demean black students because it is inherently racial in nature, such that the Board was not arbitrary, capricious, or unreasonable in reaching that conclusion.

Finally, regarding where the conduct occurred, the Act sets forth that conduct may be considered HIB when it takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3, and that otherwise satisfies the remaining elements of HIB. *N.J.S.A.* 18A:37-15.3 indicates that HIB policies adopted by boards of education shall include provisions for responses to HIB that occurs off school grounds when a school employee is made aware of such actions. Additionally, *N.J.A.C.* 6A:16-7.5(b) requires that school authorities respond to HIB that occurs off school grounds. Accordingly, the Board is required to investigate HIB complaints even if they occur outside of school. Here, the Board received an HIB complaint involving a social media post that occurred outside of school hours, so it was required to investigate the allegations. As A.H.'s social media post was viewed by many students who attended Sayreville Middle School and caused a disturbance at the school, the Board was not arbitrary, capricious, or unreasonable in

investigating the conduct that occurred off school grounds and finding that it met the definition of HIB.

The Commissioner does not find petitioners' exceptions to be persuasive. Despite their arguments as to why *Mahanoy* prevents the Board from regulating her speech, A.H.'s social media post caused a substantial disruption to the school. While the disruption in Mahanoy only consisted of a short 5 to10 minute discussion in Algebra class, the social media post at issue here resulted in students becoming very upset and emotional, creating the potential for altercations such that the principal had to monitor lunch hour for weeks to ensure student safety and to curtail the effects of the students talking about the post throughout the school. Additionally, while petitioners argue that the post had no nexus to school, it is clear that the post was made on a platform that enabled many Sayreville Middle School students to see the picture, thus bringing it into the school, where the post caused a substantial disruption. Additionally, the Board was not attempting to stand in loco parentis; rather, the staff was seeking to maintain order in the school following a social media post that caused interference with the school's regular operations. Moreover, the speech involved here is distinct from the type cited in *Mahanoy*, *i.e.*, speech expressing disagreement or criticism; instead, the speech here was a racist photograph and remark which a reasonable person would perceive as offensive to black students. Accordingly, the impact of the social media post on the school violated the HIB statute and is within the school's authority to regulate.

With respect to the second HIB matter in which the Board found that A.H. was not the victim of HIB, the Commissioner finds that the Board was not arbitrary, capricious, or unreasonable in its determination. When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless

there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration[,]" and the Commissioner will not substitute his judgment for that of the board. *Bayshore Sewerage Co. v. Dep't. of Envtl. Prot.*, 122 *N.J. Super.* 184, 199 (Ch. Div. 1973), *aff'd*, 131 *N.J. Super.* 37 (App. Div. 1974). Interviews with student witnesses found that other students did not perceive the comment at issue as malicious. While it may have been inappropriate, the comment did not substantially disrupt the school or the rights of A.H. As such, the record contains sufficient credible evidence to support the Board's decision that the HIB allegation could not be substantiated and therefore did not constitute an HIB violation. The Commissioner does not find petitioners' exceptions regarding this HIB allegation to be persuasive.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.D.S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 23, 2021
Date of Mailing: September 23, 2021

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

R.H. and M.H.,
on behalf of minor child, A.H.,
Petitioners,
v.
BOROUGH OF SAYREVILLE BOARD OF EDUCATION, MIDDLESEX COUNTY,
Respondent.

OAL DKT. NO. EDU 09435-17
and EDU 14833-17
AGENCY DKT. NO. 107-6/17 and 209-9/17

Krista Lynn Haley, Esq., for petitioners (John Rue & Associates, LLC, attorneys)

Marc G. Mucciolo, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: June 2, 2021 Decided: June 24, 2021

BEFORE **SARAH G. CROWLEY,** ALJ:

STATEMENT OF THE CASE

This case involves two harassment intimidation and bullying (HIB) claims involving A.H., who was an eighth grader at the time. The first matter involves a Snapchat post by A.H. of a girl with a mud mask on her face with the following comment, " when he says he's only into black girls." After an investigation, the School District (District) found A.H. violated the HIB statute. This decision was affirmed by the Board of Education (Board). The second matter involved a claim by A.H. that she was bullied by fellow students. This claim was not sustained after an investigation and the Board affirmed the finding of no HIB. A.H. has challenged both findings.

PROCEDURAL HISTORY

An appeal was filed by the parents of A.H. to both of the findings of District which were affirmed by the Board. The decision in the first HIB matter was issued on March 7, 2017, and the second issued on June 13, 2017. A.H.'s parents filed an appeal in both of the matters, and they were transmitted to the Office of Administrative Law as contested matters. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The matters were consolidated with the consent of both parties and were heard via Zoom on January 7, 2021. The record was closed after post-hearing submissions by the parties on June 2, 2021.

STATEMENT OF ISSUES

The facts in the first HIB matter are essentially undisputed. A.H. admitted to posting a girl with a mud mask on with the caption "when he says he only into black girls" on her snapchat account. The first issue is whether such a posting can reasonably be perceived as being motivated either by any actual or perceived characteristic, such as race. The other determinations in the first matter is whether there was a sufficient nexus to the school, and whether the conduct caused a sufficient disruption to the school to satisfy the statute. Any determination by the District will only be disturbed if it is found to be arbitrary, capricious and unreasonable. The District found that the posting constituted HIB, and their finding was affirmed by the Board. The second HIB matter involves a determination of whether A.H. was bullied by other students. A.H. alleged that she was called racist and teased about whether she liked chocolate, meaning did she date black boys. The District investigated the allegations and were unable to substantiate any of the allegations by A.H. and found no HIB. The Board affirmed this decision.

FACTUAL DISCUSSION AND FINDINGS

R.H. is A.H.'s father and testified on her behalf. He testified that his daughter was thirteen years old at the time of the incident. She reposted something that one of her friends had posted on Snapchat. R.H. testified that A.H. had two separate Snapchat accounts and one was her "finsta" account, which had a smaller following. A.H. had approximately 250 followers and many school friends on the account in question. It was her fun account and she did not mean to offend

anyone. R.H. testified that A.H. told him about an incident in her cultural diversity class where the teacher told them to put their heads down on the desk and raise them if they had witnessed racism in their home. After she raised her head a little to see what others were doing, everyone called her a racist. There was another incident in her math class when some students asked her if she liked chocolate, implying did she like black boys.

R.H. testified that A.H. was very happy and doing very well in school before this incident happened. She was on student council and loved school. However, after all this happened, she did not want to go to school anymore, and she was bullied by her classmates. They did not report any problems until after the posting, but the incident in the cultural diversity class happened before the posting. He testified that she had never been in trouble and had a lot of friends. Following the finding of HIB, they suspended her and removed it from the student council. A.H. was unable to attend a student government class trip as a result of the suspension and the removal from the student council. Ultimately, they transferred her to another school because she was so unhappy.

A.H. was sworn with the consent of her parents who were present with her on the Zoom hearing. She is now a senior in high school. She was questioned by her attorney about being under oath, and she testified that she understood that she had to tell truth. She testified that she reposted the Snapchat of a friend in the shower with a mud mask on. A.H. read the caption which stated, "when he says he's only into black girls." She testified that she thought it was funny and reposted it on her own finsta Snapchat account. She did not think it was racist and thought it was funny. A.H. testified that prior to this posting there was an incident in her multicultural class where the teacher asked everyone to put their heads down on the desk and to raise them if they had witnessed racism in their home. She lifted her head a little to see what others were doing and people started calling her a racist. Another incident happened in math class when they had a substitute, and someone asked her if she liked chocolate. She knew this meant does she like or date black boys. She tried to just ignore it, but she was taunted for being a racist. A.H. used to like school, but things got bad, and she did not want to go to school anymore. She was removed from student counsel and could not go on the student counsel trip due to HIB finding related to the posting. A.H. said she had never been in trouble in school before. However, on cross-examination she conceded that she was disciplined in sixth and seventh grade for behavior issues. When she

was questioned about whether she thought the post was racist, she said no. She further testified that sitting here today, she still did not think the post was racist.

Donna Jakubik (Jakubik), was the principal at Sayreville Middle School at the time this incident with the posting occurred. She said that several students came to see her and were very offended by the mud face posting by A.H., and another one by a friend of A.H. who posted someone wearing a Klansman hood. The kids said they were going to confront A.H. about the posting because they were so offended. Ms. Jakubik advised them not to and initiated an investigation. She had to monitor the lunchroom after the posting to make sure there was no trouble following the complaint. She interviewed several students including A.H. in connection with the investigation. She called A.H. to her office to ask her about the posting. A.H. acknowledged that she posted the mud mask with the comment. She said she re-posting of something from her friend had posted with her own comment "HAHAHAHA LOVE HERR" with some emojis. A.H. advised Ms. Jakubik that she had been reluctant to post it because she knew it was racist, but she did anyway. Because there were several students very upset by the post, Ms. Jakubik had to intervene to make sure there was no trouble. Due to the racist nature of the post, she felt the one-day suspension was appropriate. She also felt that removal from the student council was appropriate as they did not feel she was someone who should be representing the student body. Ms. Jakubik testified that this was not the first time A.H. had been in trouble and thought and that she had been disciplined in sixth grade for a fight and in seventh grade for waiving her bra around on the school bus. She also thought that A.H. knew the post was racist and offensive and she did it anyway. She said the one-day suspension and the removal from the student council were an appropriate punishment.

Ms. Jakubik is familiar with the investigative process for HIB allegations. She followed all the proper protocols and interviewed other students and prepared a report. She made her recommendation to the superintendent. There was a hearing before the Board of Education, and they considered all appropriate factors in deciding that it was HIB and what discipline to impose. She indicated that they do not share the results of their investigation with others of what the discipline was. There were several students who wanted to know what was being done, but they did not share any information about the investigation and the resulting discipline.

Ms. Jakubik was also in charge of the other HIB matter, which was filed by A.H.'s parents after the first HIB incident. A.H.'s father reported that A.H. was being bullied after the investigation was commenced into the posting. He claimed that she was being taunted for being a racist and asked if she liked chocolate. He also reported that here was an incident in the multicultural class where the teacher had asked the kids to put their head down on the desk and raised them if anyone in their household made any racist comments Apparently, A.H raised her head and was called racist by the other children. Ms. Jakubik interviewed several other students in the class and could not corroborate that she had been called a racist by anyone. She also investigated the other incident in the math class where students kept asking her if she liked chocolate—meaning did she like black boys. None of the allegations of bullying against A.H. were corroborated during her investigation. A report was prepared and the recommendation to the superintendent of a finding of no HIB went to the Board, where it was affirmed.

FINDINGS OF FACT

The resolution of the claims made by the petitioner requires that I make a credibility determination regarding certain facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of fact. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See, Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story considering its rationality, internal consistency and the way it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone, or in connection with other circumstances in evidence, excite suspicion as to its truth. In re Perrone, 5 N.J. 514. 521-22 (1950). See, D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, and to weigh the evidence before me, it is my view that A.H. was not credible. I found the testimony of Ms. Jakubik credible and consistent with the documentary evidence and other testimony. I specifically found her testimony regarding her conversation with A.H. very credible. She testified and documented that after her initial discussion with A.H. that she acknowledged that she was reluctant to repost the picture due to it being racist. I found that A.H.'s father was sincere and credible regarding his concern for his daughter but had no direct or firsthand knowledge of the facts that were relevant to a finding of HIB on either claim. I found Ms. Jakubik's testimony regarding the investigation of bullying against A.H. and the inability to corroborate any of the allegations to be credible. I found A.H.'s testimony that she did not think the post was racist then or now not be credible.

Accordingly, I **FIND** the following as **FACT:**

1. On February 11, 2017, A.H. posted a picture of a friend with a mud mask on her face with the comment "when he says he is only into black girls" on her Snapchat account.

2. A.H. was aware of the racist nature of the post.

3. Although the post was made on a Saturday, A.H. had many followers, including fellow students at Sayreville Middle School.

4. Several students complained to the school, and a HIB investigation was conducted.
5. An investigation was conducted and a report finding HIB against A.H. was issued. The Board of Education affirmed the finding of HIB.

6. All of the procedural requirements of the anti-bullying statute were followed by the District in both of the investigations.

7. Several students were very offended by the post and wanted to confront A.H.

8. The District had to monitor lunch and keep a close eye on things due to the fear that these students might confront A.H.

9. Although the post was done outside of school, due to the impact on the students at Sayreville Middle School, and the followers of her account from Sayreville, there is sufficient nexus between the post and school.

10. There was a sufficient disruption to the school as a result of the post by A.H.

11. The decision of the Board affirming this decision was not arbitrary, capricious or unreasonable.

12. After the issuance of the HIB finding by the District, R.H. filed an HIB action on behalf of A.H. claiming that she was called a racist and was being bullied at school.

13. An investigation was conducted, and students and staff were interviewed and no substantiation of the claims of HIB against A.H. were found.

14. There is no credible evidence that A.H. was bullied.

15. The decision of the District was supported by the evidence, or rather lack thereof and the affirmance by the Board was not arbitrary, unreasonable or capricious.

LEGAL ANALYSIS AND CONCLUSION

With regard to speech that constitutes harassment, intimidation or bullying, the New Jersey Legislature enacted the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2, et seq., to "strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying" occurring both on and off of school grounds. N.J.S.A. 18A:37-13.1(f). Each school district in New Jersey is required to "adopt a policy prohibiting harassment, intimidation or bullying on school property," which includes notification of the "consequences and appropriate remedial action for a person who commits an act of harassment,

intimidation or bullying," "a procedure for reporting an act of harassment, intimidation or bullying, including a provision that permits a person to report an act of harassment, intimidation or bullying anonymously," and "a procedure for prompt investigation of reports of violations." N.J.S.A. 18A:37-15. "The policy adopted by each school district . . . shall include provisions for appropriate responses to harassment, intimidation, or bullying . . . that occurs off school grounds, in cases in which a school employee is made aware of such actions." N.J.S.A. 18A:37-15.3.

N.J.S.A. 18A:37-14 defines "harassment, intimidation or bullying" to mean:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c. 122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

The threshold requirement is that the conduct be reasonably perceived as motived by actual or perceived enumerated characteristic or other distinguishing characteristic, and that the conduct substantially disrupts or interferes with the right of other students or the orderly operation of school. It is well settled that a Board decision is entitled to a presumption of correctness and may not be disturbed unless they are found to be decisively flawed. Kopera v W. Orange Bd. of

Educ., 60 N.J. Super 228 (App. Div. 1960). When a Board acts "within its discretion authorly, as it did here, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was patently arbitrary, without rational basis or induced by improper motives." Id. Neither the undersigned nor the Commissioner is permitted to "substitute her judgment for that of the board." Bayshore Sewar Company v. Dept of Envtl. Prot., 131 N.J.S. Super 37 (App. Div. 1974).

The petitioner has argued that since the conduct did not occur on school property on school hours that it fails to meet the requirement of HIB. However, our statute specifically recognizes activity that occurs off school property if it causes a substantial disruption at school and meets the other requirements of the statute. The petitioner further argues that this conduct did not cause a substantial disruption to school activities. However, the testimony of Ms. Jakubik, whom I found credible was that many students were very upset and she had to monitor activities in school due to a threat by students that they were going to confront A.H. Finally, the District findings were neither arbitrary, capricious or unreasonable. The allegations of HIB by A.H. were investigation and none of her allegations could but substantiated after a HIB investigation was conducted. The decision of the District and the Board was neither arbitrary, capricious or unreasonable.

Accordingly, I conclude that the Snapchat posting by A.H., which occurred after school hours on a social media account caused a substantial disruption with the operation of school. Many students were upset, they complained, an investigation was conducted, and activities surrounding the student had to be monitored following the event to ensure her safety. I further conclude that not only should a reasonable person know that this post had the effect of insulting or demeaning African American students, I found as fact, that A.H. was aware of the racist nature of the post when she posted it. Accordingly, I conclude that the requirements of N.J.S. A. 18A:37-14 have been satisfied, and the finding of HIB by the District is affirmed. As to the allegations of A.H. that she was called a racist and bullied, the District investigated these claims, and found no one to support these allegations. I have also found no credible evidence to support this claim. Accordingly, giving the deference I am required to give to the District, the decisions of the Board on both claims are hereby affirmed.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the decision of the Board finding HIB in the first claim is **AFFIRMED** and the appeal of A.H. is **DISMISSED.** It is also **ORDERED** that the decision of the Board finding no HIB against A.H. is **AFFIRMED,** and the appeal is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 24, 2021
DATE

Sarah G. Crowley
SARAH G. CROWLEY, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

SGC/nd

APPENDIX

WITNESSES

For Petitioners:

R.H.

A.H.

For Respondent:

Donna Jakubik

EXHIBITS

For Petitioners:

P-1 Initial Verified Complaint, dated June 5, 2017

P-2 Second Verified Complaint, dated September 5, 2017

P-3 Answer to First Complaint, dated June 26, 2017

P-4 Answer to Second Complaint, dated September 25, 2017

P-5 First HIB Incident Report, dated February 14, 2017

P-6 Second HIB Incident Report, dated April 3, 2017

P-7 Third HIB Incident Report, dated March 30, 2019

P-8 District's Motion for Summary Decision, dated February

P-9 Response to Motion for Summary Decision, dated February 16, 2018

P-10 Discovery Response, June 2018

P-11 Discovery Response, September 2019

P-12 Letters from Labbe and Board Minutes

P-13 Dr. Richard Labbe, Superintendent, Curriculum vitea

For Respondent:

R-1 Snapchat post

R-2 Email from D. Jakubik to R. Labbe, "Cyber Bullying Issue," with attachments, dated February 21, 2017

R-3 Email, "A.H. 8th grade," dated February 23, 2017

R-4 Email from R. Labbe to D. Jakubik, "Cyber Bullying Issue," dated February 23, 2017

R-5 Email from R. Labbe to D. Jakubik, "Cyber Bullying Issue," with attachments, dated March 2, 2017

R-7 Email from D. Jakubik to D. Consulmagno, "Cyber Bullying Issues," with attachments, dated March 2, 2017

R-8 Letter from Sayreville Middle School, dated March 3, 2017

R-9 Email from D. Jakubik to D. Fischer, "Take a Look at This," with attachments, dated March 6, 2017

R-10 Email from D. Jakubik to R. Labbe "Bullying Report," with attachments, dated March 8, 2017

R-11 Letter from Sayreville Public Schools to the Parents of A.H., dated March 8, 2017

R-12 Email from R. Labe to D. Jakubik, "SESSAVIN-BusOff," dated March 21, 2017.

R-13 Sayreville Public Schools Harassment, Intimidation, or Bullying (HIB) form, dated March 22, 2017.

R-14 Email from D. Consulmagno to D. Jakubik, dated March 29, 2017.

199-21

199-21

New Jersey Commissioner of Education

Final Decision

J.M., on behalf of minor child, J.S.,

Petitioner,

v.

Board of Education of the Township of Wayne,

Passaic County,

Respondent.

Synopsis

Pro se petitioner challenged the respondent Board's determination that J.S. is not entitled to attend Wayne Valley High School (Wayne Valley) because she is not residing within the attendance zone for that school. Petitioner sought to have J.S. reassigned from Wayne Hills High School (Wayne Hills) to Wayne Valley – both of which are operated by the Wayne Township school district – contending that the Board should exercise its discretionary powers under Policy #5120, which allows that the superintendent may assign a pupil to a school other than the one designated by the attendance area when such an exception is justified by circumstances and/or is in the best interests of the pupil. Petitioner asserted, *inter alia,* that safety concerns regarding J.S.'s commute to school at Wayne Hills – which will require J.S. to traverse busy roads on the walk home from school – as well as logistical issues related to J.M.'s role as a single working mother which prevent her from transporting J.S. home from school each day require that the district reassign J.S. to Wayne Valley for high school.

The ALJ found, *inter alia*, that: a school board has discretionary power to determine which school students will attend within its district, so long as the decision is not contrary to law; the Board applied its Policy #5120 in an even-handed manner; the Board considered whether attendance at Wayne Valley was required in the best interests of the pupil and determined that J.S. is a good student who will do well in either school; and J.S. would be entering her first year of high school whether at Wayne Hills or Wayne Valley. The ALJ concluded that the Board did not act in an arbitrary, capricious, or unreasonable manner when it denied petitioners' request to allow J.S. to attend Wayne Valley while the family resided in the attendance zone for Wayne Hills; and recommended that the petition be dismissed.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion for the reasons well stated in the Initial Decision. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

199-21
OAL Dkt. No. EDU 03383-21
Agency Dkt. No. 38-3/21

New Jersey Commissioner of Education

Final Decision

J.M., on behalf of minor child, J.S.,

Petitioner,

v.

Board of Education of the Township of Wayne, Passaic County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that that Board did not act in an arbitrary, capricious, or unreasonable manner when it denied petitioner's request to allow her minor child to attend Wayne Valley High School while the family resides in the attendance zone for Wayne Hills High School.

According, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 23, 2021
Date of Mailing: September 23, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03383-21
AGENCY DKT. NO. 38-3/21

J.M. ON BEHALF OF J.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,
Respondent.

J.M., on behalf of **J.S.** petitioner pro se

John G. Geppert, Jr., Esq., for respondent Wayne Township Board of Education (Scarinci Hollenbeck, attorneys)

Record Closed: July 29, 2021 Decided: August 9, 2021

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

J.M. (petitioner) appeals the Board of Education for the Township of Wayne's (Board) determination that her daughter, J.S., is not entitled to attend Wayne Valley High School because she is not residing within that attendance zone. Petitioner claims that she has extenuating personal circumstances that warrant waiving the attendance policy for J.S.

PROCEDURAL HISTORY

On or about January 10, 2021, J.M. sent via email a formal request to the Board requesting that her daughter be given permission to attend the Wayne Valley High School instead of Wayne Hills High School, which is the assigned school for her address. The Board notified petitioner of its determination on February 12, 2021. [R-5.] J.M. filed her petition of appeal directly with the Commissioner of Education on March 4, 2021. The Board filed its answer on March 24, 2021, and the matter was then transmitted to the Office of Administrative Law for determination as a contested case on March 30, 2021. The matter was assigned to me on or about April 19, 2021. Thereafter, the hearing was scheduled and held on July 29, 2021, through the use of Zoom remote technology because of the continued New Jersey State of Emergency for the coronavirus pandemic. Insofar as the petitioner was not represented by counsel and the case was presented thoroughly by both sides, I determined that I did not need post-hearing submissions and I closed the record at the end of the hearing.

FINDINGS OF FACT

Based upon due consideration of the pleadings and the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following facts:

Petitioner testified that she is single mother to her two daughters, with no family network of support. Her daughters are 3.3 years and four grades apart; S.S. has graduated. She has lived in Wayne for seventeen years. Petitioner works in Roseland, Essex County, so she is unable to pick up her daughter at the end of the school day. Her job does give her the opportunity to drive J.S. to school at the beginning of the day. Wayne does not offer busing at the distances involved.

Petitioner detailed that she is facing some hardships and/or concerns that she feels warrant the Board granting J.S. an exception in order to be able to attend Wayne Valley High School. She stated that some aspects of her support system and

circumstances have changed recently, making this request more important for J.S.'s upcoming tenure in high school. Those include that her mother is no longer well enough to help with the girls, as she did when the older daughter was in high school, and some personal medical issues coming up for her that will necessitate having J.S. sleep at a friend's home at times. Also, in her family, Covid made their lives easier when they were all remote from school or work, but now real commuting considerations come into back play. Petitioner is very worried about the safety of her daughter walking home from Wayne Hills, where traversing busier streets is required. Moreover, her older daughter suffered some serious behavioral and mental health issues when she was required to attend Wayne Hills without her friends from middle school, and petitioner does not want the same to happen to her younger daughter.

This winter, petitioner anticipated her younger daughter's entry into high school in the fall and filed her request that she be permitted to remain with her friend S.J., whose mother has also been a critical component of J.M.'s support network, from the Wayne Valley attendance zone. Petitioner explained that J.S. has become very close friends with S.J. and she has become good friends with that child's mother T.J. T.J. provides significant help to petitioner by transporting J.S. to activities both girls are engaged in, allowing J.S. to study after school, and letting her sleep over if petitioner has a medical issue. For high school, S.J. will be attending Warren Valley.

On cross examination, petitioner acknowledged that J.S. has been a good student and has had little need for interaction with her guidance counselor or the principal there.

T.J. also testified on behalf of petitioner, in addition to submitting a Certification. She detailed many of the same ways in which she helps J.M. and J.S. T.J. and her husband have a strong belief in helping others and place a very high value on that as well as on education. She has always had a nanny or babysitter in their home for hours every day as additional childcare. While she cannot commit to picking up J.S. from Wayne Hills, T.J. did assert that she will still help petitioner and J.S. in as many ways as she is able.

Donna Reichman testified on behalf of the Board. She has been an employee with the Wayne district for eighteen years as a teacher, principal, and now Assistant Superintendent, which latter position she has held for the last five years. Reichman reviewed the history of the petitioner's request and the Board's response, that were largely delegated to her, especially after Covid when everyone was overwhelmed with the "new normal" and an excessive number of personal requests by staff and pupils.

With respect to the reasons provided by petitioner, Reichman explained that Policy #5120 supported the Board's decision to deny the request to place J.S. as a freshman at the high school outside her attendance zone. Policy #5120 specifically, and in pertinent part, states:

> Pupils shall generally attend the school located in the attendance area of their residence. The Superintendent may assign a pupil to a school other than that designated by the attendance area when such an exception is justified by circumstances and/or is in the best interests of the pupil.

Reichman focused on the fact that the Board has been very consistent in applying this policy to the multiple requests they receive each year. When questioned about the frequency with which the Board has granted exceptions under Policy #5120, Reichman stated that out of a student population of over 7500, there had been approximately three who were granted it because they were in their final year and three who were granted it because of IEP implementation issues.

With respect to J.M.'s concerns that her younger daughter would experience emotional difficulties similar to those her older daughter encountered when forced to attend Wayne Hills, Reichman stated that J.S.'s guidance counselor and middle school principal were consulted for that very reason and both supported her going to the assigned school. She further testified to the after-school social options that she has observed from both high schools.

On cross-examination, Reichman expressed sympathy for J.M.'s personal circumstances. She described that Covid and its related consequences have also caused many families in Wayne into difficult circumstances. As a result, the Board has

opted to bring on four mental health professionals this school year, as well as offering transition plans for children who need them in order to adjust to an unexpected school setting. Nevertheless, Reichman detailed that she has a responsibility to adhere to the policy, which also has derivative impacts on staffing and forecasting enrollment.

ANALYSIS AND CONCLUSIONS OF LAW

The issue in this matter is whether J.S. should have been granted an exception to the attendance policy in order to be able to attend Wayne Valley High School, notwithstanding that she and her mother reside in the Wayne Hills zone, albeit pretty close to the dividing line. Specifically, petitioner seeks a determination herein that the Board should exercise its discretion under its Policy #5120 to allow J.S. to attend Wayne Valley because of her sincere dependence on T.J. for transportation, after-school supervision, and occasional, medically necessitated, overnight stays.

As set forth above, Policy #5120 states:

> Pupils shall generally attend the school located in the attendance area of their residence. The Superintendent may assign a pupil to a school other than that designated by the attendance area when such an exception is justified by circumstances and/or is in the best interests of the pupil.
>
> [J-2.]

Based on the preponderance of the credible evidence, I **CONCLUDE** that J.S. is residing in the attendance zone of Wayne Hills High School. I further **CONCLUDE** that the Board has properly applied its Policy #5120 and did so herein in a fair, reasonable, and nonarbitrary manner. The evidence clearly demonstrates that the Board has applied Policy #5120 in an even-handed manner. The Board also carefully considered whether attendance at Wayne Valley High School was required in the best interests of the pupil and determined that J.S. was not in need of special services and that she was likely to succeed there.

I **CONCLUDE** that the Board was correct and entirely consistent with its policy and past cases in deciding that petitioner's circumstances do not come within the school assignment policy exceptions. Reichman was empathetic to J.M.'s circumstances and agreed to help informally where the school can (crossing guard, ride-share information etc.). I, too, feel for J.M.'s tough situation, having been a single mother myself, and I recognize that economic or other hardships which befall parents often have unintended consequences for their child(ren). Nevertheless, these events happen in life and we all have to adjust within the system that governs all similarly situated pupils.

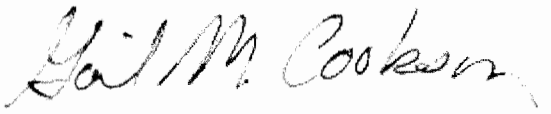
ORDER

Based upon the foregoing, it is **ORDERED** that the petition of appeal of J.M. on behalf of J.S. should be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties. of any exceptions must be sent to the judge and to the other parties.



August 9, 2021
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 8/9/21

Date Mailed to Parties: 8/9/21

id

APPENDIX

LIST OF WITNESSES

For Petitioner:

J.M.

T.J.

For Respondent:

Donna Reichman

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

Ex. A Certification of T.J., dated July 11, 2021

Ex. B Letter from Donna Reichman to J.M., dated February 12, 2021

Ex. C Certification of J.M., dated July 13, 2021

Ex. D "Suicide and Friendships Among American Adolescents," Amer. Journal of Public Health (Jan. 2004)

Ex. E Google Map of Walking Commute to Wayne Hills High School

Ex. F Google Map of Walking Commute to Wayne Valley High School

Ex. G Wayne Township Board of Education District Policy #5120

Ex. H Map of Attendance Zones

For Respondent:

R-1 Wayne Township Board of Education District Policy #5120

R-2 Letter from J.M. to Board, undated but received on or about January 10, 2021

R-3 Emails between J.M., Ann Cassera, and Michelle Giarrusso, dated January 10-12, 2021

R-4 Email from J.M. to Patricia Babich, dated February 22, 2021

R-5 Letter from Donna Reichman to J.M., dated February 12, 2021

200-21

200-21
OAL Dkt. No. EDU 07594-19
Agency Dkt. No. 92-5/19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Borough of Somerville, Somerset County,

Petitioner,

v.

M.O., on behalf of minor child, J.O.,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement), and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 28, 2021
Date of Mailing: September 28, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07594-19
AGENCY DKT. NO. 92-5/19

BOROUGH OF SOMERVILLE BOARD OF EDUCATION, SOMERSET COUNTY,

Petitioner,

v.

M.O. ON BEHALF OF MINOR CHILD, J.O.,

Respondent.

Joseph L. Roselle, Esq., for petitioner (Schenck, Price, Smith & King, LLP, attorneys)

Francis J. Campbell, Esq., for respondent (Campbell & Pruchnik, LLC, attorneys)

Record Closed: July 1, 2021 Decided: August 16, 2021

BEFORE **JEFFREY N. RABIN,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on June 5, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On July 1, 2021, the parties filed a fully executed Settlement Agreement and the Board Resolution approving the settlement. The Agreement and Resolution are attached and fully incorporated herein.

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 16, 2021
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: 8/17/2021

Date Mailed to Parties: 8/18/2021

/dw

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for the Somerville Board of Education

SOMERVILLE BOARD OF EDUCATION, **Petitioner,** **v.** **MARLENE O'BRIEN, o/b/o J.O.,** **Respondent.**	**STATE OF NEW JERSEY DEPARTMENT OF EDUCATION** **COMMISSIONER OF EDUCATION** **OAL DKT. NO.: EDU 7954-2019S** **AGENCY DKT. NO.: 92 – 5/19** **SETTLEMENT AGREEMENT**

This Agreement is made as of April _____, 2021, by and between Petitioner, Somerville Board of Education ("the Board" or "Petitioner"), and the Respondent, Marlene O'Brien, o/b/o J.O.

RECITALS

WHEREAS, in or about January of 2019, Petitioner Somerville Board of Education determined, based on the results of a residency investigation, that minor student J.O. was not domiciled in the Somerville School District ("District") and thus not entitled to a free, public education in the District; and

WHEREAS, the Board thereafter passed a resolution ordering the Respondent to pay tuition for the period of J.O.'s ineligible attendance in the District; and

WHEREAS, the Board thereafter commenced this administrative action to recoup alleged tuition costs; and

WHEREAS, this administrative action is captioned Somerville Board of Education v. M.O. o/b/o minor child J.O., and is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 7954-19S, Agency Dkt. No. 92-5/19 ("the Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, in order to avoid the expense, inconvenience, distractions and inherent uncertainties associated with continuation of this dispute, and the fees and expenses that inevitably would result therefrom, the Parties, by this Agreement, herein agree to adopt a full and final settlement of any and all claims, lawsuits, complaints, and/or disputes between Petitioner and Respondent in connection with any and all damages and losses arising from the Litigation; and

WHEREAS, by this Agreement, Petitioner will voluntarily dismiss the Litigation with prejudice, without costs to any party as against the other;

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. Petitioner shall pay the Board the sum of Three Thousand, Five Hundred Dollars ($3,500.00), representing back tuition due and owing for the period of the student's ineligible attendance in the District as determined by the Board and as set forth in the Petition, which shall constitute a full and final settlement of the claim for back tuition asserted against Respondent by the Board of Education in the Litigation.
2. The amount of $3.500.00 is to be paid as follows: Within fifteen (15) days after approval of the Agreement, Respondent, by and through her counsel, shall make

payment in the full amount due and owing in the form of a check made payable to the "Somerville Board of Education." Respondent, by and through her counsel, may deliver the check to the attention of Joseph L. Roselle, Esq., Petitioner's counsel, at Schenck, Price, Smith & King, LLP, 220 Park Avenue, Florham Park, NJ 07932, or cause the check to be delivered or mailed to the office of Bryan Boyce, School Business Administrator/Board Secretary, at the District Administration office, 51 West Cliff Street, Somerville, NJ 08876. Upon approval of this Agreement, counsel for Petitioner and Respondent will discuss and agree on the method for distribution of the amount due hereunder.

3. The Board, in consideration of this Stipulation of Settlement and Release, and in full, final, and complete settlement of the matter, hereby agrees to a withdrawal and/or dismissal, with prejudice, of the Petition of Appeal in this matter.
4. Respondent understands and agrees that, if she fails to make a payment in accordance with this Agreement, such failure shall constitute a default.
5. In the event of a default, Respondent further agrees to indemnify the Board for any and all costs, including court costs and attorney's fees, associated with any action instituted by Petitioner to enforce the terms of this Agreement should Respondent breach the Agreement and/or fail to adhere to the agreed-upon payment plan.
6. The terms of this Agreement shall in no way constitute acceptance or assent by the Board that J.O., nor any other child of Respondent, as may be applicable, is automatically entitled to a free public education in the District at any point in the future, and the Parties understand and agree that the Board reserves the right to investigate any student's residency status in the District at any time should same become necessary to

do so, in order to determine whether or not Petitioner and/or her child(ren) remain domiciled in the District.

7. This Agreement is subject to approval by the Somerville Board of Education. If approved, the Board President, Superintendent and/or Business Administrator, as indicated, is fully authorized to execute this Agreement on behalf of the Board.

8. In exchange for the above consideration, Petitioner, Somerville Board of Education agrees to release Respondent from any and all claims, cross-claims, counterclaims, demands, liabilities, damages, indebtedness, costs, attorneys' fees, actions or obligations of any nature, which solely arise out of or are related in any way to this Litigation, through the date of this Agreement and agrees to the withdrawal/dismissal of any pending claim for tuition payments, through the date of this Agreement.

9. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Respondent hereby represents that she is freely entering into this Agreement, that he was advised of her right to obtain counsel of her choosing and has consulted with her attorney regarding the effect of this Agreement.

12. This Settlement shall be subject to the approval of the Office of Administrative Law and the Commissioner of Education prior to becoming effective.

13. This Agreement shall be binding upon all parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors,

predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, shareholders, members, employees, agents and assigns.

14. This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements, undertakings, restrictions, representations or warranties as between the parties other than those set forth herein. This Agreement supersedes all previous arrangements or understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the Petitioner and Respondent.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, consisting of five pages, effective on the day and year first above written.

FOR PETITIONER,
SOMERVILLE BOARD OF EDUCATION

Date: 6/24/2021

RESPONDENT,

Date: 5-19-21

Marlene O'Brien

ATTEST:

Frances J. Campbell, Esq.

SOMERVILLE BOARD OF EDUCATION
51 West Cliff Street
Somerville, NJ 08876

AGENDA
WORKSHOP/REGULAR MEETING
Tuesday, June 15, 2021
Somerville High School Auditorium
and
Virtual Public Livestream Broadcast
6:00 p.m.

Mission Statement
Somerville Public Schools provide the highest quality education through an environment that promotes individual excellence for all students.

I. CALL MEETING TO ORDER

II. FLAG SALUTE

III. ROLL CALL OF MEMBERS

IV. PUBLIC NOTICE
Adequate Notice of this meeting in compliance with Chapter 231 of the Public Laws of 1975, entitled the "Open Public Meetings Act," has been provided by action of the Board of Education at its Regular Meeting on December 8, 2020, notices to the Courier News and Star Ledger circulated in the school district and a posted notice to this effect on the Board of Education website and building bulletin board, Administrative Headquarters, 51 West Cliff Street, Somerville, New Jersey.

V. PUBLIC COMMENT
At this time, comment is invited on any matter ***related to agenda items****.*
When permitted, public participation shall be governed by the following rules under Bylaw 9322:

1. *A participant must be recognized by the presiding officer and must preface comments by an announcement of his/her name, place of residence, and any other group affiliation, if appropriate;*
2. *Each statement made by a participant shall be limited to three minutes duration;*
3. *No participant may speak more than once on the same topic until all others who wish to speak on that topic have been heard;*
4. *All statements shall be directed to the presiding officer; no participant may address or question board members individually.*

28* Settlement Approval

RESOLVED, that the Board approves the settlement in the matter captioned Somerville Board of Education v. M.O. o/b/o J.O., OAL Docket No. EDU 7954-19S, Agency No. 92-5/19, in accordance with the terms and conditions therein; and

BE IT FURTHER RESOLVED, that the Business Administrator and/or Board President is authorized to sign the agreement on behalf of the Board.

29* NASPO Master Agreement for Chromebooks

WHEREAS, the Somerville Board of Education ("the Board") has determined that it is necessary and advisable to acquire chromebooks for its educational program; and

WHEREAS, the Board has solicited quotations from "fulfillment partners" for Dell, Inc., through NASPO Master Agreement MNWNC-108(2015-2021) and the State of New Jersey, State Contract No. A89967; and

WHEREAS, Candoris Technologies, LLC. ("Candoris") submitted the most advantageous quotation, price and other factors considered and the Board desires to acquire the equipment and services from Candoris; and

WHEREAS, the School Business Administrator has documented that the equipment to be provided by Candoris best meets the needs of the School District; and

NOW, THEREFORE, BE IT RESOLVED that the Board hereby awards a contract with Candoris pursuant to State Contract No. A89967 for the equipment and services listed on its proposal dated May 5, 2021, in the amount of $192,770.00, which said equipment and services include Dell Chromebooks and accessories, support services, and warranty protection.

BE IT FURTHER RESOLVED that this award shall be subject to all of the conditions applicable to the current State contract. The Board President and the School Business Administrator/Board Secretary are hereby authorized to execute the contract any and all documents necessary to effectuate the terms of this Resolution.

30* Field Trips

RESOLVED that the Board of Education approve the enclosed request for field trips. (Attachment C-19)

C. Curriculum

Denise Van Horn, Chairperson

Curriculum Report (Attachment C-20)

Motion to approve that Items **1 and 2** be moved upon the recommendation of the Superintendent of Schools

* (Branchburg Vote Eligible)

+ Subject to change as per the SEA contract negotiations

201-21

201-21

New Jersey Commissioner of Education

Final Decision

Charlotte Jones and Lisa May,

Petitioners,

v.

Board of Education of the Township of Winslow, Camden County,

Respondent.

Synopsis

Petitioners – tenured teachers employed by the respondent Board who received evaluation ratings below the "effective" range and were subsequently placed on Corrective Action Plans (CAP) for the 2019-2020 school year – appealed a determination by the respondent Board to withhold their salary increments for the 2020-2021 school year based upon "partially effective" summative ratings. Petitioners contend that the Board's actions contravened the Governor's COVID-19 Executive Order No. 103 and related guidelines issued by the New Jersey Department of Education (NJDOE), which mandated that as tenured teachers on a CAP, petitioners were entitled to receive Not Evaluated (NE) ratings for the 2019-2020 school year because of school closures due to the COVID-19 public health emergency. The Board maintained that its decision was made in accordance with Board policy and its managerial prerogative to award salary increments based upon effective service. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; it is well settled that a salary increment is a reward for meritorious service, not an entitlement; any board of education may withhold, for inefficiency or other good cause, the employment increment of any staff member in any year; a local school board's decision to withhold a salary increment is a matter of management prerogative and is entitled to a presumption of correctness; however, in this case, the Board improperly disregarded the Governor's Executive Order and related Guidelines when it issued "partially effective" summative evaluations to petitioners; the Board therefore acted arbitrarily in using these improper evaluations as the basis upon which to withhold petitioners' salary increments. Accordingly, the ALJ granted summary decision in favor of the petitioners and directed that the Board restore petitioners' salary increments for the 2020-2021 school year.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions in this matter and adopted the Initial Decision as the final decision for the reasons thoroughly expressed therein. The Board was directed to restore petitioners' increments for the 2020-21 school year.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

201-21
OAL Dkt. No. EDU 08392-20
Agency Dkt. No. 182-8/20

New Jersey Commissioner of Education

Decision

Charlotte Jones and Lisa May,

Petitioners,

v.

Board of Education of the Township of Winslow, Camden County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1]

In this matter, petitioning tenured teachers who are employed by the Winslow Township Board of Education (Board) are challenging the Board's decision to withhold their increments for the 2020-2021 school year. Due to evaluation ratings below the "effective" range, petitioners were both placed on Corrective Action Plans (CAPs) for the 2019-20 school year. During that school year, petitioners each had two evaluations before the school closure caused by the COVID-19 pandemic. Jones received an "effective" rating on one evaluation and "partially effective" rating on the other, while May received two "partially effective" ratings on her evaluations.

After Governor Murphy declared a public health emergency in March 2020, the Commissioner of Education issued a "Notice of Rule Waiver/Modification/Suspension Pursuant to Executive Order 103 (2020)," effective April 3, 2020, modifying certain requirements regarding

[1] The Board's exceptions were not timely filed in accordance with *N.J.A.C.* 1:1-18.4 and were therefore not considered by the Commissioner.

annual summative ratings for educators due to the extended school closures and cancellation of State assessments. In pertinent part, the rule modification found:

> Educators working under a CAP for the 2019-2020 school year will receive a NE [not evaluated] code. These individuals should continue to receive support for the remainder of the 2019-2020 school year and the CAP shall remain in effect at the start of the 2020-2021 school year in accordance with *N.J.A.C.* 6A:10-2.5(l).
>
> [Petitioners' Exhibit A.]

The Department also issued guidance on its website entitled "Educator Evaluation During Extended School Closure as a Result of COVID-19," which indicated the following regarding certificated staff who were on a CAP:

> a. Chief School Administrators have the discretion to produce a summative rating for an educator currently on a CAP who had been progressing towards an Effective or Highly Effective rating (as shown by observation scores issued up to this point in the year) and who will be moved back into good standing by the issuance of a summative rating. Please apply the guidance provided for nontenured teachers to develop a summative rating for educators described here.
>
> b. All other educators on a CAP will receive a Not Evaluated (NE) rating for the 2019-2020 school year.
>
> c. Coaching should continue for the remainder of the 2019-2020 school year.
>
> d. The current CAP will be in place for the start of the 2020-2021 school year.
>
> e. At the start of the SY 2020-2021, the educator and supervisor should collaboratively review the CAP and amend it to reflect the educator's assignment and context.
>
> [Petitioners' Exhibit B (emphasis added).]

Despite this guidance, both petitioners received summative ratings of "partially effective." The Assistant Principal's notes on May 6, 2020 regarding May state:

> Summative Completed. Ms. May was advised of the following in addition to it being recorded as part of her summative:

> "As a result of receiving an overall score of Partially Effective (2.47), as well as the continued findings listed in the above summative, Ms. May is being recommended for a pay increment withholding for the 2020-2021 school year. Ms. May will continue to be on a Corrective Action Plan for the 2020-2021 school year."
>
> [Petitioners' Exhibit D.]

Similarly, the Assistant Principal's notes on May 6, 2020 regarding Jones state:

> Summative Completed. Ms. Jones was advised of the following in addition to it being recorded as part of her summative:
>
> "As a result of receiving an overall score of Partially Effective (2.54), as well as the continued findings listed in the above summative, Ms. Jones is being recommended for a pay increment withholding for the 2020-2021 school year. Ms. Jones will continue to be on a Corrective Action Plan for the 2020-2021 school year."
>
> [Petitioners' Exhibit D.]

Thereafter, counsel for the Winslow Township Education Association (WTEA) wrote a letter to the Board in advance of a Board meeting regarding petitioners' increments. Counsel argued that there is no basis by which to withhold their increments because, based on the Department's guidance, they both should have received "NE" ratings, and accordingly they cannot be subject to performance-based increment withholdings. In response, the Board attorney acknowledged the guidance, but indicated that the guidance did not prohibit increment withholdings for inefficiency or other good cause, in accordance with *N.J.S.A.* 18A:29-14. At its meeting on June 24, 2020, the Board approved the Superintendent's recommendation to withhold petitioners' increments for the 2020-21 school year.

The Administrative Law Judge (ALJ) found that the Board improperly disregarded the Executive Order and Guidelines when it issued "partially effective" summative evaluations to petitioners, and therefore acted arbitrarily when it used those improper evaluations as the basis to withhold their increments. Specifically, the ALJ explained:

> Respondent framed the issue as whether the Guidance regarding the evaluation of tenured staff on a CAP precluded the Board from withholding Jones' and May's salary increment as a matter of law. I disagree with respondent's framing of the issue. The issue is much narrower. As articulated in petitioners' cross-motion for summary decision, the issue is whether the basis for Jones' and May's salary withholding was their summative ratings of "Partially Effective" in violation of the Executive Order and Guidelines. As there is no dispute that the salary withholding was based on the summative ratings of "Partially Effective," I **CONCLUDE** that the Board's actions violated the Executive Order and Guidelines and thus, were improper. To determine otherwise would be to condone the Board's decision to disregard the COVID-19 Executive Order and Guidelines.
>
> [Initial Decision at 8.]

Accordingly, the ALJ ordered that petitioners' increments be restored for the 2020-21 school year.[2]

Upon a comprehensive review of the record, the Commissioner agrees with the ALJ that the Board acted unreasonably when it withheld petitioners' increments based on the fact that they received "partially effective" summative ratings; both petitioners should have received "NE" ratings in accordance with Department guidance and the rule modification. Pursuant to *N.J.S.A.* 18A:29-14, a board may withhold "for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year." Teachers are not entitled to salary increments; instead, they are a reward for meritorious service. *North Plainfield Education Association v. Board of Education of the Borough of North Plainfield*, 96 *N.J.* 587, 593 (1984). The decision to withhold an increment for teachers who have not performed well is a management prerogative. *Ibid.* As such, when challenging an increment withholding, a teacher has the burden to demonstrate that the board acted arbitrarily, without rational basis or induced by improper motives. *Kopera v. Board of Education of the Town of West Orange*, 60 *N.J. Super.* 288, 294 (App. Div. 1960).

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[2] The ALJ also found that the Board treated petitioners as nontenured teachers when it chose to apply the summative rating of "Partially Effective," rather than the correct rating of "NE" as instructed by the guidance. The Commissioner finds that it is not clear from the record that the Board treated petitioners as nontenured teachers; however, the reason why the Board chose to disregard the guidance and issue summative ratings is not pertinent to this decision.

This matter involves a unique set of circumstances under which petitioners have met their burden of demonstrating that the Board acted arbitrarily and unreasonably. It is clear from the record that the Board completed petitioners' summative ratings for the 2019-20 school year. Copies of the summative reports are in the record, accompanied by the Assistant Principal's note that "[a]s a result of receiving an overall score of Partially Effective . . . as well as the continued findings listed in the above summative, [petitioners are] being recommended for a pay increment withholding for the 2020-2021 school year." (Petitioners' Exhibit D). This language leaves no doubt that the sole basis of the Board's withholding of their increments was their summative ratings. Furthermore, the Board attorney's June 10, 2020 letter – in response to the WTEA counsel's letter that challenged the Board's authority to make performance-based increment withholdings – also stated that petitioners' evaluations in the 2019-20 school year "resulted in a score of 'Partially Effective.'" (Petitioners' Exhibit H).

The Department's rule modification changed the procedures regarding educator evaluations due to the COVID-19 public health emergency and indicated that educators working under a CAP in the 2019-20 school year "will receive a 'NE' code." The Department also issued guidance which reiterated that those teachers will receive a "NE" rating. The fact that the Board disregarded the instructions that it received from the Department regarding summative ratings, issued "partially effective" summative ratings to petitioners despite specific guidance to the contrary, and then used those ratings as the basis for their increment withholdings is troubling, unreasonable, and arbitrary. While the Board has argued that the underlying performance of petitioners – and not their summative ratings – was the true reason for the increment withholding, the record is clear that the reasoning behind the increment withholdings was the "partially effective" summative ratings, which rightfully should have been rated "NE."

Finally, the Commissioner need not address the broader issue of whether performance-based increment withholdings were prohibited for the 2020-21 school year due to the

rule modification and guidelines, because the Commissioner agrees with the ALJ that the issue here is much narrower and hinges on whether the basis for petitioners' salary withholdings was their "partially effective" summative ratings in violation of the rule modification and guidelines, which has been discussed in detail above.

Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter. The Board is directed to restore petitioners' increments for the 2020-21 school year.

IT IS SO ORDERED. [3]

Angelica Allen-McMillan, J.d.S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 28, 2021
Date of Mailing: September 28, 2021

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 08392-20
AGENCY DKT. NO. 182-8/20

CHARLOTTE JONES AND
LISA MAY,
Petitioners,
v.
WINSLOW TOWNSHIP BOARD
OF EDUCATION, CAMDEN COUNTY
Respondent.

Steven R. Cohen, Esq. and **Daniel R. Dowdy**, Esq., for petitioners (Selikoff & Cohen, attorneys)

Michael A. Pattanite, Jr., Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Lang, Carrigg & Casey, LLC, attorneys)

Record Closed: June 21, 2021 Decided: July 2, 2021

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Petitioners Charlotte Jones (Jones) and Lisa May (May) appealed the determination by the respondent Winslow Township Board of Education (Board) to

withhold their salary increments for the 2020-2021 school year. Petitioners submit that the Board's actions contravened the COVID-19 Executive Order No. 103 by Governor Murphy and Guidelines issued by the New Jersey Department of Education (NJDOE). As tenured teachers on a Corrective Action Plan (CAP), petitioners were entitled to receive Not Evaluated (NE) ratings for the 2019-2020 school year. Instead, respondent assigned "Partially Effective" summative ratings and used the ratings as the justification for withholding their salary increments. Respondent maintained that its decision was made in accordance with its Policy 3152 and the Board's managerial prerogative to only reward effective service. (R-Exhibit F.) Respondent further submitted that the Executive Order and NJDOE Guidance does not alter the Board's ability to award or withhold salary increments based on job performance.

PROCEDURAL HISTORY

This matter arose with the filing of a petition of appeal with the Commissioner of Education ("the Commissioner") on August 26, 2020. The Board filed its answer on September 4, 2020. The matter was transmitted to the Office of Administrative Law ("OAL") as a contested case on October 20, 2020. The Board filed a Motion for Summary Decision on April 19, 2021. Petitioners opposed the Motion via brief and certification and filed a Cross-Motion for Summary Decision on May 10, 2021. The Board replied to the opposition and opposed the cross-motion on June 2, 2021. Petitioners replied to the Board's opposition on June 8, 2021. At respondent's request, I held oral argument, via telephone conference, on June 21, 2021 and closed the record.

STATEMENT OF FACTS

The salient facts are uncontroverted, and I **FIND**:

Jones and May are tenured teaching staff members employed by respondent as teachers with twenty and nineteen years of employment respectively with Winslow Township Public Schools (Winslow). For the 2019-2020 school year, Jones and May were on Corrective Action Plans (CAPs). (R-Exhibit B.) The CAPs were imposed because Jones' and May's scores on the Teacher Composite Score Reports were not in

the "Effective" range during the evaluation cycle for the 2018-2019 school year. (R-Exhibit C.) During the 2019-2020 school year, prior to the school closures caused by the COVID-19 pandemic, Jones and May had two classroom observations. Jones' first observation was on October 23, 2019; she received an "Effective" overall rating. Jones' second observation was on January 16, 2020; she received a "Partially Effective" overall rating. (R-Exhibit D.) May's first observation was on October 23, 2019; she received a "Partially Effective" overall rating. May's second observation was on January 24, 2020; she received a "Partially Effective" overall rating. Id.

On March 9, 2020, in response to the COVID-19 pandemic, Governor Murphy issued Executive Order 103 and on April 17, 2020, he issued Executive Order 117. In response thereto, the Commissioner of Education issued a Notice of Rule Waiver/Modification/Suspension Pursuant to Executive Order 103, effective April 3, 2020, which provided in pertinent part:

> Current Department regulations specify rules that school districts must follow to formulate and issue an annual summative rating for educators. The rules identify who must be evaluated, specific components that must be included in evaluations (observations and measures of student growth), and dates by which educators must be notified of the components and the percentage weight associated with each component. The disruption caused by the extended public health-related school closures, and the subsequent cancellation of State assessments, make it impossible to develop some components and render others less reliable as measures of educator effectiveness. Therefore, it is necessary to redefine the components and associated weights, and to notify educators of the changes. In these unprecedented times, school districts also need to direct resources to locally established priorities.
>
> . . .
>
> Educators working under a CAP for the 2019-2020 school year will receive a NE [Not Evaluated] code. These individuals should continue to receive support for the remainder of the 2019-2020 school year and the CAP shall remain in effect at the start of the 2020-2021 school year in accordance with N.J.A.C. 6A:10-2.5(l).
>
> [P-Exhibit A]

In March 2020, the NJDOE issued Guidance on its website entitled Educator Evaluation During Extended School Closure as a Result of COVID-19[1]. The pertinent section in the Guidance, "Teachers, Principals, APs, VPs, and other Certificated Staff Currently on a Corrective Action Plan (CAP)" provided as follows:

> 1. Chief School Administrators have the discretion to produce a summative rating for an educator currently on a CAP [corrective action plan] who had been progressing towards an Effective or Highly Effective rating (as shown by observation scores issued up to this point in the year) and who will be moved back into good standing by the issuance of a summative rating. Please apply the guidance provided for nontenured teachers to develop a summative rating for educators described here.
>
> 2. All other educators on a CAP will receive a Not Evaluated (NE) rating for the 2019-2020 school year.
>
> 3. Coaching should continue for the remainder of the 2019-2020 school year.
>
> 4. At the start of the SY 2020-2021, the educator and supervisor should collaboratively review the CAP and amend it to reflect the educator's assignment and context.

The NJDOE also released a PowerPoint presentation entitled COVID-19 School Closures: Amended Guidance for Evaluating Educators (Amended Guidance) which reiterated the above Guidance with respect to certificated staff on a CAP. (P – Exhibit K.)

On May 6, 2020, Winslow's Assistant Principal, Shane Ruben (Ruben), noted that May's annual summative score was completed. (P-Exhibit D.) Ruben recorded as part of May's summative, the following:

> As a result of receiving an overall score of Partially Effective (2.47), as well as the continued findings listed in the above summative, Ms. May is being recommended for a pay

[1] https://www.nj.gov/education/covid19/teacherresources/edevaluation.shtml.

> increment withholding for the 2020-2021 school year. Ms. May will continue to be on a Corrective Action Plan for the 2021-2021 school year. Id.

Similarly, for Jones, Ruben recorded the following statement as part of Jones' summative:

> As a result of receiving an overall score of Partially Effective (2.54), as well as the continued findings listed in the above summative, Ms. Jones is being recommended for a pay increment withholding for the 2020-2021 school year. Ms. Jones will continue to be on a Corrective Action Plan for the 2021-2021 school year. Id.

On May 8, 2020, Jones and May received RICE[2] Notices from Winslow informing them that the superintendent would be making a recommendation regarding the status of their employment for the 2020-2021 school year at the May 13, 2020 Board meeting. (P-Exhibit E.) Due to postponements, this meeting did not occur until June 24, 2020. Subsequent RICE Notices were given each time the meeting was postponed.

In response to the May 8, 2020 notice, counsel for the New Jersey Education Association (NJEA) on behalf of Jones and May, wrote a letter to the Board to reiterate the NJDOE Guidance that required Jones and May receive a rating of NE. As expressed, it would be improper for the Board to entertain discussion about withholding salary increments based on unsatisfactory performance. (P-Exhibit F.) On June 10, 2020, counsel for the Board responded that it was proceeding in accordance with N.J.S.A. 18A:29-14 that permitted a Board to withhold a salary increment for "inefficiency or other good cause." (P-Exhibit H.)

On June 25, 2020, the Superintendent for Winslow issued letters to Jones and May advising them that the Board approved the Superintendent's recommendation to withhold

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[2] In Rice v. Union County Regional High School Board of Education, 155 N.J. Super. 64, 73 (App. Div. 1977), the Appellate Division held that a public body was obliged to give affected employees adequate notice of any discussion intended for closed session, so that they would have the opportunity to prepare and present an appropriate request for a public discussion in writing. These notices are commonly referred to as Rice Notices.

their increments for the 2020-2021 school year. On behalf of the Board, the Superintendent expressed their hope and expectation that Jones' and May's performances would improve. (P-Exhibit-J.)

Because the District evaluated Jones and May prior to the COVID-19 closures, it used the evaluation scores that rated them as "Partially Deficient" as the basis to withhold their salary increments. The Board maintained that it withheld petitioners' salary increment due to their subpar performance.

LEGAL ANALYSIS

A motion for summary decision shall be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 252. I **CONCLUDE** that this matter is ripe for summary decision.

It is well settled that a salary increment is a reward for meritorious service, not an entitlement. N. Plainfield Educ. Ass'n v. Bd. of Educ., 96 N.J. 587, 593 (1984). Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year. N.J.S.A. 18A:29-14. A local school board's decision to withhold a salary increment is a matter of management prerogative and is entitled to a presumption of correctness. Fogerty v.

State-Operated Sch. Dist. of the City of Jersey City, 97N.J.A.R.2d (EDU) 439 Kaska v. Bd. of Educ. of the City of Trenton, 95 N.J.A.R.2d (EDU) 55.

When challenging an increment withholding, the teacher has the burden of proof to show that the board of education acted arbitrarily without rational basis or was induced by improper motives. Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294. (App. Div. 1960.) In the absence of clear and convincing proof that a board of education acted unreasonably or in a cursory manner in withholding an increment, the Commissioner will not substitute his judgment for the board of education's judgment. Id. at 296. A board of education must simply be able to demonstrate that the recommendation to withhold is factually supported by observation reports or other reliable evidence. Id. at 296-97.

Thus, by statute, among other things, a board of education can withhold an increment for inefficiency or other good cause.

Notwithstanding the above, the exigencies of the COVID-19 pandemic intervened and caused Governor Murphy to issue Executive Order No. 103 (2020) effective April 3, 2020, to reduce the "regulatory burden related to the evaluation of educators." (P-Exhibit A.) One of these measures provided that tenured teachers on a CAP receive a NE rating for the 2019-2020 school year. The NJDOE's guidance further stated that only tenured teachers who had been progressing towards an "Effective" or "Highly Effective" rating, as shown by observation scores could be moved back into good standing using summative ratings. All other tenured educators on a CAP would receive a NE rating. (P-Exhibit B.) Jones and May were entitled to a NE rating for the 2019-2020 school year.

I **CONCLUDE** that respondent's argument herein must fail because when it applied the summative rating of "Partially Effective" as opposed to the correct rating of NE, it treated Jones and May as if they were nontenured educators. Looking at the NJDOE's Guidance regarding nontenured teachers, it was the same methodology used by the Superintendent and Board when they determined that Jones and May deserved "Partially Effective" ratings. The Guidance for nontenured teachers provided as follows:

1. There must be a minimum of two observations.
2. Observations must have been conducted before the district closed.
3. They must receive a summary conference.
4. No measures of student learning will be included in the summative rating.

[P-Exhibit B]

The District and the Board disregarded the Guidance and the Executive Order that required Jones and May to receive a NE rating and instead treated Jones and May as nontenured teachers. I **CONCLUDE** that the Board acted in an arbitrary way when it made the determination not to follow the Guidance and Executive Order No.103 and treat Jones and May as nontenured teachers.

The Board's reasoning that the Guidance did not address the Board's discretionary authority to withhold salary increments was not persuasive justification for its actions, herein. Mainly, because the Board offered no other basis for its action. It repeatedly argued that salary increments are not used to reward subpar performance and maintained that petitioners' performances were subpar. However, the Board could not contradict that the basis for the subpar performances were the improper summative ratings. Under the Guidance, summative ratings were improper when applied to tenured teachers on a CAP.

Respondent framed the issue as whether the Guidance regarding the evaluation of tenured staff on a CAP precluded the Board from withholding Jones' and May's salary increment as a matter of law. I disagree with respondent's framing of the issue. The issue is much narrower. As articulated in petitioners' cross-motion for summary decision, the issue is whether the basis for Jones' and May's salary withholding was their summative ratings of "Partially Effective" in violation of the Executive Order and Guidelines. As there is no dispute that the salary withholding was based on the summative ratings of "Partially Effective," I **CONCLUDE** that the Board's actions violated the Executive Order and Guidelines and thus, were improper. To determine otherwise would be to condone the Board's decision to disregard the COVID-19 Executive Order and Guidelines.

Therefore, I **CONCLUDE** that the Board's action in disregarding the Executive Order and Guidelines was improper and its decision to withhold petitioners' salary increments was arbitrary and without basis.

ORDER

Based on the foregoing, it is **ORDERED** that respondent Winslow Township Board of Education's Motion for Summary Decision is **DENIED.** It is further **ORDERED** that petitioners Charlotte Jones and Lisa May's Cross-Motion for Summary Decision is **GRANTED**. Accordingly, petitioners' increments should be restored for the 2020-2021 school year.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Kathleen M. Calemmo

July 2, 2021
DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: July 2, 2021

Date Mailed to Parties: July 2, 2021

KMC/tat

202-21

202-21

OAL Dkt. No. EDU 05866-21
Agency Dkt. No. 87-6/21

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Sparta, Sussex County,

Petitioner,

v.

M.N., on behalf of A.D.,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto, have been reviewed and considered.

The Respondent's child, A.D., is a special education student who attended school in Sparta. Respondent withdrew A.D. from the district in March 2019. In April 2019, A.D. was issued a high school diploma by the State of New Jersey after he achieved the required Statewide standard score on the General Education Development test (GED). A series of dis-enrollments by the district and reenrollments by respondent followed, with the district ultimately informing respondent in May 2021 that A.D. was no longer entitled to receive services from the district because he had met New Jersey graduation requirements.

Following the filing of the Board's motion for summary decision, the Administrative Law Judge (ALJ) concluded that A.D. received a State-issued high school diploma that is fully aligned with State standards, not merely a (GED) diploma, and therefore he

is no longer entitled to be enrolled in the district's schools. The ALJ further concluded that respondent was not entitled to written notice of the change in A.D.'s placement because it came about through his own actions.[1]

In her exceptions, respondent argues that the diploma A.D. received is not a regular high school diploma. Respondent notes that A.D. did not attend high school for four years and that the 120 course credits required for graduation from a district does not compare with studying at home for a month and barely passing GED tests. Respondent also contends that she should have received notice when the district decided to discontinue services and unenroll A.D.

In reply, the Board argues that respondent's exceptions merely reiterate arguments made below. The Board notes that students are permitted to obtain State-issued diplomas through non-traditional pathways and contends that such a diploma is a not a lower credential and should not be considered differently simply because a student who obtains it is classified. The Board argues that the lack of a regulatory distinction between diplomas awarded by a district board of education and diplomas awarded by the Commissioner demonstrates that the State Board of Education did not intend to create different categories of credentials. Finally, the Board notes that it neither discontinued services nor disenrolled A.D., who had in fact been withdrawn from the district by respondent.

Upon review, the Commissioner concurs with the ALJ that A.D.'s diploma is a "regular high school diploma" that is fully aligned with State standards and, therefore, A.D. is no longer entitled to a free education in Sparta or any other New Jersey school district. The record reflects that the diploma awarded to A.D. was issued by the State of New Jersey Board of

[1] This matter was filed concurrently with a special education due process petition docketed as Agency Dkt. No. 2021-32852, OAL Dkt. No. EDS 05384-21. The ALJ determined not to consolidate the two matters and denied the portion of the Board's motion for summary decision pertaining to the due process petition. The Commissioner's jurisdiction does not extend to due process petitions, which fall exclusively within the purview of the Department's Office of Special Education Policy and Dispute Resolution. *N.J.A.C.* 6A:14-2.7. Accordingly, any issues relating to the due process petition will not be addressed herein.

Education, signed by the Commissioner of Education, and indicated that A.D. has satisfied in full the statutory and regulatory requirements of the State for a high school diploma.

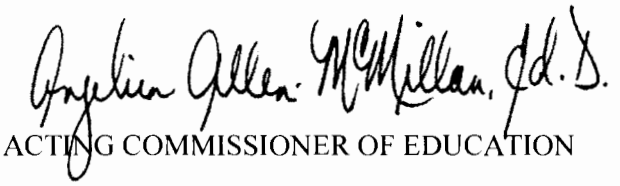
The Commissioner has previously noted that a diploma "signifying attainment of the skills and knowledge deemed necessary by the State of New Jersey for its students to be successful in their careers and daily lives" can be earned by completing the requirements of *N.J.A.C.* 8A:5-1.(a) associated with traditional high school coursework, or, among other things, by achieving the required scores on the GED. *B.A. and J.H., on behalf of minor child, M.A.A. v. Bd. of Educ. of the Borough of Somerville, Somerset Cty.*, Commissioner Decision No. 201-09 (June 22, 2009). The Commissioner further indicated that "through its acceptance of alternative measures" to obtain a diploma, "particularly the GED program," "the State has implicitly recognized that means other than course/credit/assessment completion as contemplated by *N.J.A.C.* 6A:8-5.1(a) can legitimately evidence acquisition of an education sufficient to satisfy the statutory and constitutional mandate and warrant issuance of a State-endorsed diploma so as to end a student's entitlement to attend the public schools of a district." *Ibid.*

Furthermore, there is no distinction in *N.J.A.C.* 6A:8-5.2 between a district-issued diploma and a State-issued diploma, such that both diplomas demonstrate that the student has completed an education that is fully aligned with State standards. The State Board of Education, in implementing alternate pathways for students to obtain diplomas, has recognized that students may complete their education in non-traditional ways. A State-issued diploma simply reflects such an alternate pathway and is in no way a lesser credential. Accordingly, having obtained a State-issued diploma, A.D. is no longer entitled to a free education in the district's schools.[2]

[2] The Commissioner further concurs with the ALJ's conclusions regarding the Board's obligation to provide notice to respondent, for the reasons detailed in the Initial Decision.

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 28, 2021
Date of Mailing: September 28, 2021

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO EDU 05866-21
AGY REF NO. 87-6/21

BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA, SUSSEX COUNTY,

Petitioner,

v.

M.N. ON BEHALF OF A.D.,

Respondent.

Katherine A. Gilfillan, Esq., for Petitioner (Schenck, Price, Smith & King, LLP, attorneys)

M.N., Respondent, pro se

Record Closed: August 13, 2021 Decided: August 16, 2021

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a Petition for Declaratory Ruling with the Office of Controversies and Disputes in the New Jersey Department of Education (DOE) on June 11, 2021.

The Acting Commissioner declined the request pursuant to N.J.S.A. 52:14B-8 and N.J.A.C. 6A:3-2.1(a)1, and directed that the matter proceed as a petition of appeal pursuant to N.J.A.C. 6A:3-1.1 et seq.

The matter was transmitted to the Office of Administrative Law on July 9, 2021.

A prehearing conference was held on this matter, and a companion case (EDS 05384-21), on July 13, 2021, with a prehearing order entered on the same date. The matters were not consolidated.

Petitioner filed a Motion for Summary Decision dated July 23, 2021. Respondent submitted a reply brief on August 6, 2021. Petitioner filed a response thereto on August 13, 2021. The record closed on August 13, 2021.

FACTUAL BACKGROUND

The following relevant, material facts are not in dispute:

1. A.D. initially enrolled in the District at the start of the 2018-2019 school year. He was a transfer from the Ramapo Indian Hills School District.

2. A.D. was provided an IEP and attended school in District.

3. A.D. was provided home instruction commencing on March 11, 2019.

4. On March 25, 2019, A.D. was withdrawn from the District by his parent. (Exhibit E, Lorentz Affidavit)

5. A.D. was issued a high school diploma by the State of New Jersey on April 29, 2019. (Exhibit F, Lorentz Affidavit)

6. The parent requested that A.D. be reenrolled in the District sometime in mid-April 2019, and A.D. was reenrolled.

7. By letter dated May 22, 2019, the high school principal, Michael Lauricella, advised respondents that A.D. was no longer entitled to receive services from the District as he had met New Jersey graduation requirements. (Exhibit G, Lorentz Affidavit)

8. Thereafter, A.D. was permitted to reenroll in the District for the 2019-2020 school year. (Exhibit H, Lorentz Affidavit)

9. A.D. attended school in District at the start of the 2019-2020 school year. In March of 2020 in person instruction was halted due to the COVID-19 pandemic. A.D. was issued a Chrome book for remote learning.

10. On June 8, 2020, A.D. was again disenrollment from the District. (Exhibit J, Lorentz Affidavit)

11. On September 9, 2020, the parent again sought to reenroll A.D. in the District. The reenrollment did not occur as A.D. decided to join the Army. (Exhibit K, Lorentz Affidavit)

12. A.D. obtained a medical discharge from the Army on December 16, 2020. (see page 19 of brief in opposition)

ISSUE

Does obtaining a GED, and a State issued high school diploma, preclude A.D. from reenrollment in the District.

LEGAL ANALYSIS AND CONCLUSION

Standard for Summary Decision

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported,

the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. " Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

In the instant matter there are no disputed relevant material facts, and the matter is ripe for summary decision.

A.D. obtained a New Jersey issued high school diploma, dated April 29, 2019. Prior to that, A.D. obtained a GED.

N.J.A.C. 6A:14-2.1(a) states: Prior to receiving a high school diploma, a student with disability age 16 through 21 who voluntarily leaves a public school program may reenroll at any time up to and including the school year of his or her 21st birthday.

34 C.F.R. §300,102(a)(3)(i) provides that the obligation to provide FAPE does not apply to "children with disabilities who have graduated from high school with a regular high school diploma."

However, 34 C.F.R. §300,102(a)(3)(iv) states: "As used in paragraphs (a)(3)(i) through (iii) of this section, the term regular high school diploma means the standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards, or a higher diploma, except that a regular high school

diploma shall not be aligned to the alternate academic achievement standards described in section 1111(b)(1)(E) of the ESEA. A regular high school diploma does not include a recognized equivalent of a diploma, such as a general equivalency diploma, certificate of completion, certificate of attendance, or similar lesser credential."

The District argues that what A.D. received from the State of New Jersey is "fully aligned with the State's academic standards." Citing B.A. and J.J. o/b/o Minor Child M.A.A. v. Board of Education of the Borough of Somerville, Somerset County, 2009 N.J. AGEN LEXIS 24, Commissioner of Education, #201-09, June 22, 2009.

In B.A. and J.J. o/b/o Minor Child M.A.A. v. Board of Education of the Borough of Somerville, Somerset County, the Commissioner succinctly set forth an analysis that is, in my mind, dispositive of the matter herein, as follows:

> "To properly establish the context of petitioners' claim, it is also necessary to consider that: 1) the Legislature and State Board of Education have provided for implementation of the constitutional mandate through a K-12 delivery system, a student's successful progression through which culminates in receipt of a State-endorsed high school diploma, NJ.S.A. 18A:7C-1 et seq. and N.J.A.C. 6A:8-1.1 et seq.\ 2) a general education student's entitlement to access this system terminates either upon graduation through receipt of a State-endorsed diploma - which in the normal course of events occurs at the end of 12th grade, but may occur sooner or later under certain circumstances - or upon reaching the age of 20 without having so graduated, NJ.A.C 6A:8-5.2(a), NJA.C. 6A:8-5.2(b) and N.J.A.C 6A:8-5.2(d); 3) a State-endorsed high diploma - the credential signifying attainment of the skills and knowledge deemed necessary by the State of New Jersey for its students to be successful in their careers and daily lives - can be earned not only by completing the specific course, credit and assessment requirements of N.J.A.C. 6A:8-5.1(a), but also by demonstrating academic skills and knowledge equivalent to such requirements through alternative means, specifically, by performing at proficient levels in all areas of the High School Proficiency Assessment (HSPA) and completing 30 general education college credits, NJ.A.C. 6A:8-5.2(d), or by

> achieving the required scores on the General Educational Development (GED) test of the American Council on Education, N.J.A.C. 6A:8-5.2(c); 6:30-1.3."

What A.D. obtained is a State endorsed diploma. This comports with the requirement of 34 C.F.R. §300,102(a)(3)(iv) which requires the diploma to be "fully aligned with State standards".

Respondent argues that A.D. did not receive a "regular" high school diploma. This argument fails as what A.D. received is, in fact, a State issued high school diploma that is "fully aligned with State standards." A.D. did not merely obtain a GED.

Respondent further argues that A.D. was entitled to written notice regarding a change in his placement. This argument is misguided. The change in placement was at A.D.'s own doing: the receipt of the State issued high school diploma. He was not enrolled in the District at this time. In fact, he voluntarily dis-enrolled in the District. At that point the District had no obligation to provide an education, or notice, to A.D.

Respondent cites Letter to Cort, United States Department of Education, May 14, 2010, as support for the claim that A.D. has a right to FAPE and a right to re-enroll and obtain a regular high school diploma. While guidance from the United States Department of Education is helpful, it does not carry the weight of law. Further, Respondent fails to note that A.D. voluntarily disenrolled from the District and obtained a State issued high school diploma that is "fully aligned with State standards."

Based upon the foregoing, I **CONCLUDE** that Petitioner's Motion for Summary Decision regarding the within matter (EDU 05866-21) be **GRANTED**.

ORDER

It is hereby **ORDERED** that Petitioner's Motion for Summary Decision is **GRANTED** as follows:

1. The diploma issued to A.D. by the State of New Jersey is a "regular" high school diploma terminating his entitlement to enroll in a public school in the State; and

2. The diploma issued to A.D. by the State of New Jersey is a "regular" high school diploma terminating his prospective entitlement to receive a free and appropriate public education.

That portion of Petitioner's motion requesting that Respondent's due process petitioner (filed as the petitioner in the companion case, EDS 05384-21) is **DENIED**. The undersigned determined not to consolidate that matter with the instant matter. Accordingly, EDS 05384-21 shall proceed to hearing on August 24, 2021.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 16, 2021

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

List of Moving Papers

For Petitioner:

Motion for Summary Decision

Brief in support of motion

Affidavit of Ronnie Spring

Affidavit of Susan Lorentz with Exhibits A through J

Certification of Katherine A. Gilfillan, Esq. with Exhibit A

Brief in response to Respondent's brief in opposition

For Respondent:

Brief in opposition to motion for summary decision

Affidavit of M.N. (included in brief)

205-21

205-21

New Jersey Commissioner of Education

Final Decision

S.B., on behalf of minor children, J.B., L.K., and S.K.,

Petitioner,

v.

Board of Education of the Borough of Barrington, Camden County,

Respondent.

Synopsis

Pro se petitioner appealed the determination of the respondent Board that her minor children were not domiciled within the Barrington School District from March 8, 2021 until the end of the 2020-21 school year and were therefore not eligible to receive a free public education in the Barrington public schools. The Board filed a motion for summary decision and sought reimbursement of tuition for the period of J.B., L.K., and S.K.'s ineligible attendance.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner's minor children were enrolled in Barrington schools during the 2019-2020 school year as Affidavit Students based on S.B.'s claim that the children were residing with their grandmother in Barrington due to a family or economic hardship; petitioner was notified by the Board in March 2020 that the documentation she submitted in support of this claim was insufficient to enroll the children as Affidavit Students; before the children could be removed from the District, all New Jersey schools were ordered closed due to the COVID 19 epidemic, and the children were permitted to remain enrolled remotely; in February 2021, the Board notified petitioner that her children had been determined to be ineligible for continued enrollment in its school district because the grandmother and children were no longer residing in Barrington and S.B. was found to be living in Magnolia, New Jersey; pursuant to *N.J.S.A.* 18A:38-1(b)(2), petitioner has the burden of proof in a determination of residency; petitioner has offered no competent proof that she and her minor children were domiciled in Barrington during the period from March 8, 2021 through the end of the 2020-21 school year; petitioner has in fact admitted that she has not resided in the District since 2018, and now resides in Haddon Township. The ALJ concluded that the minor children were not entitled to receive a free public education in Barrington schools during the period at issue; accordingly, the respondent Board is entitled to reimbursement in the amount of $8,924.40 for tuition costs during the period of ineligible attendance.

Upon review of the record in this matter, the Commissioner concurred with the ALJ's findings and conclusion. The Initial Decision was adopted as the final decision in this matter, and the petitioner was ordered to reimburse the Board for tuition in the amount of $8,924.40. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

205-21
OAL Dkt. No. EDU 03003-21
Agency Dkt. No. 34-3/21

New Jersey Commissioner of Education

Final Decision

S.B., on behalf of minor children, J.B., L.K., and S.K.,

Petitioner,

v.

Board of Education of the Borough of Barrington, Camden County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain her burden of establishing that she was a domiciliary of Barrington from March 8, 2021 to the end of the 2020-21 school year. The Commissioner further concurs with the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in the District's schools during that time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor children were ineligible to attend school in Barrington. Therefore, the Board is entitled to tuition reimbursement in the amount of $8,924.40 for the for the time period from March 8, 2021 through the end of the 2020-21 school year, during which time petitioner's three minor children were ineligible to attend.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $8,924.40 for tuition costs incurred during the time period in which J.B., L.K., and S.K. were ineligible to attend school in Barrington. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 30, 2021
Date of Mailing: September 30, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 03003-21

AGENCY DKT.NO. 34-3/21

S.B. ON BEHALF OF MINOR CHILDREN J.B., L.K. AND SK.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BARRINGTON, CAMDEN COUNTY

Respondent.

S.B., on behalf of minor children J.B, L.K. and S.K. petitioners, pro se

Mark G. Toscano, Esq., for respondent (Comegno Law Group, attorneys)

Record Closed: June 24, 2021 Decided: July 12, 2021

BEFORE **JEFFREY R. WILSON**, ALJ:

STATEMENT OF THE CASE

Petitioner, S.B., on behalf of her minor children J.B, L.K. and S.K., challenges the determination made by the respondent, Borough of Barrington Board of Education (Board), that she, her family, and children do not, and have not for some time, resided

within the Barrington School District. The respondent argues that pursuant to N.J.S.A. 18A:38-1(b)(2), the Superintendent may apply to the Board of Education for the removal of the students, and the Commissioner may assess tuition against the students' parent or guardian if the students are deemed ineligible. The respondent seeks payment of tuition and costs for the number of days J.B, L.K. and S.K. attended school in the Barrington School District while ineligible to do so.

PROCEDURAL HISTORY

The matter was filed at the Office of Administrative Law (OAL) on March 26, 2021, as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. On May 25, 2021, the respondent filed a motion for summary decision. The petitioner filed a response in the form of two emails, on June 24, 2021, and the record closed.

FINDINGS OF FACT

The following facts of this case are not in dispute; therefore, I **FIND** as **FACT**:

1. On March 4, 2020, it was determined by the District that the petitioners, who were residing with their grandmother at XXXX Clements Bridge Road, Apartment XXX, Barrington New Jersey, were ineligible for enrollment in the Barrington School District as Affidavit Students. A formal letter notifying of this determination, was hand delivered to S.B. on March 4, 2020.

2. The Board determined that there was insufficient proof that the children's' mother, S.B., was incapable of caring for the petitioners due to a family or economic hardship. The documentation submitted by S.B. also indicated that the children would only be residing with their grandmother in Barrington until the end of the 2019-2020 school year.

3. Despite S.B.'s indication that an appeal would be filed following the Board's March 4, 2020, letter, no appeal was filed challenging the Board's determination that the petitioners did not qualify for enrollment as Affidavit Students.

4. Before the children could be removed from the District, all New Jersey schools were ordered closed by the Governor as a result of the COVID-19 pandemic and remained closed through the end of the 2019-2020 school year. The children were permitted to remain enrolled in the District during the period of ordered closure, and during the period in which the District attempted to re-open for in-person instruction.

5. In December 2020, the Board learned that the children's grandmother no longer resided within the Barrington School District.

6. On February 25, 2021, the District sent S.B. a Notice of Ineligibility letter.

7. The February 25, 2021, letter detailed new information discovered by the District. The District learned that the children's grandmother, and the children themselves, were no longer residing at the XXXX Clements Bridge Road, Apartment XXX address.

8. Around this time, the Board also learned that S.B. has not resided within the Barrington School District, and in fact, is residing at the XXX E. Evesham Avenue address in Magnolia, New Jersey.

9. In the February 25, 2021, letter, the Board determined that the children were ineligible for continued enrollment in the Barrington School District because neither the children, their grandmother, nor S.B. were residing at XXXX Clements Bridge Road, or at any other address within the Barrington School District.

10. The Board held a meeting on March 8, 2021, wherein S.B. appeared. The Board found that the children were ineligible to continue to attend school free of charge in Barrington. For the reasons set forth in the February 25, 2021, letter as well as S.B. admitting that she left the Magnolia School district due to issues with the District, the Board made this determination of ineligibility.

11. During the March 8, 2021, Board meeting, S.B. alleged to the District, for the first time, that there was previously a family crisis incident relating to domestic violence. S.B.

alleged that this domestic violence incident occurred in the Spring of 2020 and was the impetus for S.B. and the children to no longer reside at the XXX E. Evesham Avenue address. Prior to the March 8, 2021, meeting, the District had not been informed of any such alleged family crisis incident.

12. Despite repeated requests from the Board, S.B. has failed to provide any documentation supporting her claim that a family crisis incident occurred which required the children to relocate out of the Magnolia School District.

13. However, even assuming that S.B.'s allegations of a family crisis actually took place, the petitioners would still not be entitled to attend the Barrington School District free of charge. If anything, the petitioners would have been allowed to remain enrolled in the Magnolia School District during the family's relocation period.

14. Following the March 8, 2021, meeting, the Board issued a letter on March 15, 2021, outlining their determination that the children are ineligible to continue attending Barrington Schools.

15. S.B. has admitted to the Board that neither she, the children, nor the children's grandmother presently reside within the Barrington School District.

16. The petitioners filed an appeal on March 2, 2021.

17. S.B admitted during the May 10, 2021, telephone prehearing conference in this matter, that she presently resides at XXXXB Grant Ave, Haddon Township, NJ 08107, (with J.B., L.K. and S.K.), which residence is not located within the attendance area of the District.

18. S.B listed XXX E. Evesham Avenue, Magnolia NJ 08049 as her address on the Residency Appeal form filed on March 24, 2021. The Magnolia residence is similarly not located within the attendance area of the District.

19. To date, S.B. has provided no further information demonstrating her residence in

District, or otherwise demonstrating J.B.'s, L.K.'s. and S.K.'s eligibility to attend the District's schools.

20. The Board's daily tuition rate for the 2020-2021 school year was $44.44 per day per child. Therefore, the Board is owed tuition from S.B. in the amount of $8,924.40 for J.B.'s, L.K.'s and S.K.'s attendance from March 8, 2021, through the end of the school year.

LEGAL DISCUSSION

N.J.A.C. 1:1-12.5(b) provides that a motion for summary decision may be granted if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. See also Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995). The opposing party must submit responding affidavits showing that there is indeed a genuine issue of material fact, which can only be determined in an evidentiary proceeding, and that the moving party is not entitled to summary decision as a matter of law. Failure to do so, entitled the moving party to summary judgment. Id. at 520. Moreover, even if the non-moving party comes forward with some evidence, the courts must grant summary judgment if the evidence is "so one-sided that [moving party] must prevail as a matter of law." Id. at 536. If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

In view of the standard for summary decision, the petitioner's Residency Appeal Petition fails and must be dismissed in its entirety based on S.B.'s own admission that she does not live within the Board's attendance area. N.J.S.A. 18A:38-1 provides that "Public schools shall be free to the following persons over five and under 20 years of age: a. Any person who is domiciled within the school district. . . " N.J.A.C. 6A:22-3.1(a)(1) makes clear that "A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district."

N.J.S.A. 18A:38-1(b)(2) further provides:

> . . . If the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection.

Here, S.B. has failed to show that she resides within and/or been domiciled within the District. In fact, she has admitted within her Petition and during the initial hearing in this matter, that she presently resides (with J.B., L.K. and S.K.) at XXXXB Grant Ave, Haddon Township, NJ 08107, (with J.B., L.K. and S.K.), which residence is not located within attendance area of the District. S.B. further admits that she has not lived within the District since 2018. S.B. has failed to provide any subsequent proofs that she resides within the District's attendance area. As a final matter, S.B. herself has provided this tribunal with a Haddon Township address to receive mail and service in this matter, further proving that she does not reside within the District's attendance area.

Based on the foregoing, I **CONCLUDE** there are no genuine facts in dispute and that summary decision is warranted.

ORDER

It is hereby **ORDERED** that respondent's motion for summary decision be **GRANTED**. Based upon he the Board's daily tuition rate for the 2020-2021 school year

of $44.44 per day per child, it is further **ORDERED** that the Board is owed tuition from the Petitioner in the amount of $8,924.40 for J.B.'s, L.K.'s and S.K.'s attendance from March 8, 2021, through the end of the school year.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 12, 2021
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

JRW/tat

APPENDIX

LIST OF EXHIBITS

For Petitioner:

P-1 Email response to motion for summary decision, transmitted to the Office of Administrative Law on June 24, 2021.

For Respondents:

R-1 Motion for summary decision filed with the Office of Administrative Law on May 25, 2021.

206-21

206-21
OAL Dkt. No. EDU 15592-18
Agency Dkt. No. 219-8/18

New Jersey Commissioner of Education

Final Decision

Crystal Saylor,

Petitioner,

v.

Board of Education of the Town of West New York, Hudson County,

Respondent.

This matter involves the petitioner's challenge to the Board's termination of her employment, in which she alleged that she had earned tenure as a secretary and was entitled to statutory tenure protections. The Administrative Law Judge (ALJ) found that petitioner had not earned tenure because she was not employed in a secretarial position for the requisite time to earn tenure, and her most recent position as Administrative Assistant to the Superintendent was no longer secretarial. In a decision dated September 26, 2019, the Commissioner agreed with the ALJ that petitioner was not employed as a secretary when she held the position of Administrative Assistant to the Superintendent, and therefore did not have tenure rights when she was terminated. Petitioner appealed the Commissioner's decision, and on May 12, 2021, the Appellate Division reversed and remanded the matter, finding that petitioner earned tenure as a secretary based on her employment in secretarial positions – including her position as an Administrative Assistant to the Superintendent – and she was therefore improperly terminated without the certification of tenure charges.

On remand, in accordance with the Appellate Division's May 12, 2021 decision, the Commissioner finds that petitioner is entitled to reinstatement and back pay, together with all benefits and emoluments of her employment. To the extent that any disputes arise regarding the calculation of back pay, such issues can be addressed in a new petition.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 30, 2021
Date of Mailing: September 30, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

207-21

207-21
STATE BOARD OF EXAMINERS DKT. NO. 1819-237
AGENCY DKT NO. 4-3/21A

IN THE MATTER OF THE	:	
REVOCATION OF THE CERTIFICATES	:	COMMISSIONER OF EDUCATION
OF JOSHUA ROSENBAUM BY THE	:	DECISION
STATE BOARD OF EXAMINERS.	:	

Order of Revocation by the State Board of Examiners, July 30, 2020

For the Respondent-Appellant, William P. Hannan, Esq.

For the Petitioner-Respondent State Board of Examiners, Sadia Ahsanuddin, Deputy Attorney General (Andrew J. Bruck, Acting Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Joshua Rosenbaum's appeal of the State Board of Examiners' Order of July 30, 2020, revoking his Teacher of Elementary School in Grades K-8 Certificate of Eligibility and his Teacher of Elementary School in Grades K-8 certificate. The Board found that the appellant engaged in unbecoming conduct warranting the revocation of his certificates based on tenure charges filed against him in which it was alleged that the appellant: physically assaulted students in his class on more than one occasion; failed to properly manage classroom behavior; was chronically absent; and had poor performance ratings.

On appeal, the appellant maintains that the Order of Revocation entered by the Board violates his dues process rights because it was made without him receiving adequate notice of the proposed action against his certificates. Specifically, the appellant argues that the facts demonstrate that the Board mailed the Order to Show Cause (OTSC) and subsequent correspondence to an address that he has not resided at nor been associated with in any way for

ten years. The OTSC and all other correspondence from the Board were sent to 82 Richelieu Place, Newark, New Jersey 07106; the appellant contends that he has not lived at that address since 2009, and that his current address is 87 Elm Street, Montclair, New Jersey 07042. Therefore, the appellant did not receive the OTSC that was mailed to the Newark address on November 7, 2019, nor did he receive the subsequent mailings from the Board that were likewise sent to the Newark address.

The appellant maintains that once he discovered that the Order of Revocation was entered against him, he immediately contacted the Board to inform that he had never received notice of the OTSC and as such never had an opportunity to respond before his certificates were revoked.[1] Therefore, the appellant maintains that the Board's decision to revoke his certifications should be reversed and the Commissioner should remand this matter to the Board to afford him the opportunity to respond to the Order to Show Cause.

In reply, the Board agues that it followed the appropriate procedure for service of process in administrative actions. The OTSC and all communications were sent to the appellant's Newark address via certified mail and regular mail. The regular mail copies were not returned as undeliverable and the certified mail copies were all "unclaimed." The Board gave the appellant an opportunity to contest the allegations in the OTSC, which he failed to do. Thus, the allegations were appropriately deemed admitted and summary decision was appropriate. Moreover, the appellant's claim that he had no notice of the proceedings is unavailing because he has not provided proof that he actually moved from Newark to Montclair or that he had no connection to the Newark address. The Board also argues that the appeal is untimely because *N.J.A.C.* 6A:4-2.2 requires an appeal to be filed within 30 days of the Board's decision. Here,

[1] On May 13, 2021, the Board voted to deny the appellant's request to vacate the Order of Revocation and the Motion to Stay the Order.

the Order of Revocation was mailed to the appellant on August 12, 2020 and his appeal was not filed until March 5, 2021, well beyond the 30-day limitation period. Therefore, the Commissioner should affirm the Order of Revocation and dismiss the appeal.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute her judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a). After a comprehensive review of the record and all submissions, the Commissioner finds that the appellant was not afforded the requisite due process before his certificates were revoked.

There is no dispute that all of the correspondence sent from the Board to the appellant in this matter, including the OTSC and the Order of Revocation, were mailed to the Newark address. In reaching the determination that the appellant did not have an adequate notice of the OTSC, the Commissioner emphasizes that the sworn statement of evidence in support of the tenure charges filed against the appellant by the East Orange Board of Education in 2018, upon which the OTSC was based, included exhibits that indicated appellant resided at the Montclair address. More specifically, the East Orange School District, in both 2013 and 2014, mailed correspondence regarding his performance and attendance to the appellant at the Montclair address. In the absence of any indication from the Board as to why the OTSC and other correspondence were mailed to the Newark address instead of the Montclair address, the Commissioner is compelled to find that the appellant did not receive adequate due process prior to having his certificate revoked. The Commissioner is also not persuaded by the Board's assertion that the appeal was untimely filed. If the appellant did not receive notice of the OTSC

nor the Order of revocation that was mailed to the Newark address, it would follow that he was not aware of any action against his certificates that would mandate an appeal within 30 days of the mailing of the Order of Revocation under *N.J.A.C.* 6A:4-2.2.

Accordingly, this matter is remanded to the State Board of Examiners to give the appellant an opportunity to respond to the Order to Show Cause.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 30, 2021
Date of Mailing: September 30, 2021

[2] In light of the fact that this matter is being remanded to the Board, it is not necessary to decide the Motion to Supplement the Record that was filed by the appellant.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
JOSHUA L. ROSENBAUM	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 1819-237

At its meeting of September 19, 2019, the State Board of Examiners (Board) reviewed a tenure decision regarding Joshua L. Rosenbaum, a tenured teacher in the East Orange Board of Education (East Orange). Rosenbaum was a teacher in East Orange who, after receiving tenure charges, resigned his position as a result of the allegations of unbecoming conduct in the charges. Pursuant to the tenure charges, which are incorporated herein by reference, East Orange alleged that Rosenbaum physically assaulted students in his class on more than one occasion, failed to properly manage classroom behavior, was chronically absent, and had poor performance ratings.

Specifically, East Orange alleged that on January 24, 2012, Rosenbaum knocked a student down, causing him to hit his head on a wall after the student allegedly did not stop talking while trying to line up to exit the classroom. On May 13, 2016, Rosenbaum attempted to take a student's bag from the desk and the student pulled the bag back. Rosenbaum then allegedly twisted the student's wrist, put his hands around the student's neck and choked the student while pushing him to the floor as the desk fell over. On June 4, 2018, Rosenbaum allegedly told a student to leave the classroom and when the student did not, Rosenbaum grabbed the student causing him to fall to the ground and then started "throwing punches." The District also alleged that Rosenbaum was inefficient and ineffective in performing his duties because he sent student(s) out of the classroom for misbehavior, failed to display student work in compliance with directives of his superiors, did not attend a mandatory staff meeting, was chronically absent and received several poor evaluations.

Rosenbaum currently holds a Teacher of Elementary School in Grades K-8 Certificate of Eligibility and a Teacher of Elementary School in Grades K-8 certificate. After reviewing the above information, at its November 1, 2019 meeting, the Board voted to issue an Order to Show Cause to Rosenbaum as to why his certificates should not be revoked.

The Board sent Rosenbaum the Order to Show Cause by regular and certified mail on November 7, 2019. The Order provided that Rosenbaum had 30 days to respond. The certified mail receipt was "unclaimed" and returned and the regular mail copy was not returned. Rosenbaum did not respond. On December 13, 2019, the Board sent Rosenbaum another notice by certified and regular mail providing him an additional 15 days to respond to the Order to Show Cause. The certified mail copy was returned as "Unclaimed" and the regular mail copy was not returned. Rosenbaum did not file a response.

Thereafter, pursuant to *N.J.A.C.* 6A:9B-4.6(e), on January 29, 2020, the Board sent Rosenbaum a hearing notice by regular and certified mail. The notice explained that the allegations in the Order to Show Cause were deemed to be admitted as a result of his failure to file an Answer. Thus, Rosenbaum was offered an opportunity to submit written arguments on the issue of whether the conduct addressed in the Order to Show Cause constituted conduct unbecoming a certificate holder, as well as arguments with regard to the appropriate sanction in the event that the Board found just cause to take action against his certificates. It also explained that, upon review of the charges against him and the legal arguments tendered in his defense, the Board would determine if Rosenbaum's offense warranted action against his certificates. Thereupon, the Board would also determine the appropriate sanction, if any. Rosenbaum was also offered the opportunity to appear before the Board to provide testimony on the sanction issue. The certified mail receipt was "unclaimed", and the regular mail copy was not returned. Once again, Rosenbaum did not file a response.

The threshold issue before the Board in this matter is whether Rosenbaum's conduct constitutes conduct unbecoming a certificate holder or other just cause. Since Rosenbaum failed to respond to the Order to Show Cause, the allegations therein are deemed admitted. *N.J.A.C.* 6A:9B-4.6(c). Consequently, at its meeting of June 26, 2020, the Board considered only the allegations in the Order to Show Cause. The Board concluded that no material facts related to Rosenbaum's offense were in dispute since he never denied that he had engaged in the conduct alleged. Thus, the Board determined that summary decision was appropriate in this matter. *N.J.A.C.* 6A:9B-4.6(h). After reviewing the allegations, the Board found that Rosenbaum had engaged in unbecoming conduct.

The Board must now determine whether Rosenbaum's conduct, as set forth in the Order to Show Cause, provides just cause to act against his certificates pursuant to *N.J.A.C.* 6A:9B-4.4. The Board finds that it does.

The Board may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. *N.J.A.C.* 6A:9B-4.4. "Teachers... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Moreover, unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). Rosenbaum's actions, which led to his resignation from East Orange, clearly demonstrate conduct that is unacceptable for any adult, especially one who is ostensibly a role model. The Board therefore concludes that the only appropriate response to his breach is a revocation of his certificates.

Accordingly, on June 26, 2020, the Board voted to revoke Joshua L. Rosenbaum's Teacher of Elementary School in Grades K-8 Certificate of Eligibility and his Teacher of Elementary School in Grades K-8 certificate. On this 30th day of July 2020 the Board voted to adopt its formal written decision and it is therefore ORDERED that Rosenbaum's certificates are hereby revoked, effective immediately. It is further ORDERED that Rosenbaum return his certificates to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

_____
Rani Singh, Secretary
State Board of Examiners

Date of Mailing:
via certified and regular mail

Appeals may be made to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-38.4.

208-21

208-21 SEC
SEC Dkt No. C71-18
OAL Dkt. No. EEC 09014-19
Agency Dkt. No. 6-5/21A

New Jersey Commissioner of Education

Final Decision

In the Matter of Christopher Treston,
Board of Education of Randolph Township,
Morris County.

This matter involves an appeal of the School Ethics Commission's (Commission) April 27, 2021 decision that appellant Christopher Treston, a member of the Randolph Township Board of Education (Board), violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24.1(e) of the School Ethics Act (Act) by publishing an Op-Ed, in advance of a Board election, that endorsed certain candidates and advocated against another candidate. Having carefully reviewed the Commission's decision and the record in its entirety, the Commissioner finds that the Commission's decision finding that appellant violated the Act is supported by sufficient, credible evidence, and that appellant failed to establish that the decision is arbitrary, capricious, or contrary to law. *N.J.A.C.* 6A:4-1.1(a). However, the Commissioner concludes that the appropriate penalty is reprimand.

Appellant published an Op-Ed wherein he endorsed four candidates for an upcoming Board election – while also advocating against the election of Eliza Schliefstein – in what he admitted was an attempt to influence voters. In so doing, appellant used a disclaimer that stated, "The author is writing this endorsement on his own personal behalf. His opinions are his own." Appellant did not seek the approval of the Board or its counsel before publishing the

Op-Ed. Thereafter, Schliefstein filed a complaint against appellant with the Commission. The Commission granted appellant's motion to dismiss some of the allegations; found probable cause that appellant violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f); and transmitted those allegations to the Office of Administrative Law (OAL). Following a hearing at the OAL, the Administrative Law Judge (ALJ) concluded that appellant violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24.1(e) and recommended a penalty of reprimand.[1] In its April 27, 2021 decision, the Commission adopted the ALJ's findings of fact and legal conclusions but modified the recommended penalty to a censure.

In his appeal and exceptions, appellant argues that the disclaimer included with his Op-Ed was sufficient to identify his endorsement as his personal view and that the Op-Ed was a permissible exercise of his fundamental right to free speech. According to appellant, since he stated that he was making the endorsement on his own behalf and that his views were his own, requiring additional language indicating that his views were not those of the Board would be superfluous. Appellant further contends that the substance of the Op-Ed does not violate the Act, because expressing his personal opinions does not have the potential to compromise the Board and does not provide any advantage to his endorsed candidates. Appellant claims that it was reasonable for his Op-Ed to include references to his experience as a Board member and that doing so does not render his disclaimer unclear or insufficient. Finally, appellant argues that, if he is found to have violated the Act, the appropriate penalty is reprimand as recommended by the ALJ – for reasons similar to those outlined in the Initial Decision.

In reply, the Commission argues that its decision that appellant violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24.1(e) was reasonable and supported by the record.

[1] The ALJ also concluded that the Commission failed to establish that appellant violated *N.J.S.A.* 18A:12-24(f), and the Commission adopted that conclusion in its April 27, 2021 decision.

The Commission reiterates that appellant's disclaimer was insufficient, because the content of the Op-Ed created the appearance that appellant's endorsements were also those of the Board, due to multiple references to his position and Board matters generally, as well as usage of the terms "we" and "our" throughout his writing. The Commission notes that while appellant has a right to free speech to express his own opinion, he must not convey the impression that his opinion is the Board's opinion. The Commission also contends that, in light of the proliferation of this type of electronic publication, a penalty of censure is appropriate and necessary to underscore that board members speaking as private citizens must do so clearly and unambiguously.

Upon a comprehensive review of the record, the Commissioner finds that the decision of the Commission that appellant violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24.1(e) is supported by sufficient credible evidence, and appellant has not established that the Commission's decision is arbitrary, capricious, or contrary to law. The purpose of a disclaimer is to prevent board members from compromising the board of education by causing reasonable confusion among the public about whether the board member's statement is made as a private citizen or as a public official. Here, while appellant's disclaimer noted that his views were his own, he failed to make clear that the views expressed were not those of the Board. The Commissioner disagrees with appellant that such language would be superfluous. While the precise language of a disclaimer is in the board member's discretion, the SEC has indicated that disclaimers must make clear that the opinions are not those of the board. *See* SEC Advisory Opinion A03-07, April 2, 2007 (statements should indicate that they are "neither authorized by nor written on behalf of the board"); A36-14, October 29, 2014 (publications endorsing candidates for election to a board of education "must include a disclaimer, making it clear that

your endorsement is as a private citizen and not as a member of the Board or on behalf of the entire Board.").

The Commissioner notes that in addition to appellant's disclaimer, which appears at the beginning of the Op-Ed, the publication also includes a disclaimer at the end, stating, "The opinions expressed herein are the writer's alone, and do not reflect the opinions of TAPinto.net or anyone who works for TAPinto.net. TAPinto.net is not responsible for the accuracy of any of the information supplied by the writer." Viewed in combination, it would not be unreasonable for a member of the public to conclude that the first disclaimer, written by appellant, was meant to distance the website – not the Board – from appellant's endorsements. Furthermore, a clear indication that a statement is not made on behalf of the Board provides clarity to the public when the substance of the statement repeatedly references appellant's position on the Board, and Board matters in general.

As detailed by both the ALJ and the SEC, because the Op-Ed created the appearance that the entire Board endorsed certain candidates and opposed others, appellant's actions conferred an unwarranted advantage upon the candidates he endorsed. *N.J.S.A.* 18A:12-24(b). Additionally, appellant's actions were outside the scope of his duties as a Board member, and they had the potential to compromise the Board. *N.J.S.A.* 18A:12-24(e); *N.J.A.C.* 6A:28-6.4(a)(5).[2]

In support of its recommendation for a penalty of censure, the SEC relied on four cases. First, in *Kwapniewski v. Curioni, Lodi Board of Education, Bergen County*, SEC Docket No. C70-17, decided December 18, 2019 (*Curioni*), *aff'd* Commissioner January 23, 2020, the board

[2] Appellant argues that the ALJ incorrectly found that his actions had the potential to compromise the Board because they were outside the scope of his duties. While appellant is correct that these are individual criteria, and both must be proven to find a violation of *N.J.S.A.* 18A:24.1(e), the Commissioner finds that both criteria have been proven here.

member received a six-month suspension after repeatedly making personal attacks against a teacher on blog posts over a two-month period by posting inaccurate information about her salary, questioning her teaching qualifications and honesty, calling her names, and posting a picture of the street where she lives. Despite inclusion of a disclaimer, the board member repeatedly referenced his status on the Board. Here, the SEC noted that while appellant only authored one Op-Ed rather than a series of blog posts, the appearance that the Board advocated against Schliefstein was impactful on the public, and appellant was well aware of his impact.

Second, in *Dunbar Bey v. Brown, Camden Board of Education, Camden County*, SEC Docket No. C25-11, decided December 21, 2011 (*Brown*), the SEC recommended a penalty of censure after a board member did not remove the superintendent's picture which had appeared under a Facebook post referencing local terrorists, but the Commissioner found a reprimand was more appropriate due to the lack of prior violations. Here, the SEC explained that appellant's conduct was more deliberate and egregious than the action in *Brown* and warrants a penalty of censure.

Third, in *Fleres v. Zhong, West Windsor-Plainsboro Board of Education, Mercer County*, SEC Docket No. C17-18, decided May 3, 2019 (*Zhong*), a board member disclosed confidential information about an incident involving a student to his immediate family, and the information then spread. The SEC recommended a penalty of censure for the first-time offense, and the Commissioner agreed. Here, the SEC noted that, like in *Zhong*, a penalty greater than a reprimand is appropriate for a first-time offense.

In a recent matter that also involved the use of disclaimers, a board member attached his name to a political flyer and deliberately chose to indicate that he was a member of the board of education, without including any disclaimer to indicate that his views were not those of the board. *Atif Nazir v. Nitang Patel, Bd. of Educ. of the Twp. of Piscataway*, Commissioner Decision No. 164-21SEC (August 12, 2021). His violations were not inadvertent; he purposefully referenced his position on the board to support his political agenda. In that matter, the Commissioner agreed with

the SEC that censure was the appropriate penalty, despite the fact that it was a first offense, because the board member's actions were more egregious than those in *Brown, supra.*

Upon review of appellant's actions, the Commissioner disagrees with the SEC that censure is the appropriate penalty in the instant matter, and instead concurs with the ALJ that a reprimand is the appropriate penalty. While appellant's disclaimer was insufficient, the record demonstrates that he did attempt to represent his views as his own. The Commissioner finds that appellant's behavior does not rise to the same level as that of the board member at issue in *Nazir, supra*, and, accordingly, a lesser penalty of reprimand is appropriate.

Accordingly, appellant is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 30, 2021
Date of Mailing: September 30, 2021

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
OAL Docket No.: EEC-09014-19
SEC Docket No.: C71-18
Final Decision

In the Matter of Christopher T. Treston,
Randolph Township Board of Education, Morris County,
Respondent

I. Procedural History

This matter arises from a Complaint that was filed on November 8, 2018, by Eliza Schleifstein (Complainant), alleging that Christopher T. Treston (Respondent), a then member of the Randolph Township Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* More specifically, the Complaint alleges that Respondent violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(g) in Count 1; *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(g) in Count 2; and *N.J.S.A.* 18A:12-24.1(f) and *N.J.S.A.* 18A:12-24.1(h) in Count 3. In brief, the Complaint alleges that Respondent's Op-Ed, which was published on October 30, 2018, endorsed four (4) candidates for the then upcoming Board election; the Op-Ed did not endorse Complainant (and, in fact, openly advocated for her non-election); and the Op-Ed adversely affected Complainant's ability to be elected to the Board. *Initial Decision* at 1.

At its meeting on March 26, 2019, and after considering the parties' submissions, the School Ethics Commission (Commission) adopted a decision granting Respondent's Motion to Dismiss in Lieu of Answer (Motion to Dismiss) as to all allegations except for the alleged violations of *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24.1(e) in Count 1; *N.J.S.A.* 18A:12-24.1(e) in Count 2; and *N.J.S.A.* 18A:12-24.1(f) in Count 3). On April 15, 2019, Respondent filed an Answer to the remaining allegations, and the above-captioned matter was docketed for the Commission to make a determination regarding probable cause.

Subsequently, and at a special meeting on June 19, 2019, the Commission adopted a decision finding probable cause for the remaining allegations in the Complaint. Based on its finding of probable cause, the Commission transmitted the within matter to the Office of Administrative Law (OAL) for a plenary hearing and, pursuant to *N.J.A.C.* 6A:28-10.9(c) and *N.J.A.C.* 6A:28-10.7(b) through (e), the attorney for the Commission (Petitioner) was charged with prosecuting the allegations in the Complaint for which the Commission found probable cause to credit.

At the OAL, the above-captioned matter was assigned to the Honorable Leslie Z. Celentano, Administrative Law Judge (ALJ Celentano). *Initial Decision* at 1. Prior to the first hearing, which was scheduled for February 13, 2020, Respondent filed a "motion to bar witness testimony," and Petitioner filed a reply brief arguing, among other things, "the substance of the motion was really one for summary decision, not a motion in limine." *Id.* at 2. On February 13,

2020, the scheduled hearing date was converted, with consent from the parties, to oral argument on the motion, but was later adjourned due to the COVID-19 pandemic. *Id.* at 2-3. On August 26, 2020, the parties agreed to convert Respondent's motion to one for summary decision, and Petitioner was granted twenty (20) days to file a response. *Id.* at 3. Ultimately, and as authorized by the Uniform Administrative Procedure Rules and other precedent, "to assist in the efficient disposition of" this matter, ALJ Celentano converted Petitioner's response to the "motion to bar witness testimony" as "a cross-motion for summary decision," and found the above-captioned matter ripe for summary decision. *Id.* at 3-5. In ALJ Celentano's estimation, "the papers and discovery that have been filed show there is no genuine issue as to the material facts and no facts that need to be found." *Id.* at 8.

On January 27, 2021, ALJ Celentano issued an Initial Decision detailing her findings and legal conclusions, and the Commission acknowledged receipt of same; therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was March 15, 2021.[1] Prior to March 15, 2021, the Commission requested a forty-five (45) day extension of time to issue its final decision. Pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, and for good cause shown, the Commission was granted an extension until April 29, 2021.

On February 19, 2021, and after receiving an extension, Petitioner filed Exceptions to the Initial Decision. On February 26, 2021, Respondent filed Exceptions to the Initial Decision and a response to Petitioner's Exceptions, but the filing was only accepted as a response to Petitioner's Exceptions.

At its meeting on March 23, 2021, the Commission considered the full record in this matter. Thereafter, and at its meeting on April 27, 2021, the Commission voted to adopt ALJ Celentano's findings of fact; adopt the legal conclusion that Respondent's insufficient disclaimer and statements in the Op-Ed violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:24.1(e) of the Code of Ethics for School Board Members (Code); adopt the legal conclusion that Petitioner failed to establish a violation of *N.J.S.A.* 18A:12-24.1(f) of the Code; and to modify the recommended penalty of reprimand in favor of censure.

II. Initial Decision

After converting Respondent's "motion to bar witness testimony" to a motion for summary decision, and converting Petitioner's response to a cross-motion for summary decision, ALJ Celentano found the following non-exhaustive facts, based on the papers and discovery, to be relevant to ruling on the matter:

1) In the October 30, 2018, Op-Ed, Respondent used a disclaimer that stated, "The author is writing this endorsement on his own personal behalf. His opinions are his own." Complaint, Exhibit 1.

2) In the October 30, 2018, Op-Ed, and regarding Ms. Schleifstein, Respondent stated:

[1] Forty-five (45) days after January 27, 2021, is, technically, Saturday, March 13, 2021.

> ... Ms. Schleifstein's signature theme has been her experience as an expert communicator. That experience was not in evidence earlier this year. First, there was a very bitter – and very well-documented – exchange with [the Ridgewood Education Association (REA)] president ... . In that single incident, Ms. Schleifstein positioned herself at odds with virtually the entire teaching staff. For a board that is working hard to improve relations with the REA, Ms. Schleifstein's election would be a serious impediment. The April meeting was then followed by an objectively poor interview for an appointment to [a former Board member's] seat. To me, a genuinely skilled communicator would not fall victim to outbursts of emotion, or to poor advance preparation. An elected board member should not, either. Complaint, Exhibit 1.

3) Respondent admitted that he did not seek approval from the Board or its counsel before writing the Op-Ed. *Initial Decision* at 12.

4) Respondent admitted that the endorsement in his Op-Ed was an attempt to influence the voters. *Id.* at 12.

5) Overall, Respondent has "in the record admitted to almost all of the elements of the alleged violations," except whether his endorsement resulted in an unwarranted privilege or advantage to the endorsed candidates, whether the endorsement had the potential to compromise the Board, and whether he (Respondent) attempted to use the school to acquire some benefit for himself, a member of his immediate family, or a friend." *Id.* at 12, 17-18.

With the above in mind, ALJ Celentano concluded that Respondent's "insufficient disclaimer and statements in the [O]p-[E]d were made outside the scope of his duties as a Board member" and "had the potential to compromise the Board" in violation of *N.J.S.A.* 18A:24.1(e). *Initial Decision* at 12. ALJ Celentano further concluded that because Respondent's disclaimer "was insufficient to convey that he was expressing his personal opinion, largely due to his multiple references to his position on the Board and Board matters generally," Petitioner established a violation of *N.J.S.A.* 18A:12-24(b), "as there was an 'unwarranted' advantage to the candidates [R]espondent endorsed by virtue of the appearance that they were receiving a Board endorsement." *Id.* However, ALJ Celentano concluded that Petitioner failed to establish a violation of *N.J.S.A.* 18A:12-24.1(f). *Id.*

After concluding that Respondent violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24.1(e) of the Code, ALJ Celentano turned to the issue of penalty. While acknowledging that the Commission has "historically imposed a censure either alone or with a suspension when a board member's violation is severe enough to warrant public notice of the violation and its penalty," ALJ Celentano determined that, after reviewing "comments by other ALJs and the Commission when recommending particular penalties as showing the purpose of imposing a penalty of censure versus reprimand," the penalty of reprimand "is in keeping with the Commission's past actions." *Id.* at 14-16. In support of this position, ALJ Celentano juxtaposed Respondent's conduct with the conduct of other individuals disciplined by the Commission, and also noted that Respondent had resigned his position with the Board. *Id.* at 16.

III. Exceptions

Petitioner's Exceptions

Petitioner filed exceptions on February 19, 2021, with consent from its adversary, arguing that, "the record does not support the ALJ's recommended penalty of reprimand" for the violations found in Count 1 and Count 2, and also does not support the conclusion that the allegations in Count 3 "were ripe for summary decision."

As to the recommended penalty of reprimand, Petitioner "[r]espectfully" disagrees, and argues that the "ALJ was mistaken." Petitioner asserts, "A robust body of case law suggests that a censure is warranted for Respondent's actions here," and cites many examples to support this assertion; as such, the Initial Decision should be modified to reflect the appropriate penalty of censure for the violations of *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24.1(e). According to Petitioner, the evidence "overwhelmingly shows" that Respondent's conduct did not meet the standards set forth for Board members, he violated the public trust by abusing his official position, and he secured unwarranted privileges for those he endorsed. Petitioner maintains that Respondent also "exceeded the scope of his authority as a Board member by taking private action that had the potential to compromise the Board" when he "wrote and published the [O]p-[E]d that used plural pronouns, such a 'we[,]' 'our[,]' and 'us' on numerous occasions and also discussed Board matters." Petitioner maintains that the case law cited in the Exceptions supports a penalty of censure for "equivalent or lesser conduct." Therefore, and to "further guide board members regarding actions involving endorsement of candidates," Petitioner argues the appropriate penalty is "clearly" censure.

Regarding ALJ Celentano's legal conclusion that Count 3 "was ripe for summary decision," Petitioner argues this conclusion "should be rejected as arbitrary, capricious and unreasonable." Petitioner argues that, based on allegations in the Complaint as well as "the certification of [] [C]omplainant, Petitioner sufficiently identified material facts in dispute with regard to" a violation of *N.J.S.A.* 18A:12-24.1(f) in Count 3. In this regard, the Commission "previously found in this matter that a violation of *N.J.S.A.* 18A:12-24.1(f) may be established if evidence is presented that the endorsement in the Op-Ed was an attempt to influence voters and thereby to 'stack' the Board with individuals aligned with his own personal agenda, and that such efforts would result in a benefit to him, a member of his immediate family, or a friend." Petitioner further notes that Respondent "admitted that he attempted to influence voters with the endorsements in the Op-Ed, that he knew his Op-Ed may influence voters, and that he voted 'no' to a renewal of the Superintendent's contract in July 2018." However, Respondent denies that the "Op-Ed endorsed certain individuals because those candidates expressed a desire to seek non-renewal of the Superintendent's contract." According to Petitioner, and contrary to ALJ Celentano's finding that Respondent denied that he attempted to "stack" the Board, Respondent's "denial alone does not warrant summary decision," especially considering that the Complaint and the certification of Complainant "claim otherwise."

Furthermore, Petitioner argues that Respondent's "denial" that he attempted to "stack" the Board, "must inherently abide credibility determinations of his testimony and other

witnesses, as well as a full review of the documentary evidence at a hearing." Petitioner notes that despite her attempt to "present additional facts for the factfinder's consideration through witness testimony," namely that Respondent's Op-Ed was an "attempt to influence voters and stack the board with individuals aligned with his own personal agenda," the ALJ "failed to acknowledge that there were material facts in dispute ... which contradicted [] Respondent's denials of the allegations." Petitioner further notes that the Complaint alleged Respondent was displeased with the Superintendent; Respondent was the only Board member to vote against the Superintendent's contract; Complainant certified as to her relationship with the teacher's association and the related vote of no confidence, which supports Complainant's allegation that Respondent was attempting to "stack" the Board; and Complainant notified Respondent that she supported the Superintendent and that Respondent "made inappropriate hand gestures towards Complainant during a candidate question and answer session." Therefore, Petitioner asserts that "there were genuine issues of material fact, with regard to the allegation in [C]ount 3, as to whether Respondent violated *N.J.S.A.* 18A:12-24.1(f) ... ." Based on this information, Petitioner asserts that the ALJ's "determination that there was no issue of material fact to be decided was arbitrary and capricious and not supported by the record." As such, Count 3 should be "remanded for adjudication on the merits."

In summary, Petitioner maintains that the ALJ's Initial Decision should be modified to indicate that a penalty of censure is warranted for the violations of *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24.1(e), and the allegations in Count 3 "should be remanded for adjudication on the merits," and should not have been decided by summary decision.

Response to Petitioner's Exceptions

Although Respondent's filing on February 26, 2021, was submitted as both Exceptions to the Initial Decision **and** as a response to Petitioner's Exceptions, the Commission advised the parties that the filing would only be accepted as a response to Petitioner's Exceptions. The basis for the Commission's determination is that Respondent's papers were filed beyond the thirteen-day deadline permitted by *N.J.A.C.* 1:1-18.4, and Respondent never requested an extension to file his own Exceptions.

As to Petitioner's recommendation of censure, Respondent argues this penalty is "neither necessary nor appropriate in these circumstances." Respondent maintains that Petitioner's reliance on "dated case law concerning conduct of other Board members which was in blatant violation of the Code and the Act" does not apply to this matter, and is misplaced. Furthermore, Petitioner's citation to *In re Doris Graves, C47-05* (May 27, 2008), "is not even remotely comparable" to Respondent's behavior. Respondent further maintains that he included "various disclaimers throughout his [O]p-[E]d," and "did not attribute any opinion or statement in his Op-Ed to any other Board member." Respondent claims he also used language such as "I have chosen ...," "As fellow citizens ...," and "To me ...," which indicate that he was expressing his own opinion. According to Respondent, although ALJ Celentano found that the disclaimers were "insufficient" and that Respondent's statements were "outside the scope of his duties as a Board member," she did not conclude this behavior warranted a censure. Respondent further claims he did not "blatantly ignore the Department's guidance," and he is no longer a Board member;

therefore, censure is not the appropriate penalty. Moreover, Respondent contends that Petitioner did not provide a "compelling argument" to support a censure.

Regarding a violation of *N.J.S.A.* 18A:12-24.1(f), Respondent asserts that ALJ Celentano correctly concluded that Petitioner failed to provide sufficient facts that he (Respondent) "attempted to influence the voters to 'stack' the Board with those who would help [R]espondent achieve his personal agenda, or that [R]espondent attempted to use the schools to acquire some benefit for himself, his family or a friend." Moreover, Petitioner's Exceptions fail "to set forth facts that have been alleged in the Complaint or found by the [Commission] to support a conclusion that Respondent's preferred candidates would deliver a benefit to him, a member of his immediate family or a friend." Respondent argues that Petitioner did not provide any evidence, or a witness who could confirm that Respondent "attempted to 'stack' the Board," and Respondent's "alleged dissatisfaction with the performance of the Superintendent or an allegation of 'inappropriate hand gestures towards [] [C]omplainant during a question and answer session'" do not support a violation of *N.J.S.A.* 18A:12-24.1(f). Respondent further argues, "it is undisputed that" Complainant was "against the teacher's association vote of no confidence in the Superintendent," and that Respondent "was the only Board member to vote against the Superintendent's contract renewal." Therefore, witness testimony was not needed and, even if those assertions were not "certified to in the record, they would have been assumed as true for the purposes of a motion for summary decision." In addition, Respondent argues that whether he made a "hand gesture" toward Complainant at a Board meeting "is not a fact material to the alleged violation," and the Complaint does not provide any evidence to support that any of the witnesses testimony would "offer anything relevant beyond confirming ... facts already assumed to be true ... ."

IV. Analysis

Upon a careful and independent review of the facts and evidence set forth in the record, the Commission **adopts** ALJ Celentano's findings of fact; **adopts** the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24(b) as well as *N.J.S.A.* 18A:12-24.1(e); and **adopts** the legal conclusion that Petitioner failed to establish a violation of *N.J.S.A.* 18A:12-24.1(f).

In finding violations of *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24.1(e), ALJ Celentano, cited various decisions and advisory opinions issued by the Commission, and noted important parameters regarding the conduct of school officials with regard to disclaimers, all of which the Commission finds are worthy of reiteration here. In this regard:

> Members of ... local boards of education are held to the same standards as other municipal officials regarding any conflicts of interest. ... And, a high standard was intended, as seen in the legislative findings and declarations of the Act, which is concerned with preventing violations of the public trust, or even [a] "justifiable impression among the public that such trust is being violated." ...
>
> The purpose of a disclaimer is to prevent board members from compromising the local boards of education by causing reasonable confusion among the public whether the board member's statement is made as a private citizen or as a public

> official. ... Officials should be clear [not to] hold themselves out as a board member when attempting to engage in private actions to "ensure the public would be notified that the board member's [writing] was written in the board member's role as a private citizen." In order to not hold oneself out as a board member, the official should identify themself as a board member, but also indicate that they are writing "in their role as a private citizen and that the letter is neither authorized by nor written on behalf of the board." ... This disclaimer will not impact the official's First Amendment rights, and will also fulfill the Legislature's intent behind the Act. ...
>
> ... The most clear on what the [Commission] would consider to be a sufficient endorsement is from Advisory Opinion A36-14 (Oct. 29, 2014).
>
> In this opinion, while the [Commission] stated that it would leave it to the board members' discretion what language should be used in a disclaimer, the [Commission] repeatedly used a phrase which indicates it may have the specific language necessary to qualify as a sufficient disclaimer. The disclaimer is: "this endorsement is [Board Member's Name] personal one, and not as a member of the [Township] Board of Education, nor is the endorsement on behalf of the entire Board." Because this language is used so frequently, and clearly disclaims the board member's status in relation to the statement—as one made not in their official capacity, and not on behalf of or in relation to the board on which they sit—this phrase therefore appears to be a requirement in order to comply with the [Commission's] disclosure requirements before a board member endorses a candidate in an election. ....
>
> Having a disclaimer, even if it appears to be sufficient, may not be enough if the substance of the statements may reasonably lead the public to believe the official is speaking, and representing themself as a member of the board. ...
>
> *Initial Decision* at 8-11.

Based on the standards set forth above, and after reviewing the Commission's Probable Cause Notice, ALJ Celentano concluded that because Respondent's disclaimer was "insufficient to convey that he was expressing his personal opinion, largely due to his multiple references to his position on the Board and Board matters generally," and "there was an 'unwarranted' advantage to the candidates [R]espondent endorsed by virtue of the appearance that they were receiving a Board endorsement," Petitioner established a violation of *N.J.S.A.* 18A:12-24(b). *Id.* at 12. In addition, Respondent's "insufficient disclaimer and statements in the [O]p-[E]d were made outside the scope of his duties as a Board member, and thus violated" *N.J.S.A.* 18A:12-24.1(e) because "they had the potential to compromise the Board." *Id.* However, ALJ Celentano concluded that Petitioner failed to establish a violation of *N.J.S.A.* 18A:12-24.1(f) because the Complaint did not set forth any facts to "support a conclusion that establishes either that [R]espondent attempted to influence the voters to 'stack' the Board with those who would help [R]espondent achieve his personal agenda, or that [R]espondent attempted to use the schools to acquire some benefit for himself, his family, or a friend." *Id.* In light of, among other things,

Respondent's resignation from the Board, the Commission agrees with ALJ Celentano's legal conclusions and the basis therefor.

The Commission is also compelled to note that there are more current cases, which provide similar direction on the use of disclaimers. For example, in *Melnyk v. Fiel*, which resulted in the dismissal of a complaint because the initiating party failed to present sufficient facts which could support a finding that the school official violated the cited provision of the Code, the Commission discussed how failure to include a disclaimer can lead to the belief that the statements made by a school official, even if attempted to be made in their personal/private capacity, can be viewed as those of the Board. Highlands Borough Board of Education, Monmouth County, Commission Docket No. C64-18 (C64-18). More specifically, and although Respondent Fiel argued that the statements attributed to her by Complainant Melnyk "were not made in her capacity as a Board member, and [did] not relate to her Board membership or to Board actions," the Commission found that "the statements on her Facebook page [were] clearly linked to her Board member (and candidacy)," her social media page did not have a disclaimer noting that the statements made were her own and unrelated to the Board, and that, as a result, "it [was] reasonable for a member of the public ... to perceive the statements as being made by Respondent in her capacity as a Board member." C64-18 at 4. In a footnote, the Commission also addressed the kind of disclaimer that could have avoided the issue altogether, to wit:

> A prominent disclaimer (caps/bold), such as, "***THE FOLLOWING STATEMENTS ARE MADE IN MY CAPACITY AS A PRIVATE CITIZEN, AND NOT IN MY CAPACITY AS A BOARD MEMBER. THESE STATEMENTS ARE ALSO NOT REPRESENTATIVE OF THE BOARD OR ITS INDIVIDUAL MEMBERS, AND SOLELY REPRESENT MY OWN PERSONAL OPINIONS***," may have avoided the appearance – actual or perceived – that the statements were made in Respondent's capacity as a Board member. *The Commission additionally notes that, even if an appropriate disclaimer is used, the substance of a post/statement can, nevertheless, render the disclaimer meaningless.*
>
> *Id.* (emphasis added).

In addition, in *Kober v. Langevin*, Complainant Kober asserted that Respondent Langevin violated the Code when she, among other things, promoted the approval of a ballot issue/question on her personal Facebook page. Ho-Ho-Kus Board of Education, Bergen County, Commission Docket No. C07-19 at 2-3 (C07-19). In defense of this allegation, Respondent Langevin countered that she included a disclaimer on her social media page stating, "I am a member of the [Ho-Ho-Kus Board of Education (HHK BOE)], however the views expressed here are my own and not expressed on behalf of the HHK BOE." *Id.* at 3. Although the Commission ultimately dismissed the matter, and of relevance here, the Commission averred:

> Notwithstanding the determination as set forth herein, the Commission feels compelled to note that, as it has stated previously, Board members do not abdicate their state and federal constitutional rights upon being sworn-in. Although Board members, unlike other citizens, are bound by and must adhere to the provisions of

> the Act, the facts as alleged in the Complaint do not rise to the level of a violation. Without any suggestion that Respondent and/or other members of the Board utilized or expended taxpayer dollars to advocate only one side of the issue, or any suggestion that Respondent – in her capacity as a Board member – endorsed the issue, the Commission is restrained by the provisions of the Act, and its implementing regulations. The facts in the Complaint relate to actions taken by Respondent in her capacity as a citizen, community member, and taxpayer, and do not implicate her standing as a Board member. In addition, whenever Respondent actually endorsed the issue ..., as opposed to discussing the logistics of posting a sign or dropping off a sign at another community member's request, Respondent did include a disclaimer noting that her opinion was as a private citizen, and did not reflect the position of the Board (or her standing as a Board member).
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> *Id.* at 7-8.

As such, and as a supplement to those cited by ALJ Celentano, there is a robust body of decisions and advisory opinions which school officials can utilize to determine when, and how, a disclaimer must be used on social media (and other online/electronic publications) when speaking in their personal/private capacity in order to avoid running afoul of the Act. These decisions and advisory opinions also make clear that the use of a disclaimer does not give a school official carte blanche to *then* discuss Board business and/or matters in a way that is, or appears to be, on behalf of the Board. In this way, it is the substance of the writing, and not the disclaimer itself, that will dictate whether the school official has rendered a disclaimer meaningless.

V. Decision

For the reasons more fully detailed above, the Commission **adopts** ALJ Celentano's findings of fact; **adopts** the legal conclusion that Respondent's insufficient disclaimer and statements in the Op-Ed violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:24.1(e); and **adopts** the legal conclusion that Petitioner failed to establish a violation of *N.J.S.A.* 18A:12-24.1(f).

VI. Penalty

Based upon the conclusion that Respondent violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24.1(e), ALJ Celentano recommended a penalty of reprimand. Following its review of the facts and evidence set forth in the record, the Commission modifies the recommended penalty of reprimand in favor of censure. In modifying ALJ Celentano's recommended penalty, the Commission finds three (3) prior decisions to be most instructive, namely *Kwapniewski v. Curioni*, Lodi Board of Education, Bergen County, Commission Docket No. C70-17 (C70-17); *Dunbar Bey v. Brown*, Camden Board of Education, Camden County, Commission Docket No. C25-11 (C25-11); and *Fleres v. Zhong*, West Windsor-Plainsboro Board of Education, Mercer County, Commission Docket No. C17-18 (C17-18).

First, in C70-17, Respondent Curioni, a board of education member, made "multiple" references to Complainant Kwapniewski, a teaching staff member, on his personal blog over a

period of two months. C70-17 at 4. In particular, the posts on Respondent Curioni's blog contained inaccurate or misleading information about Complainant Kwapniewski's salary; referenced Complainant Kwapniewski in a negative manner; depicted a picture of the street where she (Complainant Kwapniewski) lives; undermined her credibility with members of the local education association; questioned her qualifications for her teaching position; implied she received her position through patronage; questioned her salary and honesty; and referred to Complainant Kwapniewski as a "greedy bastard" and "union bully." *Id.* Importantly, and although Respondent Curioni had a "disclaimer" on his blog purporting to indicate that he was writing in his capacity as a private citizen, the ALJ determined that, based on his repeated reference to his status as a Board member, the blog "indisputably represents him as a Board member." *Id.* at 6. As a result, the ALJ found that Complainant Kwapniewski had proven that Respondent Curioni's conduct violated *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(g), and recommended a penalty of suspension for no less than six months. *Id.*

Although the Commission agreed that Complainant Kwapniewski had established violations of *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(g), it rejected the determination that Respondent Curioni had violated *N.J.S.A.* 18A:12-24.1(a) and *N.J.S.A.* 18A:12-24.1(d). *Id.* at 7-8. In terms of penalty, the Commission agreed with the ALJ that Respondent's deliberate, unnecessary, and repeated attacks on Complainant Kwapniewski, her qualifications, her salary, and her general employment, justified a harsh penalty, and, consequently, recommended a six month suspension. *Id.* at 8-9. The Commission also noted that, but for its rejection of the conclusion that Respondent Curioni violated *N.J.S.A.* 18A:12-24.1(a) and *N.J.S.A.* 18A:12-24.1(d), the Commission would have recommended a suspension for a much longer duration, and possibly removal. *Id.* at 9.

Upon review, the Commissioner agreed with the Commission's recommended penalty of suspension for six months, citing "the severity, willfulness, and frequency of respondent's inappropriate conduct ...," and imposed same. *Kwapniewski v. Curioni*, New Jersey Commissioner of Education, Agency Docket No. 334-12/19.

While Respondent here did not engage in a series of posts, but rather only authored one Op-Ed, the substance of the Op-Ed, and the import of his failure to include an appropriate disclaimer on that Op-Ed must be carefully scrutinized. More specifically, while offering public support for four (4) named candidates, Respondent also publicly opposed Ms. Schleifstein's candidacy. In this Op-Ed which, again, was not appropriately disclaimed as being made in his personal/private capacity and thus was made in his capacity as a Board member and/or on behalf of the Board, Respondent stated:

> ... Ms. Schleifstein's signature theme has been her experience as an expert communicator. That experience was not in evidence earlier this year. First, there was a very bitter – and very well-documented – exchange with [the Ridgewood Education Association (REA)] president ... . In that single incident, Ms. Schleifstein positioned herself at odds with virtually the entire teaching staff. For a board that is working hard to improve relations with the REA, Ms. Schleifstein's election would be a serious impediment. The April meeting was

> then followed by an objectively poor interview for an appointment to [a former Board member's] seat. To me, a genuinely skilled communicator would not fall victim to outbursts of emotion, or to poor advance preparation. An elected board member should not, either. Complaint, Exhibit 1.

In short, and in one single post, Respondent – a member and representative of the Board – publicly denounced Ms. Schleifstein's stated prowess as an effective and "genuinely skilled" communicator; indicated that she had "positioned herself at odds" with the entire teaching staff, thus broadcasting to the community that Ms. Schleifstein would be unable to establish or foster a meaningful relationship with "the entire teaching staff"; and proclaimed that her election would be a "serious impediment" to a productive relationship between the Board and the REA. Although it is impossible to determine whether the Op-Ed, in and of itself, was the reason that Ms. Schleifstein was not successful in her bid for election, the power of Board-backed public non-endorsement of a candidate cannot be denied. Moreover, Respondent specifically admitted that he wrote the Op-Ed to "influence the voters" – as a sitting Board member, Respondent was well aware how impactful his words could be to the public. *Initial Decision* at 12.

Second, in C25-11, the Commission found that Respondent Brown, a board of education member, violated *N.J.S.A.* 18A:12-24.1(i) when he posted a message on his Facebook page ("Now if we could only do something about our local terrorists that destroy dreams and burn futures"), the Superintendent's photo came up as a result of the post, and he did not remove it. C25-11 at 4, 6-7. In finding a violation, the Commission stated, "when a sitting Board member makes such a judgmental proclamation, it is likely to be credited far more than a statement offered by an ordinary citizen"; therefore, the Commission recommended a penalty of censure. *Id.* at 7. In recommending censure in this matter, which it termed one of "first impression," the Commission stated, "the Commission takes this opportunity to impress upon this Respondent, as well as other Board members, that in using social media, the affirmative duties within the Code of Ethics for School Board Members may not be overlooked." *Id.* at 8. Consequently, the Commission found that censure was "an appropriate sanction to convey this message." *Id.*

Upon review, the Commissioner found that, due to the absence of prior violations by Respondent Brown, reprimand was the more appropriate penalty. *Dunbar Bey v. Brown*, New Jersey Commissioner of Education, Agency Docket No. 365-12/11.

Finally, in C17-18, Respondent Zhong, also a board of education member, received a message from a parent within the school district about an incident, which resulted in the discipline of a high school student. C17-18 at 2. Respondent Zhong forwarded the message via WeChat to a group of people solely consisting of members of his immediate family. *Id.* Thereafter, one of Respondent Zhong's immediate family members forwarded the message to "countless" others, and it eventually made its way to the student who was the subject of the initiating message. *Id.* Following her review, the ALJ determined that Respondent Zhong had violated the confidentiality provision of *N.J.S.A.* 18A:12-24.1(g), and recommended a penalty of reprimand. *Id.* at 1. The basis for the ALJ's recommended penalty was that Respondent acknowledged that he made a mistake, and indicated that he did not intend to disclose the information to anyone outside of his immediate family. *Id.* at 4.

While the Commission agreed that Respondent Zhong's conduct violated the confidentiality provision of *N.J.S.A.* 18A:12-24.1(g), it rejected the recommended penalty of reprimand in favor of censure. *Id.* In finding that a more severe penalty was appropriate, the Commission stated, "Respondent seems to overlook the fact that confidential information, which is shared with him because he is a Board member, should not be shared with anyone, including members of his own family until, at the very least, the information is no longer confidential." *Id.* As such, and "*in order to impress upon Respondent the fundamental importance of safeguarding confidential information*," the Commission recommended a penalty of censure. *Id.*

Of note, and following review, the Commissioner concurred with the penalty of censure for Respondent Zhong. *Fleres v. Zhong*, New Jersey Commissioner of Education, Agency Docket No. 105-5/19 (emphasis added).

Taken together, C25-11 and C17-18 recognize that, in certain circumstances, which the Commission finds applicable here, a penalty greater than reprimand is warranted even when a school official has not previously been found in violation of the Act and/or has not otherwise been sanctioned for same. Although, in C25-11, the Commissioner downgraded the Commission's recommended penalty of censure in favor of reprimand because there was an absence of prior infractions, the conduct at issue in that case (C25-11) was far less egregious, deliberate, and purposeful than Respondent's actions here. In addition, in C25-11, the Commission appropriately recognized the potential pitfalls associated with the use of social media by school officials and attempted, at that time, to send a cautionary warning to the field. Now, more than a decade later, when use of social media and online publications has become commonplace, prolific, pervasive, and often times divisive, and given that there has been a significant influx in the number of complaints filed with the Commission regarding use (or non-use) of disclaimers in electronic publications (not just on social media), it is now more critical than ever to underscore and emphasize that when Board members want to speak as private citizens, they must include an appropriate disclaimer that makes the capacity in which they are speaking clear and unambiguous. In addition, even if an appropriate disclaimer is used, a school official must never negate the import of the disclaimer by proceeding, under the purported protection of a disclaimer, to discuss or comment on Board business or matters in a way that leads a member of the public to believe that the individual is speaking on behalf of, and as a representative of, the Board. Finally, it is of no moment to the Commission that Respondent resigned his seat from the Board, and this fact should not mitigate or otherwise reduce a penalty to any degree. To the extent resignation affords a school official the ability to avoid the imposition of a harsher penalty, the force and effect of the Act becomes diminished.

For all of the aforementioned reasons, the Commission recommends that Respondent be **censured** for having violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24.1(e).

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education (Commissioner) for review of the Commission's recommended sanctions. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's findings of violations of the Act; or 3) file both exceptions to the recommended sanction and an appeal of the Commission's findings of violations of the Act.

Parties taking exception to the recommended sanctions of the Commission but *not disputing* the Commission's findings of violations may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended sanctions to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's findings of violations *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4, *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the mailing date to the parties, as indicated below. In such cases, the Commissioner's review of the Commission's recommended sanctions will be deferred and incorporated into the Commissioner's review of the findings of violations on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender, Chairperson
School Ethics Commission

Mailing Date: April 27, 2021

Resolution Adopting Decision in Connection with C71-18

Whereas, at a special meeting on June 19, 2019, and in accordance with *N.J.A.C.* 6A:28-10.9(c) and *N.J.A.C.* 6A:28-10.7(b) through (e), the School Ethics Commission (Commission) voted to transmit the remaining allegations in the matter docketed as C71-18 to the Office of Administrative Law (OAL) for a plenary hearing; and

Whereas, at the OAL, the attorney for the Commission (Petitioner) was responsible for prosecuting the remaining allegations; and

Whereas, at the OAL, and after converting certain of the parties' filings, the Honorable Leslie Z. Celentano, Administrative Law Judge (ALJ Celentano) determined the matter was ripe for summary decision, and issued an Initial Decision dated January 27, 2021; and

Whereas, in her Initial Decision, ALJ Celentano found that Respondent violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24.1(e); Respondent did not violate *N.J.S.A.* 18A:12-24.1(f); and recommended a penalty of reprimand; and

Whereas, on February 19, 2021, Petitioner filed Exceptions to ALJ Celentano's Initial Decision, and Respondent filed a reply to Petitioner's Exceptions on February 26, 2021;

Whereas, at its meeting on March 23, 2021, the Commission reviewed and discussed the full record in the above-captioned matter; and

Whereas, at its meeting on March 23, 2021, the Commission discussed adopting the findings of facts; adopting the legal conclusions; and modifying the recommended penalty of reprimand in favor of a censure; and

Whereas, at its meeting on April 27, 2021, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on March 23, 2021; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its meeting on April 27, 2021.

Kathryn A. Whalen, Director
School Ethics Commission

209-21

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

October 6, 2021

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Souder Shabazz & Woolridge Law Group
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Re: *Board of Education of the City of Paterson, Passaic County v. New Jersey State Interscholastic Athletic Association, Agency Dkt. No. 185-9/21, Commissioner Decision No. 209-21E.*

Dear Counsel:

I have reviewed the materials filed in connection with the petition of appeal and motion for emergent relief filed by the Paterson Board of Education (Paterson) in the above-captioned matter. Paterson is appealing the New Jersey State Interscholastic Athletic Association's (NJSIAA) determination that S.V. is required to sit out four football games this season, as well as 30 days of basketball, based on the fact that he transferred from Manchester Regional High School to Eastside High School without a bona fide change of address. The Transfer Rule is addressed in Article V, Section 4(K)(2) of the Bylaws and states:

> a. A student-athlete transferring from one secondary school to another, without a bona fide change of residence by that student's parent or guardian, shall be ineligible to participate for a period of thirty (30) calendar days or one half of the maximum number of games

> allowed in the sport by NJSIAA rules (ineligibility period) from the beginning of the regular schedule, whichever is less, in any sport in which the student has previously participated at the varsity level.

Under the Transfer Rule, S.V. would be required to sit out a portion of both the football season and the basketball season because he played both sports while he attended Manchester Regional High School. However, the NJSIAA indicated through the transfer portal that S.V. could "sit 30 days or 4 games in football, or 30 days or 13 games in basketball." Based on that language, Paterson maintains that S.V. believed he had the option of choosing to sit out either part of the football season or part of the basketball season, and therefore he decided to sit out part of the basketball season and he participated in this season's football games. Once the NJSIAA became aware that S.V. had played in three football games, S.V. was directed to sit out the next four football games. Recognizing the ambiguity in its initial notice, the NJSIAA did not impose any penalty on the Eastside football program for playing an ineligible student.

Upon review of the submissions, I have determined that this matter is not properly before me as the NJSIAA rules clearly state that no appeals of the Transfer Rule will be heard. Article V, Section 4(K)(2) of the Bylaws states:

> CL1: Since the thirty (30) days or one half the maximum number of games allowed in a sport by the NJSIAA rules ineligibility period (whichever is less) is intended to serve as a deterrent for students transferring from one school to another without a bona fide parental/guardian change of residence and is one of the most lenient penalties in the United States, appeals will not be heard, regardless of reason.

Further, under *N.J.A.C.* 6A:3-7.1(c), "[t]he Commissioner shall summarily dismiss any petition seeking to appeal a determination of the NJSIAA in an area that is expressly designated as not appealable by the NJSIAA constitution, bylaws or rules and regulations as adopted by member schools pursuant to law." Unfortunately, despite the fact that the NJSIAA's notice of the specific sit-out requirements in this case was erroneous, I am precluded from adjudicating this matter because the Transfer Rule is not appealable. However, given the fact that the NJSIAA clearly made a mistake and that S.V. has already been forced to sit out two football games through no fault of his own, I strongly encourage

the NJSIAA to reconsider its position for the remaining two football games that S.V. is being directed to miss.

Accordingly, the petition of appeal is hereby dismissed.[1]

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner of Education

c: State Law Library

VIA EMAIL ONLY

Decision No.: 209-21E
Date of Mailing: October 6, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

210-21

210-21

New Jersey Commissioner of Education

Final Decision

V.L., on behalf of minor children, N.D. and D.D.,

Petitioner,

v.

Board of Education of the Borough of Island Heights, Ocean County,

Respondent.

Synopsis

Petitioner appealed the determination of the respondent Board that her minor children were not entitled to a free public education in the Island Heights School District during the 2020-2021 school year. Petitioner had registered her children in July 2020, stating that the family would be residing with petitioner's mother indefinitely at her home in Island Heights. The Board contended that a subsequent residency investigation revealed that petitioner and the children consistently entered and exited the children's father's home in Toms River and were not living at petitioner's mother's home in Island Heights. The Board filed a counterclaim for tuition for the children's period of ineligible attendance.

The ALJ found, *inter alia*, that: the issue in this case is whether petitioner's children were entitled to enrollment in Island Heights schools for the purpose of receiving a thorough and efficient public education free of charge pursuant to *N.J.S.A.* 18A:38-1; any child between the ages of five and twenty years old is entitled to a free public education in the school district in which he or she is domiciled, *N.J.S.A.* 18A:38-1(a); here, petitioner acknowledged that she and her children did not live in Island Heights for the period of September 8, 2020 through October 30, 2020; and their intent to move to Island Heights is not consistent with the regulations which require that petitioner and her children be currently domiciled within the school district. The ALJ concluded that petitioner and her children were domiciled in Toms River with the children's father from September 8, 2020 to October 30, 2020, and that the Board is entitled to reimbursement of tuition costs for that period in the total amount of $8,526.44.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. The petitioner was ordered to reimburse the Board for tuition in the amount of $8,526.44 for the period from September 8, 2020 to October 30, 2020. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

210-21
OAL Dkt. No. EDU 01550-21
Agency Dkt. No. 228-10/20

New Jersey Commissioner of Education

Final Decision

V.L., on behalf of minor children,
N.D. and D.D.,

Petitioner,

v.

Board of Education of the Borough of
Island Heights, Ocean County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.[1]

Petitioner enrolled her children in the Island Heights school district in July 2020, stating that she and her children would be residing at her mother's home indefinitely. A residency investigation conducted by the district demonstrated that petitioner and the children consistently entered and exited the children's father's home in Toms River, and never entered or exited petitioner's mother's home in Island Heights. The district sent petitioner a notice of removal, and she filed a petition of appeal. Following a hearing, the Administrative Law Judge (ALJ) concluded that petitioner and her children were domiciled in Toms River from September 8, 2020 to October 30, 2020, and that the Board is entitled to reimbursement of tuition costs for that period.

[1] The Board did not file a reply to petitioner's exceptions.

In her exceptions, petitioner argues that the Initial Decision failed to acknowledge petitioner's claims that the Board selectively enforces residency rules on the basis of race and/or disability. Petitioner also takes issue with several alleged inaccuracies in the Initial Decision, including the location and dates of the investigation. Finally, petitioner requests that any calculation of tuition reflect that the period of ineligibility included virtual and half days.

Upon review, the Commissioner concurs with the ALJ's finding that petitioner failed to sustain her burden of establishing that she was a domiciliary of Island Heights from September 8, 2020 through October 30, 2020. Petitioner acknowledged that she and her children did not reside in the district during that time, and their intent to move there is insufficient to establish domicile. In *K.L. v. Board of Education of the Borough of Kinnelon*, 2010 *N.J. Super. Unpub.* LEXIS 11 (App Div. January 4, 2010), the Appellate Division found that although the petitioners in that case had purchased a home in Kinnelon, they did not reside in the district, as they could not occupy the home during renovations. The court explained:

> We think it obvious from these general principles that petitioners and their children were never domiciled in Kinnelon. While they may have possessed a present intention to reside there when the renovations were complete, it is undisputed that petitioners and their children never did reside in the district during the 2007-2008 school year. As such, their intention to do so is irrelevant. They had never established an "actual and physical . . . abode" in Kinnelon, and therefore they lacked the "necessary concurrence of physical presence and an intention to make that place one's home" upon which the legal concept of domicile rests.
>
> *[Id.* at *13-14 (quoting *In re Unanue*, 255 *N.J. Supra.* 362, 376 (Law. Div. 1991), *aff'd,* 311 *N.J. Super.* 589 (App Div.), *certif. denied,* 157 *N.J.* 541 (1998), *cert. denied,* 526 *U.S.* 1051 (1999)).]

Following this principle, petitioners' argument that they "intended" to live in Island Heights, while actually living in Toms River, lacks merit. Whether or not petitioners hoped to move into Island Heights does not change the fact that they had not taken up an actual and physical abode

in the district. While petitioner's move was allegedly delayed due to the failure of the former tenant of the home to vacate the premises, rather than the need for renovations that was at issue in *K.L.*, the Commissioner does not find that this distinction warrants a different conclusion.

Additionally, as the ALJ found, petitioner and her children were not displaced from the Island Heights address, because they did not live there until November 1, 2020. The inability of petitioner's mother to evict the former tenant due to the Covid-19 eviction moratorium does not equate to a displacement. Accordingly, petitioner has not met the requirements for a finding of family crisis that would permit them to attend school in Island Heights pursuant to *N.J.S.A.* 18A:38-1.1. Because petitioner was not domiciled in Island Height or experiencing a family crisis, the Commissioner concurs with the ALJ's conclusion that the children were not entitled to a free public education in the district's schools during that time.

Petitioner's exceptions briefly refer to her allegations regarding discrimination by the Board, without further explanation. Having reviewed the pleadings below – in which petitioner claimed that students who are not members of a racial minority reside out of district but have been permitted to enroll in the district – the Commissioner does not find them persuasive. Petitioner acknowledged that she and her children did not reside in the district until November 1, 2020, making the children ineligible for a free public education in the district's schools during that time as a matter of law. The possible treatment of other students by the Board is irrelevant to the conclusions reached herein. Furthermore, the alleged inaccuracies in the Initial Decision listed in petitioner's exceptions are minor and do not change the application of the residency rules or the outcome of this matter.

Finally, the Commissioner concludes that there is no basis for a reduction in the tuition reimbursement based on the fact that the school days at issue may have been virtual

and/or half days. Calculation of tuition reimbursement is governed by *N.J.S.A.* 18A:38-1b, and the Commissioner has no discretion to alter that calculation. Moreover, the Commissioner notes that a typical school year often includes a number of half days, a fact of which the legislature was surely aware when it chose not to include any different calculation for half days in the statute.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor children were ineligible to attend school in the district. Therefore, the Board is entitled to tuition reimbursement in the amount of $8,526.44 for the period from September 8, 2020 through October 30, 2020,[2] during which time petitioner's minor children were ineligible to attend school in Island Heights.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $8,526.44 for the period from September 8, 2020 through October 30, 2020, for tuition costs incurred during the time period in which N.D. and D.D. were ineligible to attend school in Island Heights. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 7, 2021
Date of Mailing: October 7, 2021

[2] This period totals 38 school days, at a per diem tuition rate of $112.19 for each child.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01550-21
AGENCY DKT. NO. 228-10/20

V.L. on behalf of minor children N.D. and D.D.,
Petitioner,
v.
BOROUGH OF ISLAND HEIGHTS BOARD OF EDUCATION, OCEAN COUNTY,
Respondent.

Matthew J. Lang, Esq, for petitioner

Danielle Panizzi, Esq., for respondent (Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys)

Record Closed: July 16, 2021 Decided: August 30, 2021

BEFORE **MARY ANN BOGAN,** ALJ:

STATEMENT OF THE CASE

Petitioner V.L. on behalf of her two children, N.D. and D.D. challenges the decision of respondent, Borough of Island Heights Board of Education, Ocean County (Board), that minor children N.D. and D.D., were non-resident students, and were not eligible to attend school within the Island Heights District (District), pursuant to N.J.S.A. 18A:38-1, and its accompanying regulations, N.J.A.C. 6A:1-1 et. seq. from September 8, 2020 to October 30, 2020. Respondent requests tuition for the days D.D. and N.D. attended the district as non-resident students.

PROCEDURAL HISTORY

On October 28, 2020, V.L. filed a petition with the Commissioner of the New Jersey Department of Education pursuant to N.J.S.A 18A:6-9. On or after November 30, 2020, respondent filed a motion to dismiss in lieu of an answer. This motion was not decided by the Commissioner and was transmitted with the petition on February 11, 2021, to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. At the request of the parties a settlement conference took place. Thereafter the hearing took place on July 16, 2021, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

The following facts were undisputed, and I therefore **FIND** the following **FACTS:**

1. On or about May 6, 2020, petitioner, V.L. parent, posted on Facebook, "[d]oes anyone know if there is any administration at the elementary school? I want to get my kids on the out of town waiting list, but when I go to the website, I only see a registration packet not a[n] application. Does anyone know if this is what I would fill out?" (J-1.)

2. On or about July 22, 2020, petitioner submitted an application for enrollment for her children N.D. and D.D. at Island Heights Grade School which stated they reside at [redacted to maintain privacy] Island Heights, and included a letter from her mother, J.L., which states, "This letter is to inform my daughter V.L. and her two sons' D.D. and N.D. will be residing in my home at [redacted to retain privacy], indefinitely as their main residence." The packets also indicated the children's father resided at Bark Street in Toms River. (J-2, J-3, J-4.)

3. The Board initiated a residency investigation which included surveillance of residences at Bark Avenue, Toms River and the Island Heights address. (J-6, 7, 8.)

4. The investigation indicated that N.D. and D.D. consistently entered and exited the home at Bark Street in Toms River during the residency investigation and neither the petitioner nor D.D. or N.D. were observed entering or exiting the home located in Island Heights.

5. On September 22, 2020, the Board issued a preliminary notice of ineligibility and removal to petitioner based upon the results of the residency investigation. (P-9.)

6. On October 14, 2020, the petitioner and the Board participated in the formal residency hearing as to petitioner's residency in the Borough of Island Heights.

7. Petitioner's Jersey Central Power and Light utility bill and a job work order lists the Island Heights home as petitioner's address. (R-11, 12.)

8. Petitioner's New Jersey Department of Motor Vehicle Commission issued driver's license lists a P.O. Box in Island Heights as petitioner's address. (P-13.)

9. On October 15, 2020, the Board issued a Final Notice of Ineligibility stating that D.D. and N.D. are not domiciled in Island Heights and are not eligible for a free public education. (J-14.)

10. On or around November 9, 2020, petitioner submitted to the Board an affidavit that states as of November 1, 2020, petitioner and her children N.D. and D.D. are residing at a home in Island Heights. (J-16.)

11. On August 24, 2020, Ocean County Health Department wrote to petitioner at Bark Street setting forth guidelines for managing the onset of COVID. (J-17.)

12. The per diem rate of tuition for general education students enrolled in the respondent's school district is $112.19.

13. N.D. and D.D. were ineligible for thirty-eight days of school between September 8, 2020 and October 30, 2020.

TESTIMONY

Timothy Rehm, Superintendent Principal, stated that the District takes at "face value" any and all documents submitted on behalf of incoming students who are registered to attend school in Island Heights. Here a letter submitted on behalf of N.D. and D.D. stated that the students would be living in Island Heights "indefinitely" by the start of the school year. The concern for N.D. and D.D.s' residency started after the school year began when the students and also parent V.L. made statements indicating that they lived outside of the District. An investigation commenced in and around September 17, 2020 and determined that the family did not live in Island Heights. Thereafter the petitioner admitted that the family did not live in Island Heights until November 1, 2020. Mr. Rehm explained the entry in the investigation report dated August 17, 2020, is a typo[1] and should be September 17, 2020. The administrator conducting the investigation did not work in August, and the District did not have a concern about the students' residency as it was not known at that time that there was a question about where they lived.

For Petitioner

Patrick Ferraro is a former subtenant at the Island Heights house from approximately October 2019 to June or July 2020. He entered into a month-to-month lease agreement with the tenant, "Nicole." He stated the owner of the home asked him to move out in the summer 2020 so that V.L. and her children could move in. V.L. and her children did not live in the home during the time that he lived there.

[1] The District's residency determination letter indicates that the investigation took place between August and September 2020.

V.L., mother of N.D. and D.D. testified that the family lives in Island Heights in a home that has been in her family for thirty-four years. She previously lived in Toms River. She wanted to move to Island Heights so that her sons could attend a smaller school. Her mother suggested she could "come home" and live in the home. At that time, "Nicole" a family friend lived there. In and around June or July 2020, V.L.'s mother notified "Nicole" that she could live there until the end of August 2020, so long as she allowed renovation work to take place in the home. The other tenants were notified to leave by July 2020.

V.L. explained that she intended to return to her childhood home in time for the school year. She relied on a work order dated August 27, 2020 and an electric bill for services at the Island Heights home dated July 15, 2020 in her name, to demonstrate her intent to live there. Near the end of August 2020, she learned that "Nicole" refused to leave the home by the end of the month. The move was also delayed because at the beginning of August 2020 she was diagnosed with COVID-19.

She never suspected a residency issue until in and around mid-September when she learned that her son was "interrogated" about where he lived. Then on September 22, 2020, she received a letter of ineligibility from the District. That same day, she asked Mr. Rehm if she could have thirty days to get the tenant to leave the home. She also asked the tenant to allow her to move in and sublet rooms, but the tenant did not agree.

V.L. acknowledged that she began living in Island Heights on November 1, 2020. She informed the District that she had no intention of changing her driving license or mailing address that has the Toms River address because she does "not have time," it is "easier" to get the mail in Toms River because otherwise she would need to "track" her mother down to get the Island Heights mailbox key, and she had "no intention" of severing ties with her Toms River home. The delay in moving to Island Heights was caused by the tenant. She "planned" to live there, she bought supplies to renovate the property and she arranged for furniture delivery.

She acknowledged that her Facebook posts states "I am in Silverton with Dan and the kids. Looking for home in Island Heights but could not find a pool not necessary but want to find

my own home." She also posted that she bought the house for a "steal" and was reluctant to purchase because of the price. She continues to look for new homes "all the time."

Petitioner thinks she completed the "Choice" paperwork application, but the school did not have seats in the grade her son was attending.

J.L., mother of V.L., owns the home in Island heights where her daughter currently resides with N.D. and D.D. In the beginning of June 2020 she started talking about V.L. moving in. At that time a tenant named "Nicole" lived in the home along with two subtenants, she later learned. "Nicole" paid $1,000 per month plus utilities. At that time she told Nicole that she needed to go back home and they needed to leave, by September 1, 2020 so her daughter could live in the home by September. There was some "push back" and then she learned that due to COVID "my hands were tied." She could not evict the tenant and V.L. could not gain access to the home by the start of the school year.

LEGAL ANALYSIS AND CONCLUSIONS

The issue is whether petitioner's children N.D. and D.D. were entitled to be enrolled in the Borough of Island Heights School District for purposes of receiving a thorough and efficient public education free of charge pursuant to N.J.S.A. 18A:38-1. If not, should the respondent's request for tuition reimbursement for thirty-eight days at the beginning of the 2020-2021 school year be granted.

Any child between the ages of five and twenty years old is entitled to a free public education in the school district in which he is domiciled. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). See, V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom.; Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education).

The domicile of an unemancipated child is that of his parent, custodian or guardian. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001); P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001). A child may also be considered domiciled in a school district if he lives with an adult domiciled in that school district, as long as the child is financially supported by that adult as if he were their own child, upon submission of a sworn affidavit to the board of education. N.J.S.A. 18A:38-1(b)(1).

The acts, statements and conduct of the individual, as viewed in the light of all the circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent, or in this case, petitioner V.L., has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2).

When a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal for the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

A student's "domicile" is where the student's parent or guardian has a permanent home in the school district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1); State v. Benny, 20 N.J 238, 250 (1955); In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999).

When a person arguably has more than one residence, there are factors to consider in determining his or her domicile: the physical characteristics of each place; the time spent and the things done in each place; the other persons found there; the person's mental attitude

towards each place; and whether or not there was an intention, when absent, to return to that address. Mercadante v. City of Paterson, 111 N.J. Super. 35, 39–40 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). "[A] choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." In re Unanue.

In the within matter, petitioner acknowledged that she and her children did not reside within the Borough of Island Heights during the period of September 8, 2020 through October 30, 2020. Their intent to move into Island Heights is not consistent with the regulation which requires that the petitioner and her children be currently domiciled in the District and when absent intend to return to the home located in the District. Moreover, intention when absent to return to the home located in the District that was once a childhood home does not satisfy the regulatory requirement even when the home is owned by a petitioner's parent.

Based on N.J.A.C. 6A:22-3.1(a)(1) and the analyses in State v. Benny, and In re Unanue, if the Toms River address is where petitioner returned to on a daily basis, and where petitioner resided with her husband, as well as with her two children, then petitioner was domiciled in Toms River from September 8, 2020 to October 30, 2020. As unemancipated children, N.D. and D.D.'s domicile would be the same as their parents. Somerville Bd. of Educ. v. Manville Bd. of Educ.,

Petitioner's assertion that the COVID-19 pandemic caused the family to be *displaced* because they were unable to evict the tenant from the property due to Governor Murphy's Executive Order prohibiting the eviction of a tenant from residential property is unconvincing. The regulation addressing displaced families is inapplicable to the facts herein. In accordance with

N.J.A.C 6A:22-3.2

> (h) a student who is not considered homeless...and who moves to a new school district during the academic year as a result of a family crisis shall be permitted to remain enrolled in the original

> school district of residence for the remainder of the school year without the payment of tuition.
>
> 1. For purposes of this subsection, "family crisis" shall include, but not be limited to:
>   iii. An unplanned displacement from the original residence such as fire, flood, hurricane, or other circumstances that render the residence uninhabitable.

Here the family was not "displaced" from the home located in the Borough of Island Heights because they were not domiciled in that home.

Accordingly, **I CONCLUDE** by a preponderance of the credible evidence that petitioner and her children N.D. and D.D., were domiciled in the Borough of Toms River from September 8, 2020 to October 30, 2020. Therefore, N.D. and D.D. were ineligible to receive a free public school education in the Borough of Island Heights during that time period.

The respondent Board of Education asserts that it is entitled to be reimbursed for tuition for the period of N.D. and D.D.'s ineligible enrollment in its school. When, as here, the evidence does not support the petitioner's claim for a free public education, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

> If in the judgment of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

N.J.S.A. 18A: 38-1(b) similarly requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

Out-of-District tuition for N.D. and D.D.'s attendance at Island Heights School District was $112.19 per day, for thirty-eight days, for a total of $8,526.44.

Based upon the facts and the legal principles cited above, I **CONCLUDE** that respondent is entitled to reimbursement for the costs of tuition in the amount of $8,526.44.

ORDER

It is hereby **ORDERED** that respondent's determination that petitioner's children were ineligible for a free education in the Borough of Island Heights for the time period of September 8, 2020 through October 30, 2020, is hereby **AFFIRMED.**

It is **ORDERED** that petitioner, V.L., pay to respondent, the Board of Education of the Borough of Island Heights, tuition in the amount of $8,526.44, for the time period of September 8, 2020 through October 30, 2020.

Petitioner's appeal is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 30, 2021
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: August 30, 2021

Date Mailed to Parties: August 30, 2021

MAB/nd

APPENDIX

WITNESSES

For Petitioner:

V.L.

J.L.

For Respondent:

Timothy Rehm

EXHIBITS

Joint Exhibits:

J-1 Facebook Post from V.L., dated May 6, 2020

J-2 Letter from J.L., re: [redacted] Vansant Avenue and attachment, dated July 22, 2020

J-3 School Registration Packet-N.D., dated July 22, 2020

J-4 School Registration Packet-D.D., dated July 22, 2020

J-5 Letter from T. Rehm to V.L. re: Parental Access to Student Records, Attendance at Activities, dated August 6, 2020

J-6 Emails from T. Reham, E. Smutz, J. Mekles, and C. Thomas re: residency investigation, dated September 17, 2020

211-21

211-21

New Jersey Commissioner of Education

Final Decision

N.S., on behalf of minor child, S.S.-B.,

Petitioner,

v.

Board of Education of the Borough of Magnolia, Camden County,

Respondent.

Synopsis

Pro se petitioner appealed the determination of the respondent Board that N.S. no longer resides in Magnolia – the family having relocated in April 2020 to North Carolina at the beginning of the COVID 19 pandemic – and, therefore, S.S.-B. was not eligible to receive a free public education in the Magnolia public schools during the 2020-2021 school year. The Board filed a motion for summary decision and sought tuition reimbursement for the period of S.S.-B.'s ineligible attendance.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; during the 2020-2021 school year, S.S.-B. remained enrolled in the Magnolia school district and attended school remotely despite the fact that the family had relocated to North Carolina in April 2020; petitioner and his family are living out of state with S.S.-B.'s grandmother, and are not homeless; and petitioner has indicated that S.S.-B will not return to the Magnolia residence until such time as there is a "safe" COVID 19 vaccine for children. The ALJ concluded that S.S.-B. was not entitled under *N.J.S.A.* 18A:38-1(a) to attend school in Magnolia during the 2020-2021 school year. Accordingly, the ALJ granted summary decision to the respondent and ordered that petitioner reimburse the Board $18,599.40 for tuition costs associated with the attendance of S.S.-B. in the Magnolia Township school district for the 2020-2021 school year.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision as the final decision in this matter. In so doing, the Commissioner directed – pursuant to *N.J.S.A.* 18A:38-1b – that petitioner reimburse the Board in the amount of $18,599.40 for tuition costs incurred during the 2020-2021 school year, when S.S.-B. was not eligible to attend school in Magnolia.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

211-21
OAL Dkt. No. EDU 01430-21
Agency Dkt. No. 15-1/21

New Jersey Commissioner of Education

Final Decision

N.S., on behalf of minor child, S.S.-B.,

Petitioner,

v.

Board of Education of the Borough of Magnolia, Camden County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain his burden of establishing that he was a domiciliary of Magnolia during the 2020-2021 school year. The Commissioner further concurs with the ALJ's conclusion that the minor child was, therefore, not entitled to a free public education in the District's schools during that time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in the District. Therefore, the Board is entitled to tuition reimbursement in the amount of $18,599.40 for the 2020-2021 school year, during which time petitioner's minor child was ineligible to attend school in Magnolia.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $18,599.40 for the 2020-2021 school year, for tuition costs incurred during the time period in which S.S.-B. was ineligible to attend school in Magnolia. The petition of appeal is hereby dismissed.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 7, 2021
Date of Mailing: October 7, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 01430-21
AGENCY DKT. NO. 15-1/21

N.S. ON BEHALF OF MINOR CHILD,
S.S-B.,
Petitioner,
v.
BOROUGH OF MAGNOLIA BOARD
OF EDUCATION, CAMDEN COUNTY,
Respondent.

N.S., on behalf of minor child, S.S.-B., petitioner, pro se

William C. Morlock, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: August 20, 2021 Decided: August 26, 2021

BEFORE **CATHERINE A. TUOHY**, ALJ:

STATEMENT OF THE CASE

Petitioner N.S., the father of minor child S.S.-B., appeals the determination by the respondent Borough of Magnolia Board of Education, Camden County (the "Board") that S.S.-B. did not reside within the Borough of Magnolia School District since April of 2020, and that tuition reimbursement is required. The Board alleges that the minor child S.S.-

B. was not residing at the address provided by the petitioner and seeks repayment of tuition. At issue is whether S.S.-B. was entitled to be enrolled in the district for purposes of receiving a thorough and efficient public education free of charge for the 2020-2021 school year, pursuant to N.J.S.A. 18A:38-1.

PROCEDURAL HISTORY

By letter, dated January 8, 2021, the Board notified N.B. that S.S.-B. was ineligible to continue to attend school within the district as they were no longer domiciled in the District consistent with N.J.S.A. 18A:38-1. The petitioner filed a pro se residency appeal on or about January 25, 2021. The Board filed an answer and counterclaim for tuition on February 2, 2021. The Department of Education Office of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) where it was filed on February 4, 2021 as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Several telephone conferences were conducted, and discovery was exchanged. The Board filed a motion for summary decision on June 22, 2021. An email was sent to the parties confirming the filing of the summary decision motion and advising petitioner that any opposition would need to be filed by July 12, 2021. A follow-up email was sent to the parties on August 20, 2021. Petitioner has not filed any opposition to the summary decision motion.

STATEMENT OF FACTS

The facts are not in dispute, and I **FIND**:

Petitioner and S.S.-B. were residing in Magnolia Township until the family left the Township in approximately April 2020 and "fled" to North Carolina due to COVID-19 as the cases were fewer there compared to New Jersey. (See April 14, 2020, email from S.S.'B.'s mother to district employee Ms. Augustine, attached to Certification of Counsel as Exhibit E.) Petitioner still maintains a lease in Magnolia although they have not resided there since the family left for North Carolina in April 2020. The petition, as well as answers to interrogatories (attached to Certification of Counsel as Exhibit B) indicated that S.S.-B. is a cancer survivor with a heart condition who is susceptible to air- borne illness and the

residents of their apartment building were not adhering to all safety protocols. Petitioner further indicated that since the pandemic he had been having difficulty getting a job. S.S.-B.'s grandmother lives in North Carolina and offered them financial assistance and took them in. Petitioner's residency appeal was notarized by a notary in Mecklenberg County, North Carolina on January 25, 2021. Petitioner N.S. has since obtained employment in North Carolina with the State of North Carolina. (See April 16, 2021, email of William Morlock to S.S.-B.'s parents attached to Certification of Counsel as Exhibit C.) S.S.-B. has not slept in their Magnolia, N.J. residence since the family left for North Carolina in approximately April of 2020. Petitioner has indicated that S.S.B. will not return to reside in Magnolia until there is a safe COVID vaccine for children. (See answer to interrogatory #10, Exhibit B to Certification of Counsel.) Petitioner responded to a request for admissions on May 24, 2021, and admitted that they are not homeless. (Exhibit A to Certification of Counsel.)

I also **FIND** as fact that the per pupil tuition rate for the Magnolia Township Board of Education for the 2020-2021 school year was $103.33 a day and that there were 180 school days in the 2020-2021 school year, amounting to annual tuition of $18, 599.40 for the 2020-2021 school year. (See annexed Certification of Greg Gontowski, Business Administrator.)

I further **FIND** as fact that S.S.-B. was not domiciled in the district during the 2020-2021 school year.

LEGAL ANALYSIS

A motion for summary decision shall be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are

sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 252. I **CONCLUDE** that this matter is ripe for summary decision.

The issue in this appeal is whether S.S.-B. had been a domiciled student in the Magnolia School District during the 2020–2021 school year. It is clear from the record that he has not, since he and his family relocated to North Carolina in April of 2020.

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including individuals who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is the domicile of the parent, custodian, or guardian. P.B.K. ex rel. minor child E.Y. v. Bd. of Educ. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001). Thus, a child would routinely attend school in the district where his or her parents live. The petitioner has the burden of proof in a determination of residency eligibility. N.J.S.A. 18A:38-1(b)(2).

From the evidence submitted, it is clear that S.S.-B. has not been domiciled in the district while attending school there. On April 14, 2020 S.S.-B.'s mother sent a text message to a district employee, Ms. Augustine, confirming their relocation to North Carolina. N.S. has since obtained employment with the State of North Carolina. The family has been residing in North Carolina since April 2020, to the present time. It is clear that petitioner's domicile is now in North Carolina where they have been residing for more than one year. Petitioner's employment with the state is further evidence that he intends for it to be his true, fixed, permanent home and principal establishment, and to which whenever he is absent, has the intention of returning.

N.J.A.C. 6A:22-3.1(a)(1) provides as follows:

> A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.

S.S.-B. was not domiciled in the district during the 2020-2021 school year. Accordingly, I **CONCLUDE** that respondent is entitled to summary decision that S.S.-B. was not entitled to attend school in the district and receive a free public education there during that time frame pursuant to N.J.S.A. 18A:38-1(a).

A school board is entitled to recover tuition from a parent or guardian of a child found ineligible to attend a school in its district. N.J.S.A. 18A:38-1(b)(2). S.S.-B. was not entitled to a free public education in the Magnolia Township district based upon the above. Tuition for school year 2020-2021 was $18,599.40 (180 school days x $103.33 per pupil tuition rate per day.) Therefore, I further **CONCLUDE** that respondent is entitled to summary decision on its counterclaim for reimbursement from N.S. for the cost of providing an education to S.S.-B. in the sum of $18,599.40 for the 2020-2021 school year.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that respondent's motion for summary decision is **GRANTED;** that the petition of N.S. o/b/o S.S.-B., is hereby **DISMISSED;** and that respondent's counterclaim be **GRANTED.** It is further **ORDERED** that N.S. reimburse respondent the total sum of $18, 599.40 for tuition costs associated with the attendance of S.S.-B. in the Magnolia Township school district for the 2020-2021 school year.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 26, 2021
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: August 26, 2021

Date Mailed to Parties: August 26, 2021

CAT/tat

Appendix

Exhibits

For Petitioner:

None

For Respondent:

Notice of Motion for Summary Decision; Brief in Support of Respondent's Motion for Summary Decision; Certification of Counsel with attached Exhibits A – E; and Certification of Greg Gontowski

212-21

212-21

New Jersey Commissioner of Education

Final Decision

Howard Walker,

Petitioner,

v.

Board of Education of the City of East Orange, Essex County,

Respondent.

Synopsis

Petitioner has been employed as a principal in the respondent Board's school district since the 2004-2005 school year, initially at the Garvin Elementary School from July 2005 through the end of the 2015-2016 school year. Petitioner was subsequently transferred to the position of principal at the Healy Middle School (Healy). Due to a "partially effective" evaluation of his performance for the 2016-2017 school year at Healy, petitioner was placed on a Corrective Action Plan (CAP) and his increment was withheld for the 2017-2018 school year. Subsequently, his increment for the 2018-2019 school year was also withheld, based again on a "partially effective" performance evaluation. Petitioner filed an appeal challenging the withholding of his increment for the 2018-19 school year, contending that the evaluation process was not proper and that the decision to withhold his increment was arbitrary and capricious.

The ALJ found, *inter alia*, that: The Board was arbitrary, capricious and unreasonable in withholding petitioner's increment; further, the Board acted in an unfair and prejudicial manner when it placed the petitioner on a CAP almost immediately after transferring him to Healy – a lower performing school that had been identified as in need of comprehensive support; and petitioner was not given clear and transparent direction regarding what was expected of him in his new assignment as principal at Healy. The ALJ concluded that the District's Assistant Superintendent, who served as petitioner's evaluator, was subjective rather than objective in her evaluations of petitioner, and that the petitioner is a "good educator," despite "personal traits that make him appear that he is better or smarter than those around him." As such, the ALJ reversed the Board's withholding of petitioner's increment for the 2018-19 school year.

Upon review, the Commissioner found, *inter alia*, that: the Board was not arbitrary, capricious, or unreasonable in withholding petitioner's increment for the 2018-19 school year; pursuant to *N.J.S.A.* 18A:29-14, a board may withhold "for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year."; in this case, there is sufficient evidence in the record to support the Board's decision to withhold petitioner's increment for the 2018-19 school year based on performance. The Commissioner disagreed with the ALJ's finding that petitioner was not given clear direction regarding job expectations in his position at Healy, as Dr. Walker had more than 10 years of experience as a principal and should have been well aware of the expectations of that position, regardless of his school assignment. Accordingly, the Initial Decision of the OAL was rejected and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

212-21
OAL Dkt. No. EDU 15251-18
Agency Dkt. No. 202-8/18

New Jersey Commissioner of Education

Decision

Howard Walker,

Petitioner,

v.

Board of Education of the City of East Orange, Essex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the respondent Board in accordance with *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto.

Petitioner is a principal employed by the Board of Education of the City of East Orange (Board). He has worked for the school district since 1989, rising to the rank of principal in the 2004-05 school year. Petitioner served as principal of Garvin Elementary School from July 2005 through the end of the 2015-16 school year, at which time he was transferred to the position of principal of the Healy Middle School (Healy). Due to a "partially effective" performance evaluation for 2016-17, petitioner was placed on a Corrective Action Plan (CAP) and his increment was withheld for the 2017-18 school year. At the end of the 2017-18 school year, Assistant Superintendent Deborah Harvest recommended that his increment be withheld again for the 2018-19 school year. Petitioner filed an appeal challenging the withholding of his increment for the 2018-19 school year.

Following a hearing, the Administrative Law Judge (ALJ) found that the Board was arbitrary, capricious and unreasonable in withholding petitioner's increment. The ALJ concluded that Dr. Harvest was subjective, rather than objective, in her evaluations of petitioner, and that petitioner is a "good educator," despite "personal traits that make him appear that he is better or smarter than those around him." (Initial Decision at 12). The ALJ further found that it was unfair and prejudicial of the Board to place petitioner on a CAP almost immediately after transferring him to Healy, without a "clear and transparent directive... about what was expected of him." *Ibid.* As such, the ALJ reversed the Board's withholding of petitioner's increment for the 2018-19 school year.[1]

In its exceptions, the Board argues that it acted in accordance with *N.J.S.A.* 18A:29-14 when it withheld petitioner's 2018-19 increment due to performance issues. The Board argues that the ALJ improperly found that the Board did not give petitioner adequate time to adjust when he was transferred to Healy before placing him on a CAP. The Board cites to *Nortiza Andino, et al. v State Operated School District of the City of Jersey City, Hudson County*, Commissioner's Decision No. 388-98 (September 4, 1998) for the proposition that being transferred to a new position does not make an increment withholding arbitrary, capricious or unreasonable. In that case, one teacher was transferred from third to first grade only a few days before being evaluated. While the ALJ found that her increment should not be withheld because the teacher had not received training in the position, the Commissioner upheld the increment withholding, finding that her performance had been found to be below the acceptable level for an elementary teacher on two occasions and that evaluations "go to the very core of her job as a teacher, irrespective of the grade she is responsible for teaching." *Id.* at 31. As such, the Board

[1] The Initial Decision ordered that petitioner's increment withholding for the 2017-18 school year be reversed. This appears to be a typographical error as the increment being challenged in this matter is for the 2018-19 school year.

argues that petitioner's evaluations go to the core of his job as a principal, regardless of what school he is overseeing. Additionally, the Board points out that petitioner was evaluated three times during the 2017-18 school year as a result of his CAP – twice by Dr. Harvest and once by another administrator – and he received the "partially ineffective" rating due to his scores, justifying his increment withholding. Accordingly, the Board urges the Commissioner to reject the Initial Decision.

In reply, petitioner argues that the ALJ correctly reversed the 2018-19 increment withholding because Dr. Harvest based her evaluations of his performance on unclear criteria and overlooked his efforts to improve Healy. Petitioner points out that such efforts resulted in the removal of Healy from "comprehensive" status (*i.e.*, lower performing schools that the Department of Education has identified as needing comprehensive support) in January 2019. Petitioner argues that Dr. Harvest conducted her evaluations of petitioner in bad faith as she failed to give him any credit for improvements he had made at Healy. Petitioner agrees with the ALJ that Dr. Harvest failed to provide clear direction about what was expected of petitioner, so the increment holding was unjust, unfair, and arbitrary. As such, petitioner asks the Commissioner to adopt the Initial Decision.

Upon a comprehensive review of the record, the Commissioner finds that the Board did not act in an arbitrary, capricious, or unreasonable manner when it withheld petitioner's increment for the 2018-19 school year. Pursuant to *N.J.S.A.* 18A:29-14, a board may withhold "for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year." Teachers are not entitled to salary increments; rather, increments are a reward for meritorious service. *North Plainfield Education Association v. Board of Education of the Borough of North Plainfield*, 96 *N.J.* 587, 593 (1984). The decision

to withhold an increment for teachers who have not performed well is a management prerogative. *Ibid.* As such, when challenging an increment withholding, a teacher has the burden to demonstrate that the board acted arbitrarily, without rational basis or induced by improper motives. *Kopera v. Board of Education of the Town of West Orange*, 60 *N.J. Super.* 288, 294 (App. Div. 1960).

Here, there is sufficient evidence in the record to support the Board's decision to withhold petitioner's increment for the 2018-19 school year based on performance. Petitioner had three evaluations during the 2017-18 school year – two by Dr. Harvest and one by another administrator – which resulted in a summative rating of 2.65, or a performance ranking of "partially effective." The evaluations use a rubric with scores of "ineffective," "developing," "effective," or "highly effective" for a variety of domains. In examining all three of his evaluations, petitioner received a combination of "developing" and "effective" ratings, with one "ineffective" rating and no "highly effective" ratings. The rubric scores were supported with notes from the evaluators justifying the rating and providing guidance on how to improve. The evaluators conducted site visits of the school prior to completing the evaluations. Dr. Harvest testified that the purpose of the site visit is to go through the building and visit classrooms to gain a visual perspective on what is occurring in the school and how that relates to the domains in the principal's evaluation. For example, during her site visit on February 20, 2018, Dr. Harvest conducted a walk-through of the building and classrooms, and testified that:

> [T]his was the worst that it has ever, ever been. Just room to every single room that I went in I was not able – it was just totally mind boggling. I did not observe any instruction at all in about 6 or 7 rooms. The kids were absolutely out of control. And not only were they out of control, the teachers weren't doing anything. It was like they were just sitting there and just letting it happen. So halfway through it, his assistant principal joined me. And so, she was there, after room after room after room that we visited. I

> wasn't able to observe instruction because there were extreme discipline concerns. And we spent about 15 minutes in one teacher's classroom, who had two teacher assistants in there with her. And that classroom was tote – I had to take over the classroom. It was totally out of control. Totally.
>
> [Testimony of Deborah Harvest, T2 at 195-96, December 16, 2020.]

What Dr. Harvest witnessed on the site visit was reflected on petitioner's subsequent evaluation, as petitioner was rated "ineffective" with respect to the school's learning environment and a note describing what Dr. Harvest observed during her school walk-through of the classrooms appeared beneath the rating. Accordingly, upon consideration of the comprehensive evaluations, which included justifications for the ratings that resulted in a "partially effective" final summative assessment, the Commissioner cannot find that the Board was arbitrary, capricious, or unreasonable in its decision to withhold petitioner's increment for the 2018-19 school year.

The Commissioner disagrees with the ALJ's conclusions. The ALJ focused on the limited amount of time available to petitioner to become acclimated to his new assignment at Healy before he was evaluated. The Commissioner agrees with the Board that, as in *Nortiza Andino, et al. v State Operated School District of the City of Jersey City, Hudson County*, petitioner's duties and responsibilities as a principal remained the same, regardless of which school he was assigned to lead. With petitioner's more than ten years of experience as a principal, this position was not new to him and he was aware of his job expectations. The Commissioner also notes that the increment at issue in this matter was based on petitioner's performance in the 2017-18 school year, which was his second year assigned as principal at Healy.

The ALJ also found that petitioner "never received a true explanation of what criteria were being utilized to evaluate his work at Healy." The Commissioner finds that, with

respect to his evaluations, petitioner had been a principal since the 2004-05 school year and had been evaluated in that role for many years. As such, he should have been well aware of the criteria used in evaluations of principals. Additionally, the ALJ insinuates that a personality conflict between Dr. Harvest and petitioner contributed to Dr. Walker's poor evaluations; however, the Commissioner notes that one of petitioner's evaluations was conducted by another administrator, whose ranking of petitioner was similar to that of Dr. Harvest. With respect to his CAP, there is ample evidence in the record that petitioner had many meetings to develop and discuss his CAP, and that he only completed 63% of his demonstrable goals. However, regardless of whether Dr. Walker understood the CAP or completed the CAP, the Commissioner notes that Dr. Harvest testified that the CAP was not the reason petitioner's increment was withheld; rather, that determination was made based on Dr. Walker's evaluations. (T2 at 118, 206-207).

The ALJ also discusses that petitioner made efforts to improve the school, which resulted in Healy being removed from the "comprehensive" list in January 2019. Additionally, the ALJ notes that following the 2017-18 school year, superintendent Dr. Kevin West was assigned as petitioner's evaluator, and his evaluations improved. The Commissioner notes that while it is positive news that the school was removed from the "comprehensive" list, improvements in petitioner's evaluations conducted by Dr. West in 2018-2019 and the fact that school operations had improved by January 2019 could not have impacted the Board's increment decision at the end of the 2017-18 school year because these improvements had not yet occurred. As such, those factors have no bearing on whether the Board was arbitrary, capricious, or unreasonable in deciding in June of 2018 to withhold petitioner's increment for the 2018-19 school year. Finally, the ALJ found that petitioner is a good educator who is dedicated to

improving the performance of students and the community. While that may be true, the Commissioner notes that petitioner's good intentions fail to demonstrate that his actual performance during the 2017-18 school year did not warrant the withholding of his increment for the 2018-19 school year.

Accordingly, the Initial Decision of the OAL is rejected for the reasons expressed herein. The petition is hereby dismissed.

IT IS SO ORDERED. [2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 7, 2021
Date of Mailing: October 7, 2021

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 15251-18
AGENCY DKT. NO. 202-8/18

HOWARD WALKER,

Petitioner,

v.

CITY OF EAST ORANGE, BOARD OF EDUCATION, ESSEX COUNTY,

Respondent.

Robert M. Schwartz, Esq., petitioner, (Schwartz Law Group, attorneys)

Erdal Turnacioglu, Esq., for respondent (Keenan and Doris, attorneys)

Record Closed: March 10, 2021 Decided: July 16, 2021

BEFORE **ANDREW M. BARON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Dr. Howard Walker contests the 2018 withholding/denial of his annual salary increment in in connection with his employment as a principal by the East Orange School District at the conclusion of the 2018 school year. Among other things, he also contests the manner in which the evaluation process was handled, and the decision to withhold the increment which he contends was arbitrary and capricious.

On or about August 21, 2018, petitioner filed an appeal with the Department of Education regarding the decision by the East Orange School District to withhold his annual salary increment.

On October 5, 2018, East Orange filed an Answer to the petition.

The petition alleges that respondent acted in an arbitrary and capricious manner by withholding Dr. Walker's annual increment at the end of the 2017-18 school year.

The Department of Education transmitted the matter to the Office of Administrative Law for a determination as a contested case. Hearings were conducted on December 3, 2019, and December 16 and 17, 2019. Final submissions were filed on March 5, 2020 and March 10, 2020, then Covid ensued. Oral argument was held on March 10, 2021.

TESTIMONY AND DISCUSSION

Based upon a review of the documentary and testimonial evidence presented and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following pertinent **FACTS** and accept as **FACT** the testimony set forth below.

Petitioner has been employed by the East Orange School District, starting out as In 2004, as a math supervisor since 1989. In 1996, petitioner was promoted to serve as Director of Secondary Education.

While serving in this position, petitioner was then appointed to serve as principal of the Truth Middle School. Shortly after, he became the permanent principal, serving in that position for a year, until he was reassigned to serve as principal of the Garvin Elementary School, where he remained until 2017.

While at Garvin, virtually all of his annual reviews were favorable, and he received normal salary increments each year, until the 2015-16 school year. His review that year was conducted by Assistant Superintendent Deborah Harvest, who had risen through the ranks of administrative positions within the district with Dr. Walker, and now served as Assistant Superintendent. These personnel recommendation accepted by the East Orange Board of Education at its June 17, 2017 meeting. However, the day after the Board acted on Dr. Walker's recommendations, he testified he was called into a meeting with Dr. Harvest and another assistant superintendent. At this meeting, he was told that a recommendation was being made to withhold his increment for the 2017-18 school year due to what Dr. Harvest characterized as "less than effective performance."

Dr. Harvest also determined that for the first time in his long career in East Orange, Dr. Walker should be placed on a Corrective Action Plan, otherwise known as CAP for the coming school year. It should be noted here that during her testimony, Dr. Harvest gave a somewhat evasive answer on why this decision was made, for which Dr. Walker had no means of appeal, and even after he completed the Corrective Active Plan, which included several seminars, her view of his performance did not change. According to Dr. Walker, when he would frequently ask Dr. harvest for feedback or some indication of how he could meet her expectations, he either got silence or little if anything in return to indicate if she viewed his performance as having improved.

One thing which is undisputed, is Dr. Harvest left Dr. Walker little time to adjust to his new surroundings, including all new staff and parents, in one of the lowest performing schools in the district prior to the time Dr. Walker was re-assigned there.

Despite his frustration with how he was being treated by the Administration, and particularly Dr. Harvest, Dr. Walker testified he set out to do what he was asked to do, which is make Healy a better school. After his personnel changes were accepted, he created a school newspaper, the Hart Herald, which was designed to let students, parents and faculty know what was going on at Healy and make the school more a part of the community. (This was also done to overcome one of the criticisms by Dr. Harvest that Dr. Walker needed to do a better job of promoting the mission of the school.).

Also important here and something which stood out during the proceeding which was not noted anywhere by Dr. Harvest is the fact that Dr. Walker testified that when he noticed a student out of the school for an extended period, not knowing if it was truancy or illness, he would actually get in his car and visit the child's home and the parents after school hours to see if he could improve the overall attendance at the school.

Thus, it seems clear that while both Dr. Walker and Dr. Harvest are both dedicated educators who had worked their way up the ranks in the East Orange School District. When Dr. Harvest became Dr. Walker's evaluator, it changed the dynamic of their professional relationship in a dramatically negative way.

Other actions Dr. Walker said he took during the 2017-2018 school year while serving as principal of Healy was to develop a school improvement plan because Healy was what the State refers to being in Comprehensive status, provide more in service and professional development programs for Healy's teachers, conduct walkthroughs of all classrooms to obtain a better understanding of how teachers and students were performing, and train teachers in how to develop new lesson plans.

None of these changes were noted by Dr. Harvest as part of Dr. Walker's yearend review in which she gave him a low score of "2" in 24 out of 31 areas and an increment withholding.

Dr. Harvest is a veteran educator, who like Dr. Walker, spent a majority of her years in education working her way up the ranks of administration with the East Orange School District. Having achieved the position of Assistant Superintendent, among her duties was to evaluate principals throughout the district, monitor their progress and make recommendations on how it improve performance.

Dr. Harvest said she had been Dr. Walker's evaluator since 2010, most of the time being when he was the principal at Garvin. Dr. Harvest earned a Doctorate in Educational Leadership and had been employed by the district for thirty-seven (37) years.

According to Dr. Harvest, State law requires a principal to be placed on a Corrective Action Plan, when part or all of their performance is deemed "partially effective." At the end of the 2016-17 school year, because of this evaluation that she prepared, Dr. Walker was required to complete a CAP. Dr. Walker said following her evaluation for that year, she forwarded a document to Dr. Walker entitled; "Areas of Concern Dr. Howard Walker." She said the purpose of the document was to provide Dr. Walker with a roadmap as to the areas that were in need of improvement for the next school 2017-18 school year.

In describing the document further, Dr. Harvest testified that she asked him to focus on at least three areas to improve, including but not limited to: Mission, Vision and Core Values, Ethics and Professional Norms, and Curriculum, Instruction and Assessment of the teachers at Healy.

It is undisputed that with Healy being one of the lowest performing schools in the district, Dr. Harvest's decision to place Dr. Walker in a CAP, did not account for the fact that he was new to the school, nor was he given additional time before she arrived at the conclusion that he was now performing at lower than acceptable standards in these areas.

Not taking well to the criticisms which he felt were unjust and unfair, Dr. Walker said he started to document everything, at times sending multiple emails the same day to Dr. Walker. Dr. Walker, who felt she was being harassed, asked the board attorney to get involved because she felt Dr. Walker was interfering with her responsibility of assessing his performance which was within her duties and responsibilities.

She said this pattern of what she deemed "over documenting" every exchange between them by Dr. Walker continued through the Summer of 2017, into the start of the new school year, when two weeks after school started, Dr. Harvest said Dr. Walker resisted efforts to comply with the CAP on the basis of his belief that her evaluation was "too vague" to comply with the CAP.

In early October 2017, Dr. Harvest commenced site visits to Healy so in her words, "she could get a feel for what was going on in the classrooms" where Dr. Walker was serving as principal. One area she noted was lacking was posting recent student work on bulletin boards, as well as student data on State standardized tests know as PARCC.

Instead of complying with the areas of improvement as outlined in the CAP, Dr. Harvest was of the view that Dr. Walker increased the adversarial nature of her supervisory relationship over him by including a union representative in their meetings who was being copied on all correspondence. Among other things, she assigned him a book on "body language" but did not explain in detail why it was being assigned. In her testimony, Dr. Harvest candidly stated that she believed although she and Dr. Walker worked their way up the administrative ranks in East Orange, together, he resented her supervisory role, and felt Dr. Walker felt his knowledge and experience should not be challenged. **(This was evident throughout the proceeding by Dr. Walker's demeanor, method of speaking, and by virtue of his refusal to meet with Dr. Harvest as requested towards the end of October 2017, when the CAP was due to expire.)** Though he came across at times as having a superior attitude, it also came across they he is very dedicated to his job, and has the best interests of his students, parents and teachers in mind as he implemented certain changes at Healy once he reluctantly accepted the decision to reassign him there.

There is no dispute that the conflict in the relationship between Dr. Harvest and Dr. Walker continued through the end of the 2018 school year. The record indicates that Dr. Harvest prepared another memorandum in February 2018 regarding her site visit to Healy, and another memorandum on April 5, 2018 summarizing her meeting with Dr. Walker the previous day, as to what areas of the CAP he had successfully completed, and which areas still needed improvement. Despite fulfilling certain CAP criteria, she warned him "it did not necessarily mean his increment for 2017-18 would be awarded.

In fact, on April 9, 2018, Dr. Harvest informed Dr. Walker that the recommendation was for another increment withholding due to "gaps in leadership and

inability to take responsibility for his own learning." In early May 2018, as the school year was nearing completion, Dr. Walker was served with a third evaluation, essentially giving him a 2.65 rating, resulting in a finding of being partially effective, placing him on CAP status for the next 2018-19 school year, and generating a "Rice" notice which meant the Board of Education would be discussing his employment status with the East Orange School District at an upcoming meeting.

Concerned for his reputation, and his status within the district as well as another salary increment withholding, Dr. Walker asked for and was granted a new evaluator, Dr. Kevin West, who was the Superintendent of Schools. Dr. West, who had already served as superintendent in another district, as well as assistant superintendent in Newark, and as a principal in Irvington, came across as a veteran educator who better understood and appreciated the challenges Dr. Walker faced when he was moved from his position as principal at Garvin, to becoming principal at Healy. And it appears from Dr. West's testimony that during the two years that Dr. Walker was in charge of Healy while simultaneously being placed on CAP status by Dr. Walker, Healy, the school where Dr. Walker had been reassigned over his objection was starting to improve. Among other things, during the 2018-19 school year, with Dr. Walker at the helm, Healy was removed by the State from "comprehensive status" to "Focus status" still in need of improvement, but showing better results for the teachers, and, of course, the students.

During this period, teacher and student attendance improved, student misconduct decreased, and better communication between parents and the school was noted by virtue of Dr. Walker's home visits and efforts to make Healy more of a "community."

These achievements were noted in a letter written to Dr. West dated January 31, 2019, from the Commissioner of Education taking Healy, which had been in the bottom 5 percent performing school in the State for almost eighteen (18) years and removing it from comprehensive status only two and a half years into Dr. Walker's tenure at the school. (Interesting, it is also undisputed that in the same letter, Garvin, the school which Dr. Walker was transferred from to take over Healy, was now lowered to comprehensive status, which was not the case while Dr. Walker was there).

When asked about the January 2019 letter from the Commissioner of Education, upgrading Healy's status out of comprehensive, Dr. Harvest minimized Dr. Walker's role in the improvement, attributing most of it to the former principal Ms. Coleman, who was replaced by Dr. Walker over two years earlier. While Dr. Harvest came across as a dedicated educator, one of the things that seemed inconsistent and did not make sense in her testimony was her statement that "student achievement is not the primary goal of the evaluation process." If that were the case, **I FIND** Dr. Walker never received a true explanation of what criteria were being utilized to evaluate his work at Healy, which in and of itself is arbitrary and capricious.

As a result of the noted improvements at Healy by the State and Dr. West, the new evaluator, the CAP which Dr. Harvest had put into effect for two school years shortly after Dr. Walker was reassigned to Healy was removed.

Viewed and evaluated from the eyes of an equally experienced educator, whose testimony came across as more objective than Dr. Harvest, also a dedicated educator but perhaps stricter in her assessments, without more guidance and direction from Dr. Harvest or other district officials about what was expected of him upon being transferred to Healy, and without giving Dr. Walker an extended period of time to demonstrate a turn around at a low performing school, the increment withholding was unjust and unfair to Dr. Walker.

FINDINGS OF FACT

1. Petitioner Howard Walker is a veteran educator with over thirteen years of experience serving as a school principal in the East Orange School District.
2. Prior to the 2016-17 school year, he served as principal of the Garvin School.
3. At the beginning of the 2016-17 school year, Dr. Walker was transferred to serve as principal of the Healy School, one of the lowest performing schools in the East Orange School District, which was on comprehensive watch by the State Education Department.
4. At the time of the transfer, which Dr. Walker objected to, he did not know any of the staff, parents or students who were part of the Healy community.

5. Part of Dr. Deborah Harvest's duties and responsibilities was to evaluate the performance of principals with the school district.
6. Both she and Dr. Walker knew each other and had worked their way up the ranks of administration within the East Orange School District.
7. As Assistant Superintendent, Dr. Harvest was responsible for evaluating Dr. Walker after he was transferred to become principal at Healy.
8. No adjustments were made to the evaluation process for Dr. Walker, who was now the principal at one of the lowest performing schools in the district.
9. After a brief period at Healy, Dr. Harvest placed Dr. Walker on a Corrective Action Plan CAP, which required him to make several adjustments and meet certain criteria before he could be removed from this status.
10. Almost immediately after being placed on the CAP, Dr. Walker and Dr. Harvest clashed, thereby causing a breakdown in communication and lack of trust between them.
11. To her annoyance, Dr. Walker started documenting everything he did, which only made the situation between them worse.
12. At the end of the 2017-2018 school year, Dr. Harvest recommended that Dr. Walker's salary increment be withheld, as in her opinion, he had not met the criteria of the CAP, which he continued on during the next school year.
13. The Board of Education adopted Dr. Harvest's recommendation and withheld the increment, from which this appeal was filed.
14. Frustrated with the way he was being treated. Dr. Walker asked for, and was granted a new evaluator, Dr. Kevin West, who served as the Superintendent of Schools.
15. In January 2019, Dr. West received a letter from the Commissioner of Education removing Healy from comprehensive status and noting the improvement at the school. Without naming Dr. Walker, it is clear from this letter from the State, that Dr. Walker had started to achieve improvement at Healy, which though not expressed directly was the reason why he was reassigned there.
16. Dr. West determined that the Corrective Action Plan which Dr. Harvest created for Dr. Walker should be terminated.
17. No increment withholding was recommended by Dr. West.

LEGAL ANALYSIS AND CONCLUSION

In this matter, petitioner was employed as a principal by the East Orange school district for thirteen years. The pivotal issue concerns the propriety of a series of evaluations by his supervisor, an assistant superintendent who had been a colleague, to withhold a salary increment for the 2017-18 school year, place petitioner on a Corrective Action Plan, CAP, and compel petitioner to take classes, read books and do other remedial things, shortly after the district reassigned petitioner to one of the lowest performing schools in the district.

Pursuant to N.J.S.A. 18A:6-9, the Commissioner of the Department of Education has jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws. N.J.A.C. 6A:3-1.1 to 1.17. sets forth the rules of procedure for the filing of petitions with the Commissioner of Education to hear and decide controversies and disputes arising under school laws in accordance with N.J.S.A. 18A:6-9. N.J.A.C. 6A:3-1.1(a).

The procedure for withholding salary increments in an educational setting are set forth in N.J.S.A. 18A:29-14, which applies to situations where an employee is considered inefficient or for other good cause shown.

A school employee challenging such a decision has the burden of showing by a preponderance of the evidence that the action was arbitrary and capricious or lacks a rational basis. Mullennaphy v. Bd. of Ed. of Twp.of Marlboro, A-0052-18T3, 2019 WL 5788326 (App. Div. November 6, 2019).

Increment withholding "is a matter of essential managerial prerogative which has been delegated by the legislature to the board" See Bernards Twp. Bd. of Ed. v. Bernards Twp. Educ. Ass'n, 79 N.J. 311 (1979). Notwithstanding that policy, a board of education cannot withhold a salary increment from a tenured employee without providing that employee with minimum procedural due process. See: Basile v. Bd. of Ed. of Elmwood Park, 1 N.J.A.R. 199 (Dept. of Ed. 1980).

In determining whether a decision to withhold a salary increment in an educational setting was arbitrary and capricious and without rational basis, it a court should examine whether the underlying facts made by the evaluator were correct and whether it was unreasonable for the evaluator to reach the conclusion that the increment should be withheld, bearing in mind their expertise. Without something more, a board's action in this regard is entitled to a presumption of validity, absent a showing of bad faith, illegal motive or lack of rational basis. See: Quinlan v. Bd. of Ed. 73 N.J. Super, 40 (App. Div. 1962), And see: Raimondi v. Westwood Reg'l Bd. of Ed. EDU 5904-04 Initial Decision Sept. 25, 2005, aff'd State Bd. of Ed. (June 7, 2006).

The Petition requests that the undersigned set aside the Board's adoption of a salary increment withholding for the 2017-18 school year, and to determine that the assistant superintendent Dr. Deborah Harvest acted in an arbitrary capricious and discriminatory manner in placing him on a CAP for two consecutive years and for withholding his salary increment.

"School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal."

Boards have broad discretionary authority to decide whether a teacher, or in this case a principal should or should not be re-engaged. Donaldson v. N. Wildwood Bd. of Educ., 65 N.J. 236 (1974). No obligation exists on the part of board to renew non-tenured teachers. Wyckoff Twp. Bd. of Educ. v. Wyckoff Educ. Ass'n, 168 N.J. Super. 497 (App. Div. 1979).

There are some limits and procedural safeguards afforded to school employees when their employment status is due to be considered. A board of education is required to send a "Rice notice" any time it has placed on its agenda any matters involving the employment, evaluation appointment, evaluation of performance or discipline. N.J.S.A. 10:4-12(b)(8). This provides the affected employee with an opportunity to decide whether they desire a public discussion and prepare and present an appropriate request

in writing. See Rice v. Union Cty. Reg' High Sch. Bd. of Educ., 155 N.J. Super. 64 (App. Div. 1977).

There was little, if any information about the extent to which the recommendation to withhold Dr. Walker's increment was discussed prior to adoption, and who made the presentation. But assuming the board relied just on Dr. Harvest's evaluation, and her report that Dr. Walker had not completed his CAP, then there was nothing put before the board about the status of Healy itself, that over his objection Dr. Walker had been reassigned to Healy purportedly to improve performance in a low performing school, or how little time he had been given to change the culture at Healy.

Despite Dr. Harvest's long and dedicated career, **I CONCLUDE** that in this case, her evaluation and recommendation for increment withholding was **subjective, not objective, and, as such was done in an arbitrary and capricious manner.**

I FURTHER CONCLUDE that while Dr. Walker may present some personal traits that make him appear that he is better or smarter than those around him, (which at times he exhibited during the hearing), that does not mean he is not a good educator, dedicated to improving the performance of his students, and the community around him.

I ALSO CONCLUDE, that the decision to almost immediately place him on CAP status, shortly after he was reassigned to Healy, without a clear and transparent directive from the Administration about what was expected of him, was unfair and prejudicial to his ability to do the job the district had placed him in.

I THEREFORE CONCLUDE that there was no rational basis for the increment withholding and that Dr. Walker has met his burden that the decision to withhold his increment at the conclusion of the 2017-18 school year was arbitrary and capricious and should be **REVERSED.**

ORDER

It is **ORDERED** that the East Orange Board of Education's determination as to the increment withholding filed against petitioner is deemed void, and it is further **ORDERED** that the decision by the East Orange Board of Education, the result of which was to withhold petitioner's increment for the 2017-2018 school year, is **REVERSED.**

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This order on application for emergency relief may be adopted, modified or rejected by the **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 (title of agency head) 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.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 16, 2021
DATE

ANDREW M. BARON, ALJ

Date Received at Agency: July 16, 2021

Date Mailed to Parties: July 16, 2021

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APPENDIX

Witnesses

For Petitioner:

Dr. Howard Walker

For Respondent:

Dr. Deborah Harvest

Dr. Kevin West

Exhibits

For Petitioner:

P-1- 9/6/11 Letter
P-2- 6/2015
P-3- 5/2016 Evaluation
P-4- 3/17 Memo
P-5- 9/17 Action Plan
P-6-Emails
P-7- 2/22/18 Action Plan
P-8-2017-18 Evaluation
P-9- 2018-19 Evaluation
P-10- Action Plan
P-11- DOE Letter
P-12- 5/11/18 Memo
P-13- 5/11/18 Memo
P-14- CAP

For Respondent:

R-1- Evaluations

R-2- 9/2/17 Email

R-3- Post conference summary email

R-4- Professional Standards

R-5- 8/17 Memo

R-6- 8/9/17 email chain

R-7- 8/17 Email chain

R-8-Dr. Harvest areas of concern

R-9- 9/15/17 CAP Progress

R-10- Dr. Walker 9/20/17 email

R-11- Dr. Harvest response amil

R-12- (Not used)

R-13- 10/3/17 Site visit form

R-14- 10/4/17 Meeting notes

R-15- 10/7/17 email re; book

R-16- 10/13/17 email

R-17- 10/30/17 email

R-18- 11/7/17 Email re: Bulletin boards

R-19-11/10/17 Walker email

R-20- 12/19/17 email

R-22- 2/9/18 Memo

R-23-2/14/18 Harvest email

R-24-2/18 Revised CAP

R-25-Workshops email

R-26-3/22/18 Harvest email

R-27- 4/5/18 Harvest memo

R-28- 4/9/18 Increment review

R-29-4/26/18 Harvest email

R-30- 5/18 Final CAP

R-31- 6/11/18 Rice Notice

R-32- 6/20/18 Determination

213-21

213-21

New Jersey Commissioner of Education

Final Decision

R.G. on behalf of minor child, N.G.,

Petitioner,

v.

Board of Education of the Township of East Brunswick, Middlesex County,

Respondent.

Synopsis

Petitioner appealed the determination of the respondent Board that his minor child was not entitled to a free public education in the East Brunswick School District for the 2020-2021 school year. The Board contended that N.G. was registered to attend East Brunswick schools using a Milltown, New Jersey home address. However, the Board discovered in October 2020 that N.G. had been living in Carteret, New Jersey since the end of the prior school year. The Board filed a motion to dismiss the petition, and a counterclaim for tuition for N.G.'s period of ineligible attendance.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(b)(2), if a school district finds that the parent or guardian of a child who is attending school in the district is not domiciled in the district, the superintendent or administrative principal may apply to the board of education for the removal of the child; here, it is undisputed that, for the entirety of the 2020-2021 school year, R.G. and his family, including N.G., were residing in Carteret, New Jersey; further, it is undisputed that the last known residence of R.G. and his family within the geographic boundaries of the East Brunswick school district was occupied by and deeded to another family who enrolled their child in the District at the beginning of the 2020-2021 school year, utilizing this address to establish domicile within the District. The ALJ concluded that: petitioner failed to carry his burden of proof that N.G. was domiciled in the District during the 2020-2021 school year; and N.G. was therefore not entitled to attend school in the District free of charge during that time, pursuant to *N.J.S.A.* 18A:38-1(a). Accordingly, the ALJ granted the Board's motion to dismiss as well as the counterclaim for tuition in the amount of $16, 314.00 for N.G.'s ineligible attendance in East Brunswick schools during the 2020-2021 school year.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. The petitioner was ordered to reimburse the Board for tuition in the amount of $16.314.00 for the 2020-2021 school year. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

213-21
OAL Dkt. No. EDU 02702-21
Agency Dkt. No. 23-2/21

New Jersey Commissioner of Education

Final Decision

R.G., on behalf of minor child, N.G,

Petitioner,

v.

Board of Education of the Township of East Brunswick, Middlesex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain his burden of establishing that he was a domiciliary of East Brunswick during the 2020-21 school year. The Commissioner further concurs with the ALJ's conclusion that the minor child was, therefore, not entitled to a free public education in the District's schools during that time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in East Brunswick. Therefore, the Board is entitled to tuition reimbursement in the amount of $16,314.00 for the entire 2020-21 school year, during which time the minor child was ineligible to attend school in East Brunswick.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $16,314.00 for tuition costs incurred during the time period in which N.G. was ineligible to attend school in East Brunswick. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 7, 2021
Date of Mailing: October 7, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENT'S
MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 02702-21
AGENCY DKT. NO. 23-2/21

R.G. ON BEHALF OF
MINOR CHILD N.G.,
Petitioner,
v.
TOWNSHIP OF EAST BRUNSWICK
BOARD OF EDUCATION,
MIDDLESEX COUNTY,
Respondent.

R.G., petitioner, pro se

Matthew J. Giacobbe, Esq., for respondent (Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys

Danielle A. Panizzi, Esq.,co-counsel for respondent and on the brief (Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys)

Record Closed: August 10, 2021 Decided: September 2, 2021

BEFORE **DAVID M. FRITCH, ALJ**:

STATEMENT OF THE CASE

The petitioner is challenging the residency determination made by the Township of East Brunswick Board of Education (Board) with regard to a minor child, N.G. N.G. was, for the 2020/21 school year, a tenth-grade student enrolled at East Brunswick High School (EBHS). N.G. was enrolled at EBHS utilizing a home address in Milltown, New Jersey. In October 2020, the Board learned that N.G. had been living in Carteret, New Jersey since the end of the prior school year. The Board contends that, because N.G. was not domiciled in the Township of East Brunswick during the 2020/21 school year, he was not entitled to a free, public education from the Township of East Brunswick School District (District). The petitioner challenges the Board's residency determination. The Board further counterclaims seeking reimbursement from the petitioner for tuition, based on a per diem tuition rate, for N.G.'s period of ineligible attendance at EBHS.

PROCEDURAL HISTORY

On January 28, 2021, the Board issued a Final Notice of Ineligibility and Removal to the petitioner, seeking N.G.'s disenrollment from EBHS and seeking reimbursement based on a per diem tuition rate for N.G.'s period of ineligible attendance at EBHS. The petitioner's appeal of this action was transmitted to the Office of Administrative Law (OAL) on March 16, 2021, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1. The respondent filed a motion for summary decision on July 21, 2021. Pursuant to N.J.A.C. 1:1-12.5(b), the record remained open for twenty days to permit the petitioner to file a response showing that there is a genuine issue which can only be determined in an evidentiary hearing. When no response was filed by the petitioner within this twenty-day period prescribed by N.J.A.C. 1:1-12.5(b), the record closed on August 10, 2021, leaving the respondent's motion in this matter unopposed.

FACTUAL DISCUSSION

A summary of the pertinent facts is undisputed and I **FIND** the following **FACTS**:

1. N.G. was a tenth-grade student at EBHS during the 2020/21 school year. (Giuliana Cert. at ¶ 1.)

    a. In enrolling N.G. for the 2020/21 school year, the petitioner indicated that his address was 48 Louise Drive, Milltown, New Jersey 08850. (Id. at ¶ 3.)

2. At the outset of the 2020/21 school year, another family registered for attendance in the District utilizing the 48 Louise Drive, Milltown, New Jersey address. (Id. at ¶ 4.)

    a. The other family produced a deed to the 48 Louise Drive, Milltown, New Jersey address as proof of their residency within the geographic boundaries of the District. (Ibid.)

3. Representatives from the District contacted the petitioner by telephone to inquire about their residency. (Id. at ¶ 5.) In October 2020, the petitioner confirmed to a representative of the District that his family was residing in Carteret, New Jersey. (Id. at ¶ 6.)

    a. The petitioner confirmed in a follow-up email to representatives of the District that he and his family left their residence at 48 Louise Drive, Milltown New Jersey "at the end of last school year." (Id. at Ex. A.) He explained that he and his family were staying with his mother in Carteret to "take[] care of her through covid." (Ibid.) The petitioner indicated that his "goal is to move back [to East Brunswick] by November or December 2020 at the latest." (Ibid.)

4. On October 29, 2020, the respondent sent the petitioner an invoice for N.G.'s attendance at EBHS for the 2020/21 school year for the period between September

8, 2020 and November 30, 2020. (Id. at Ex. B.) This invoice sought a payment from the petitioner of $4,882.78. (Ibid.)

5. The petitioner contacted the District's finance department to obtain a payment plan for N.G.'s tuition. On November 10, 2020, the District's finance department presented the petitioner with a payment plan option for the outstanding tuition bill. (Id. at Ex. C.) This plan would have allowed the petitioner to pay $3,000 up front with the balance of the tuition due November 30, 2020. (Ibid.) The petitioner would also be obliged to restore residency in East Brunswick in December 2020, or pay additional weekly tuition for EBHS until he re-establishes residency in the District. (Ibid.)

6. The District did not receive any tuition payments from the petitioner, and on December 2, 2020, the District contacted the petitioner via email. (Id. at ¶ 11.) This email communication informed the petitioner that, because he and his family did not reside in East Brunswick, the District was requiring N.G. to be withdrawn from EBHS. (Id. at Ex. C.) Although the District had attempted to make arrangements for N.G. to continue as a tuition student, because the District had not received any payments or a signed agreement from the petitioner to pay the outstanding tuition, the District was seeking N.G. to withdraw from EBHS and enroll in school in Carteret as he was currently living in Carteret, New Jersey. (Ibid.)

7. On December 18, 2020, the District sent the petitioner a Preliminary Notice of Ineligibility. (Id. at ¶ 12; Id. at Ex. E.) This notice informed the petitioner that, because his son, N.G., was no longer domiciled in the District, he was no longer eligible to obtain a free public education from the District. (Ibid.) The notice also notified the petitioner that he could challenge this decision at a hearing before the Board. (Ibid.)

8. On January 7, 2021, a formal residency hearing was held before the Board. (Id. at ¶ 13.) The petitioner appeared at this hearing and offered testimony on his own behalf. (Id. at Ex. F.) At this hearing, the petitioner admitted that he and his family have resided in Carteret, New Jersey for the entirety of the 2020/21 school year. (Ibid.)

9. On January 11, 2021, Dr. Victor Valeski, Superintendent of the East Brunswick Public Schools, contacted the petitioner in writing. (Id.)

a. This letter informed the petitioner that, in order for N.G. to remain enrolled in a District school for the remainder of the 2020/21 school year, the petitioner was required to provide "proof of residency via certified lease agreement or deed dated ***no later than February 1, 2021*** to re-establish domicile within the Township of East Brunswick." (Id. (emphasis in original).)

b. The letter also sought payment of the outstanding tuition for N.G.'s attendance at EBHS for the 2020/21 school year. (Id.) The District sought payment for N.G.'s ineligible attendance at EBHS at the per diem rate of $90.63 for each day of ineligible attendance. (Id.) For the period between September 8, 2020, and January 31, 2021, the outstanding tuition balance sought by the District was $8,598.59. (Id.) The District sought payment of the outstanding tuition in full no later than January 21, 2021.

c. If the petitioner did not meet the two requirements of providing proof of residency in the Township of East Brunswick by February 1, 2021, and remitting payment in full for the $8,598.59 back tuition, the Board would vote at its next meeting on January 21, 2021, on "whether to permanently remove [N.G.] from the East Brunswick Public School District." (Id.)

10. On January 21, 2021, the Board met and found N.G. ineligible for a free public education from the District because he and his family resided in Carteret, New Jersey for the entirety of the 2020/21 school year. (Id. at Ex. G.)

11. On January 28, 2021, the Board issued a Final Notice of Ineligibility and Removal to the petitioner informing him of the Board's decision and his rights to appeal the Board's determination. (Id. at Ex. G.)

12. The cost of tuition for tenth-grade general education students enrolled in the District for the 2020/21 school year is $16,314. (Id. at ¶ 17.) The per diem rate is $90.63 per day. (Id. at ¶ 18.)

13. The cost for tuition for N.G.'s attendance at EBHS for the 2020/21 school year, from September 8, 2020, through June 23, 2021, is $16,314. (Id. at ¶ 19. See also Id. at Ex. H.)

14. To date, the petitioner has not made any payments to the District for N.G.'s tuition for the 2020/21 school year. (Id. at ¶ 20.)

LEGAL DISCUSSION

Public schools are free to persons over five and under twenty-five years of age who are domiciled within the school district. N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22.3.1(a), which sets forth the right of a student to a free public education, states in pertinent parts:

> Public schools shall be free to the following persons over five and under twenty years of age:
>
> a. Any person who is domiciled within the school district[.]

Pursuant to N.J.A.C. 6A:22-3.1(a)(1), a student is eligible to attend a school district if he or she is domiciled within the school district, and a student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.

> "Domicile" is defined as "the place where [a person] has his [or her] true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has an intention of returning." T.B.W. ex rel. A.W. v. Bd. of Ed. of the Township of Belleville, Essex County, 1998 N.J. AGEN LEXIS 122, Agency Dkt. No. 159-5/96, 1998 WL 668678 (N.J. Adm. June 18, 1998). As the court noted in Collins v. Yancey, 55 N.J. Super. 514, 520–21, 151 A.2d 68 (Law Div. 1959), a person may have several residences or places of abode, but only one domicile at a time. Id.
>
> [D.L. v. Bd. of Educ. of Princeton Reg'l Sch. Dist., 366 N.J. Super. 269, 273–74 (App. Div. 2004).]

A child's domicile is normally that of his or her parents. Somerville Bd. v. Manville Bd., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div. 1998), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051 (1999). The acts, statements and conduct of the individual, as viewed in light of all circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). A choice of domicile by a person, irrespective of his motive, will be honored "provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991).

If a school district finds that the parent or guardian of a child who is attending school in the district is not domiciled in the district, the superintendent or administrative principal may apply to the board of education for the removal of the child. N.J.S.A. 18A:38-1(b)(2). The parent or guardian is entitled to a hearing before the board and if, in the judgment of the board, the parent or guardian is not domiciled within the district, the board may order the transfer or removal of the child from school. Id. The parent or guardian may contest the board's decision before the Commissioner within twenty-one days of the date of the decision and is entitled to a hearing. Id.

In challenging the findings of a board regarding a child's eligibility to attend school in the district, parents have the burden of establishing domicile in the school district by a preponderance of the evidence. Y.E. ex rel. E.E. v. State-Operated Sch. Dist. of the City of Newark, No. A-6009-06T3, 2008 WL 2492258, at *9 (App. Div. 2008); N.J.S.A. 18A:38-1(b)2. A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1).

It remains factually undisputed on the record in this matter that, for the entirety of the 2020/21 school year, R.G. and his family, including N.G., were residing in Carteret, New Jersey. (Giuliana Cert. at ¶ 6. Id. at Ex. A.) It is further factually undisputed on this record that the last known residence of R.G. and his family within the geographic boundaries of the District was occupied by and deeded to another family who enrolled their child in the District at the beginning of the 2020/21 school year utilizing this address to establish domicile within the District. (Id. at ¶ 4.) Although the petitioner has indicated that his "goal is to move back [to East Brunswick] by November or December 2020 at the latest" (id. at Ex. A), there is no evidence on this record presented to indicate that the petitioner has done so and the petitioner has produced no evidence that they possess a permanent home within the geographic boundaries of the District to return to at some future date. N.J.A.C. 6A:22-3.1(a). In the absence of any evidence that they possessed a permanent home in the District during the 2020/21 school year, the petitioner has failed to establish that N.G. was domiciled within the geographic boundaries of the District for that school year. I **CONCLUDE**, therefore, that R.G. has failed to carry his burden of proof that N.G. was domiciled in the District during the 2020/21 school year. N.J.S.A. 18A:38-1(b)(2). Accordingly, I **CONCLUDE** that N.G. was not entitled to attend school in the District and receive a free public education there during that time pursuant to N.J.S.A. 18A:38-1(a).

In its counterclaim, the Board seeks tuition for the period of ineligible attendance. A school board is entitled to recover tuition from a parent or guardian of a child found ineligible to attend a school in its district. N.J.S.A. 18A:38-1(b)(2). The Commissioner of Education is authorized to assess tuition prorated to the time of the student's ineligible attendance in the schools of the district, and tuition is computed on the basis of 1/180 of the total annual per-pupil cost to the local district multiplied by the number of days of ineligible attendance. N.J.S.A. 18A:38-1(b)(2).

The applicable per-pupil cost for the 2020/21 school year for attendance at EBHS was $16,314. (Giuliana Cert. at ¶ 19.) This amount calculates to $16,314/180 = $90.63 per day. Because N.G. moved out of the District and remained domiciled outside the District for the entirety of the 2020/21 school year, the total amount of tuition for N.G.'s ineligible attendance at EBHS totals $16,314. In view of the foregoing, I **CONCLUDE**

that the petitioner should pay to the Board tuition in the amount of $16,314 for the period of N.G.'s ineligible attendance at EBHS during the 2020/21 school year. I **FURTHER CONCLUDE** that N.G. should be disenrolled from the East Brunswick Public Schools.

ORDER

Based on the foregoing, it is **ORDERED** that the respondent's motion to dismiss the petition is **GRANTED** and the petitioner's Petition of Appeal be and hereby is **DISMISSED**.

It is **FURTHER ORDERED** that R.G. pay to the Board tuition in the amount of $16,314 for the period of his son's ineligible attendance at the East Brunswick public schools during the 2020/21 school year and that N.G. be disenrolled from the East Brunswick Public Schools.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 2, 2021
DATE

DAVID M. FRITCH, ALJ

Date Received at Agency: September 2, 2021

Date Mailed to Parties: September 2, 2021

/dw

214-21

214-21

New Jersey Commissioner of Education

Final Decision

M.O. and H.O., on behalf of minor children, Z.O., A.O., J.O. and E.O.,

Petitioners,

v.

Board of Education of the Borough of Tenafly, Bergen County,

Respondent.

Synopsis

Petitioner appealed the determination of the respondent Board that their children are not entitled to a free public education in the Tenafly School District. Petitioners and their children moved from Maryland to Alpine, New Jersey, in December 2020, residing with family and enrolling the children in the Alpine school district for the remainder of the 2020-2021 school year. Petitioners subsequently purchased a home in Tenafly in March 2021 but did not move in immediately as the home needed substantial renovations, estimated to take six to eight months to complete. Petitioners attempted to register the children in the Tenafly district for the 2021-2022 school year but were denied as they were not yet living in the Tenafly house. Petitioners argue that they are legally domiciled in Tenafly and that domicile was established, *inter alia*, by the purchase of the home, the payment of the mortgage and utility bills on the property. The Board contended that it is the policy of the district that residency is not established until a family is physically domiciled in the home and filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the sole issue is whether petitioner's children are eligible to attend respondent's public schools free of charge in accordance with *N.J.S.A.* 18A:38-1; established case law has addressed the issue not only of intent to move to a location as evidence of domicile, but also the necessity of having already lived at the new location; the burden of proof is on the petitioner to show that they are legally domiciled in Tenafly; nothing in the petitioners' legal argument effectively counters the necessity that for domicile to be established, there must be an "actual and physical taking up of an abode". The ALJ concluded that: at no time relevant to this action were petitioners domiciled in Tenafly; the decision to deny enrollment of the children was not an unreasonable exercise of the Board's discretion; the children are not currently entitled to a free public education in Tenafly and will remain ineligible as long as they remain domiciled in a municipality other than Tenafly. The Board's motion for summary decision was granted, and the petition was dismissed.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

214-21
OAL Dkt. No. EDU 05938-21
Agency Dkt. No. 97-6/21

New Jersey Commissioner of Education

Final Decision

M.O. and H.O., on behalf of minor children, Z.O., A.O., J.O., and E.O.,

Petitioners,

v.

Board of Education of the Borough of Tenafly, Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

In this matter, petitioners are challenging the Board's determination that they were not domiciled in Tenafly and their minor children were therefore ineligible to attend school in the district. Petitioners purchased a home in Tenafly in March 2021 but were unable to move in as the home needed substantial renovations which were estimated to take six to eight months to complete. When petitioners attempted to enroll their minor children in the district in May 2021, the Board denied their request on the basis that they did not yet live in Tenafly. The Administrative Law Judge (ALJ) found that petitioners did not meet their burden of demonstrating that they are residents of Tenafly because at no time relevant to their appeal were they domiciled in that municipality. Accordingly, the ALJ concluded that the minor children were not eligible to attend school in the district, and the Board was not arbitrary, capricious or

unreasonable in failing to admit the children under the policy that gives the Board the discretion to admit nonresident students.

Upon review, the Commissioner concurs with the ALJ, for the reasons thoroughly set forth in the Initial Decision, that petitioners are not domiciled in Tenafly and the minor children are therefore ineligible to attend school in the district. The Commissioner further concurs with the ALJ that the Board did not abuse its discretion by refusing to enroll the minor children.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 12, 2021
Date of Mailing: October 14, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5938-2021
AGENCY DKT. NO. 97-6/21

M.O. and H.O. ON BEHALF OF MINOR CHILDREN,
Z.O., A.O., J.O., and E.O.
Petitioner,
v.
BORO of TENAFLY BOE, BERGEN COUNTY,
Respondent.

Julie Warshaw, Esq. for petitioners (Warshaw Law Firm, attorneys)

Steven R. Fogarty, Esq. for respondent (Fogarty & Hara, attorneys)

Record Closed: August 23, 2021 Decided: August 27, 2021

BEFORE: **MATTHEW G. MILLER,** ALJ

STATEMENT OF THE CASE

Petitioners, M.O. and H.O., the parents of minor children Z.O., A.O., J.O. and E.O., (Petitioners or family) have challenged the determination made by the respondent, Board

of Education of the Boro of Tenafly, Bergen County, that their children are not entitled to a free public education in Tenafly because Petitioners and their children were not domiciled in the Tenafly School District (Respondent or District).

PROCEDURAL HISTORY

On or about May 26, 2021, Respondent notified Petitioners that their four children, Z.O., A.O., J.O. and E.O. (the children), were ineligible to receive free educations in the Tenafly due to non-residency. The Petitioners filed a Residency Appeal with the Department of Education on or about June 14, 2021. On or about July 6, 2021, respondent filed a Motion to Dismiss in Lieu of Answer. The Department of Education transmitted this matter to the Office of Administrative Law (OAL) on July 13, 2021, for hearing as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

An initial conference was held on August 4, 2021 and it was agreed by the parties that this matter could be resolved by summary decision and at that time, per N.J.A.C. 1:1-12.5, the Motion to Dismiss was converted to a Motion for Summary Decision. The record remained open for the submission of additional documentation and legal argument, which was received on August 7, 2021 and August 11, 2021. Following oral argument on August 23, 2021, the record closed on that date.

FINDINGS OF FACT

The facts of the case are not in dispute:

1. On December 3, 2020, Petitioners, who had been residing and were domiciled in Maryland sold their only home and moved to Alpine, New Jersey into a home where H.O.'s parents resided. The children were enrolled in the Alpine school district and remained enrolled there through the conclusion of the 2020-21 school year.

2. On March 23, 2021, Petitioners purchased a home located at 11 Stanton Road in Tenafly. (Exhibit P-1). Petitioners' Residency Appeal certified that this is the address where the family is "located". (Exhibit P-2). This property is the only "home" owned by Petitioners.

3. Since purchasing the property at 11 Stanton Road, Tenafly, the children have registered in Tenafly-based youth sports programs, the family is paying utility bills for the Tenafly property and both H.O. and M.O. listed the Tenafly address on their newly issued New Jersey driver's licenses. Smoke detector and carbon monoxide alarm compliance certificates have also been issued for the property. (Exhibits P-3, P-4, P-5, P-6)

4. However, the home itself has "needed extensive renovations and was not habitable" and the family continues to reside in Alpine. (Petitioner's brief at 3). Per an email supplied to the District on or about May 11, 2021, it was estimated that the renovations "will take around 6-8 months to complete" from the time of the issuance of all necessary permits. (Exhibits P-7 and P-8).

5. On or about May 6, 2021, Petitioners reached out to the District expressing interest in enrolling the children in the Tenafly school system. In reply, the Interim Registrar of the Tenafly Public Schools responded that "district policy is firm in requiring that students be physically residing in Tenafly before they can be registered", given the circumstances, a further review would be undertaken. She requested that more specific information be provided, including information from the contractor as to a start date for the work and an estimated completion date and their current residential address. (Exhibits P-9 and P-10).

6. Tenafly School District Policy 5111 covers the "Eligibility of Resident/Nonresident Students". (Exhibit R-1).

7. After a substantial amount of back-and-forth between Petitioners and the Board, on May 12, 2021, Petitioners were advised by Shauna C. DeMarco, Superintendent of the Tenafly School District, that because they were not domiciled in Tenafly and since "there is no exception for a future residents (sic) who are renovating a home they have not lived in", the children would not be registered in the District until they were actually living at 11 Stanton Road. A follow-up email from Ms. DeMarco on May 13, 2021, noted that she had consulted with the Board attorney prior to making her decision. (Exhibits P-11 and P-12).

8. The colloquy between Petitioners and the District continued and on May 26, 2021, Jocelyn Schwarz, the President of the Tenafly Board of Education, wrote to Petitioners and advised them that on May 24, 2021, the Board "affirmed the Superintendent's denial of your request" and that "Policy 5111 does not permit your children to enroll in the District under the circumstances presented". (Exhibit P-13).

9. The parties have stipulated that there are only 2 issues in dispute;

    a. Whether the family was domiciled in Tenafly for the purposes of the children receiving a free public education.
    b. If the answer to a. is "no", then whether the District abused its discretion in failing to admit the children to the Tenafly public schools per Policy 5111.

LEGAL ARGUMENTS

Petitioners

Domicile

Petitioners argue that given the totality of the circumstances, they are legally domiciled in Tenafly and that domicile was established by the purchase of the home at 11 Stanton Road, the payment of a mortgage on the property, their payment of utility bills,

the issuance of New Jersey driver's licenses with the Tenafly address, the hiring of the contractor and the registration of their children in Tenafly-based sports activities. They also emphasize their roots in the community, with H.O. having been raised in Tenafly and attended District schools and that it is their intent to move into the home as soon as renovations are completed and to raise their children in Tenafly.

First and foremost, however, Petitioners argue that they are domiciled in Tenafly, citing to A.M.S. ex rel. A.D.S. v. Board of Educ. of City of Margate, 409 N.J. Super. 149 (App. Div. 2009) and N.J.A.C. 6A:22-3.1, citing the following paragraph;

> N.J.A.C. 6A:22-3.1(a)(1) HN9 provides that students "over five and under 20 years of age" are "eligible to attend school in a district if the student is domiciled within the district" and sets forth various living arrangements from which a student's domicile may be established, including:
>
> 1. A student is domiciled in the school district when he or she is living with a parent or legal guardian whose permanent home is located within the school district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.
>
> [Id. at 161.]

Petitioners argue that case law supports their contention that so long as the home is owned by them and they intend to live there, they should be considered domiciled in Tenafly. This is particularly true when N.J.A.C. 6A:22-3.3(a) states that a student's eligibility for a free public education in a particular district "shall not be affected by the physical condition of an applicant's housing" or if they were displaced "from the original residence...(due to occurrences) such as fire, flood, hurricane, or other circumstances that render the residence uninhabitable." N.J.A.C. 6A:22-3.2(h(1)(iii).

Abuse of Discretion

Assuming, *arguendo*, that it is found that Petitioners are not domiciled in Tenafly, it is argued that Respondent abused its discretion by failing to admit the children as permitted by Policy 5111, citing to the following passage;

> The admission of a nonresident student to school free of charge must be approved by the Board. No student otherwise eligible shall be denied admission on the basis of the student's race, color, creed, religion, national origin, ancestry, age, marital status, affectational or sexual orientation or sex, social or economic status, or disability. The continued enrollment of any nonresident student shall be contingent upon the student's maintenance of good standards of citizenship and discipline.

Petitioners also point to N.J.A.C. 6A:22-2.2, which, under a headnote that reads "Discretionary admission of nonresident students", states;

> Nothing in this chapter shall be construed to limit a district board of education's discretion to admit nonresident students, or the ability of a nonresident student to attend school with or without payment of tuition with the accepting district board of education's consent, pursuant to N.J.S.A. 18A:38-3(a).[1]

In addition, they cite to N.J.A.C. 6A:22-3.1(a)(1)(i)(ii)(1), which discusses the domicile of a student whose parents/guardians are located in different school districts and how it is determined.

Petitioners also reference the difficulties that the COVID-19 pandemic has effectuated not only on their children, but also on the educational system as a whole. Petitioners supplied multiple citations to publications from the New Jersey Department of Education, the New Jersey School Boards Association and like organizations detailing

[1] N.J.S.A. 18A:38-3(a). Any person not resident in a school district, if eligible except for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, and with or without payment of tuition, as the board may prescribe.

"strategies to support student engagement", how to enhance remote and hybrid learning experiences and how to avoid chronic absenteeism. Emphasized was a quote from the State's return to school plan, The Road Back, Restart and Recovery Plan for Education[2], in which it is noted that schools must be "prepared to accommodate students' unique needs during this unprecedented time". Id. at 8.

Continuing in that vein, Petitioners supplied a May 22, 2021 letter from a psychiatrist and a May 23, 2021 letter from a Licensed Social Worker, both of whom argue that not being permitted to enroll in the Tenafly schools would cause "unnecessary consequences" and has already "precipitated great angst and anxiety" and that given the "trauma" the children have suffered over the past year, the "mental health of these children" must be considered when considering whether they should be permitted to start the school year in Tenafly or have to transfer there later in the year. (See, 5/22/21 letter of Barry L. Feinberg, M.D. and 5/23/21 e-mail of Gwen Crystal, L.S.W., attached hereto as Exhibits P-9 and P-10).[3]

Petitioners also point to various circumstances, including their long-term affiliation with Tenafly, the affirmative steps that they have taken to demonstrate that they intend to move to Tenafly as soon as possible as well as the effects of the pandemic on both the educational system and their children in particular.

They further point to a variety of what they deem to be administrative errors made by Respondent in its denial of admission, including;

1. That the May 26, 2021, notice of ineligibility was deficient.
2. That statements made by the President of the Tenafly Board of Education were "false and misleading" concerning the definition of "domicile".

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[2] https://www.nj.gov/education/reopening/NJDOETheRoadBack.pdf

[3] Please note that these documents were not presented as "expert reports" and will not be considered as such. There is no indication that either of these licensed professionals conducted an examination of any family members, reviewed any documents or expressed their opinions to within a reasonable degree of probability. Further, neither of them cited to any academic or scientific support for their conclusions. See generally, Vitrano by Vitrano v. Schiffman, 305 N.J. Super. 572 (App. Div. 1997)

3. That the Superintendent "misled" the Petitioners concerning appellate timeframes.

It was argued that these administrative deficiencies, while not sufficient to warrant a finding of domicile or to compel the Respondent to be compelled to admit the children, are evidence that it failed to consider all relevant circumstances in denying admission and that it abused its discretion in doing so.

Respondent

Domicile

Respondent asserts that the case law is crystal clear that Petitioners are not domiciled in Tenafly since they have never lived in the 11 Stanton Road home. Without having lived there, they "are missing a necessary element of domicile; residence in Tenafly". (Respondent's brief at 3).

In support of its position, Respondent cites to In re Unanue, 255 N.J. Super. 263 (Law Div. 1991), 311 N.J. Super., 589 (App. Div. 1998), certif. denied, 157 N.J. 541 (1998), cert. denied sub. nom., Unanue-Casal v. Goya Foods, Inc., 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999).

Respondent further cites to K.L. and C.L. o/b/o N.L. v. Board of Educ. of Freehold, AOL Dkt. No. EDU 441-01 (Initial Decision June 26, 2001), adopted (Comm'r Aug. 13, 2001) and Board of Educ. of Twp. of Livingston v. H.L. and D.L. o/b/o K.L. and J.L., OAL Dkt. No. EDU 11593-96 (Initial Decision Apr. 3, 1998) where it was determined, in general, that since a house was not habitable during the school year, the family could not be considered to domiciled there.

Abuse of Discretion

Concerning Petitioners' "abuse of discretion" position, Respondent noted that;

> The Board denied (the) request based on a plain reading of the Policy, which disallows enrollment to nonresidents except those expressly contemplated therein. The Policy does not make exception for people who have purchased a house in Tenafly, but who have not yet moved into it due to it being uninhabitable, i.e., incapable of living in. Certainly, the Board's decision, rooted in the plain language of the Policy, had a legitimate, rational basis.
>
> [Respondent's brief at 11.]

Respondent argues that case, administrative and statutory law all strongly support the position that a District has broad discretionary authority in deciding when to admit out-of-district students and that the considerations cited by it clearly demonstrate that the decision to deny admittance to the children was not "patently arbitrary", "without rational basis" or "induced by improper motives". Parsippany-Troy Hills Educ. Ass'n v. Board of Educ. of Parsippany-Troy Hills, 188 N.J. Super. 161, 167 (App. Div. 1983) (cit. omitted).

LEGAL ANALYSIS AND CONCLUSION

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The OAL summary decision rule is essentially the same as the summary judgment rule under the New Jersey Court Rules, which states:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

[R. 4:46-2(c).]

The New Jersey Supreme Court has modified and clarified the analysis required when considering a motion for summary decision/judgment. In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), the Court adopted the summary judgment standard utilized by federal courts:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." [Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986).] . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. Liberty Lobby, supra, 477 U.S. at 250, 106 S. Ct. at 2511, 91 L. Ed. 2d at 213. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214, the trial court should not hesitate to grant summary judgment.
>
> [Id. at 540.]

The burden is on the moving party to exclude all reasonable doubt as to the existence of any genuine issue of material fact, and all inferences of doubt are drawn against the moving party and in favor of the non-moving party. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). The critical question therefore is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." Brill, supra, 142 N.J. at 533 (citation omitted). If the non-moving party's evidence is merely colorable, or is not significantly

probative, summary judgment should not be denied. See, Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

The sole issue in dispute is whether Petitioner's four children are eligible to attend respondent's public schools free of charge in accordance with N.J.S.A. 18A:38-1.

Any child between the ages of five and twenty years old is entitled to a free public education in the school district in which he is domiciled. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). See V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom.; Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education).

Per N.J.S.A. 18A:38-1(b)(2), the resident "shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education". See, generally, D.L. v. Board of Educ. of Princeton Regional School Dist., 366 N.J. Super. 269 (App. Div. 2004).

A student is domiciled in a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1); State v. Benny, 20 N.J. 238, 250 (1955); In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999).

The domicile of an unemancipated child is that of his parent, custodian or guardian. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001); P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001). A child may also be considered domiciled in a school district if he lives with an adult domiciled in that school district, as long as the child

is financially supported by that adult as if he were their own child, upon submission of a sworn affidavit to the board of education. N.J.S.A. 18A:38-1(b)(1).

This case hinges, obviously, on the definition of domicile, and this was addressed in tremendous detail in In re Unanue, 255 N.J. Super. 362 (Law Div. 1991), aff'd 311 N.J. Super. 589 (App. Div. 1998), certif. denied, 157 N.J. 541 (1998), cert. denied sub. nom., Unanue-Casal v. Goya Foods, Inc., 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999). While Unanue concerned a probate case, the concept of domicile was key to the dispute between the potential heirs to Goya Foods, Inc., a sizable food manufacturer and distributor. Ironically, the case also involved Tenafly and a question as to whether the decedent, Prudencio Unanue, was domiciled there or in Puerto Rico.

The Court provided a comprehensive review of the law, noting;

> When a man has acquired a domicile in a particular place, that place remains his domicile until he acquires another domicile". In re Dorrance, 115 N.J. Eq. 268, 274, 170 A. 601 (Prerog.Ct.1934), aff'd 13 N.J. Misc. 168, 176 A. 902 (Sup.Ct.1935), aff'd 116 N.J.L. 362, 184 A. 743 (E & A 1936), cert. den. 298 U.S. 678, 56 S.Ct. 950, 80 L.Ed. 1399 (1936), reh den. 298 U.S. 692, 56 S.Ct. 957, 80 L.Ed. 1410 (1936). In considering whether a change of domicile has occurred, three elements must be considered: 1) whether there had been an actual and physical taking up of an abode in a particular state; 2) whether the subject had an intention to make his home there permanently or least indefinitely; and (3) whether the subject had an intention to abandon his old domicile. The court must evaluate all of the facts of the case to determine the place in which there is the necessary concurrence of physical presence and an intention to make that place one's home. Lyon v. Glaser, supra, 60 N.J. at 264-265, 288 A.2d 12. See also, Mercadante v. The City of Paterson, 111 N.J. Super. 35, 39-40, 266 A.2d 611 (Ch.Div.1970), aff'd o.b. 58 N.J. 112, 275 A.2d 440 (1971).
>
> [Unanue, supra, 255 N.J. Super. at 376.]

The Court in Lyon, supra addressed the issue not only of intent to move to a location as evidence of domicile, but also the necessity of having already lived at that location;

> A very short period of residence in a given place may be sufficient to show domicil, but mere residence, regardless of its length, is not sufficient. It has been said that concurrence, even for a moment, of physical presence at a dwelling place with the intention of making it a permanent abode, effects a change of domicil. And once established, the domicil continues until a new one is found to have been acquired through an application of the same tests. In re Fisher, supra; Cromwell v. Neeld, 15 N.J. Super. 296, 300-301 (App. Div. 1951); In re Dorrance, 115 N.J. Eq. 268, 274-275 (Prerog. Ct. 1934), aff'd per curiam sub nom. Dorrance v. Thayer-Martin, 13 N.J. Misc. 168 (Sup. Ct. 1935), aff'd o.b. 116 N.J.L. 362 (E. & A. 1936); Slater v. Munroe, 313 Mass. 538, 48 N.E. 2d 149 (1943); State ex rel. Orr v. Buder, 308 Md. 237, 271 S.W. 508 (1925); In re Appleby's Estate, 106 N.Y.S. 2d 294 (Sur. Ct. 1951), aff'd mem. 279 App. 993, 112 N.Y.S. 2d 493 (1952); Schillerstrom v. Schillerstrom, 75 N.D. 667, 32 N.W. 2d 106 (1948); 25 Am. Jur. 2d Domicil, §§ 16, 17, pp. 13-15 (1966); Restatement (Second) of Conflicts of Laws, §§ 15-19, pp. 61-79 (1971). Since the concept of domicil involves the concurrence of physical presence in a particular State, and an intention to make that State one's home, determination of a disputed issue on the subject requires an evaluation of all the facts and circumstances of the case.
>
> [Id. at 264-65.]

Along those lines, the Court in In re Fisher's Will, 13 N.J. Super. 48 (App. Div. 1951) put it very succinctly;

> It is also settled that to effect a change in domicile "* * * the residence at the place chosen for the domicile must be actual; to the factum of residence there must be added the animus manendi; * * *." Harral v. Harral, 39 N.J. Eq. 279, 285 (E. & A. 1884). In other words, in order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence, does not effect a change of domicile. See also Rinaldi v. Rinaldi, 94 N.J. Eq. 14, 20 (Ch. 1922); In re Gilbert, 18 N.J. Misc. 540, 548 (Essex Cty. Surr. Ct. 1940).
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> [Id. at 53.]

The case at bar practically mirrors the factual scenario in K.L. v. Board Educ, 2010 N.J. Super. Unpub. LEXIS 11 (App. Div. 2010). In K.L., the plaintiffs purchased a home in Kinnelon, New Jersey in May, 2007 and "anticipated establishing residency (there) as of October, 2007". The Kinnelon Board of Education had established a policy which permitted a student to enroll "not greater than 5 weeks prior to the anticipated date of residency" in the town when the family "has entered a contract to buy, build or rent a residence" in the district." Id.

When the Board requested "an update on [their] home renovations" in early October and advised that it would be charging monthly tuition beginning on October 15, the plaintiff filed the petition which led to a referral to the Office of Administrative Law. Id. at 1-2.

In the underlying OAL matter, the judge detailed a factual scenario similar to that in the case at bar.

a. Family lives outside of district.
b. Family buys home in district.
c. Family does not move into home due to need for renovations.

The judge determined that, largely because the family had never moved into the home (nor eaten in, slept in or entertained in it), even though they intended to do so in the future, that it was not domiciled in Kinnelon, and a summary decision was entered on behalf of the district. See, K.L. and K.L. on behalf of Minor Child M.L. v. Bd. of Educ. of Kinnelon, EDU 1191-08, Initial Decision (April 24, 2008).[4]

The judge's decision was upheld by the Commissioner of Education, largely for the reasons expressed in the underlying decision. Of, note, however, is that the Commissioner distinguished the case of A.P., Sr., on behalf of minor child D.K. v. Board

[4] This matter was consolidated with K.L. and K.L. on behalf of Minor Child C.L. v. Bd. of Educ. of Kinnelon, EDU 1192-08.

of Education of the Bordentown Regional School District, Burlington County, EDU 541-06, OAL Initial Decision (December 5, 2006), Comm'r Decision (January 18, 2007). In A.P., there was evidence that the petitioner had purchased and lived in the same home located in the district, had moved out when extensive damage had been done to it while he was away on duty in the National Guard and that he and D.K. had moved back into the home three (3) months after the school year had begun and while construction was ongoing. The Commissioner emphasized that in K.L.;

> By way of contrast, petitioners in this case had never lived in Kinnelon before the 2007-2008 school year and do not appear to have lived in Kinnelon at any time during that school year. They lived in Butler and could have sent their children to the Butler public schools without payment of tuition. In short, the Commissioner finds petitioners' arguments concerning domicile to be unpersuasive.
>
> See, K.L. and K.L. on behalf of Minor Child M.L. v. Bd. of Educ. of Kinnelon, EDU 1191-08, Comm'r Decision (July 23, 2008) at 7.

The court upheld the Commissioner's decision, citing to Unanue;

> Although not a case involving education law, Unanue, is instructive on the general issue of "domicile" as a legal concept. "'In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving.'" Unanue, supra, 255 N.J. Super. at 374 (quoting Kurilla v. Roth, 132 N.J.L. 213, 215, 38 A.2d 862 (Sup. Ct. 1944)); accord D.L. v. Bd. of Educ. of Princeton Regional School Dist., 366 N.J. Super. 269, 273, 840 A.2d 979 (App. Div. 2004).
>
> > In considering whether a change of domicile has occurred, three elements must be considered: 1) whether there had been an actual and physical taking up of an abode in a particular state; 2) whether the subject had an intention to make his home there permanently or least indefinitely; and (3) whether the subject had an intention to abandon his old domicile.

> The court must evaluate all of the facts of the case to determine the place in which there is the necessary concurrence of physical presence and an intention to make that place one's home.
>
> [Unanue, supra, 255 N.J. Super. at 376 (citing Lyon v. Glaser, 60 N.J. 259, 264-65, 288 A.2d 12, (1972)) (emphasis added).

[K.L. v. Board of Educ., supra at 4.]

The court found it "obvious" that the family was "never domiciled in Kinnelon" and that while "they may have possessed a present intention to reside there when renovations were complete", there was no dispute that they "never did reside in the district". It concluded;

> They had never established an "actual and physical abode" in Kinnelon, and therefore they lacked the "necessary concurrence of physical presence and an intention to make that place one's home" upon which the legal concept of domicile rests.
>
> [Id. at 4.]

The cases cited by the Petitioners in their brief are either clearly distinguishable [A.P. v. Lower Merion Sch. Dist., 389 F. Supp. 3rd 322 (E.D.Pa. 2019) (domicile case where the petitioners were 'living' part-time in 2 different school districts)] or are entirely consistent with the cases cited above. For example, in S.H. and C.H. o.b.o Minor Children, C.H., S.H. and S.H. v. Township of Alloway Board of Education, Salem County, OAL Initial Decision (February 11, 2019), Comm'r Decision (March 26, 2019), the court largely adopted language from Unanue, supra and V.R. ex rel A.R., supra and includes the "intention of returning" language, while the facts of that case involved whether the plaintiffs had moved back to a residence where they had formally resided.

Further, concerning the aspect of Petitioner's argument that her roots in Tenafly should be considered in determining domicile, while not entirely on point (since the case involved a person who had moved away from her old hometown, but maintained a home

"so she could see her few remaining friends in New Jersey, when she wished"), the court in Lyon, supra, held, that;

> A mere sentimental attachment does not hold an old domicile.
>
> Lyon v. Glaser, 60 N.J. 259 at 272, cit., District of Columbia v. Murphy, 314 U.S. 441, 456, 62 S. Ct. 303, 86 L. Ed. 329, 338 (1941).

With that final finding, it is clear that nothing in the Petitioners' legal argument effectively counters the clear necessity that for domicile to be established, there must be an "actual and physical taking up of an abode". Unanue, supra, 255 N.J. Super. at 376.

That simply has not been established by Petitioners here.

Abuse of Discretion

The law is clear that a student may attend school in a district in which he is not domiciled, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2. A superintendent or administrative principal may also have a non-domiciled student removed from that school, on application to the board of education. N.J.S.A. 18A:38-1(b)(2).

Tenafly has adopted a specific policy concerning this issue, which reads as follows;

> **Nonresident Students**
>
> Effective December 6, 2004, the Board generally ceased accepting new nonresident tuition-paying students. This restriction does not apply to the special education program for autism, pre-school disabilities or language learning disabilities self-contained program, for students who successfully apply to the program.
>
> A. Exceptions to paying tuition by nonresident students may occur under the following situations:

1. Nonresident School Faculty and Staff. Children of full time Board of Education employees who work a minimum of 35 hours a week in one particular position may attend Tenafly schools at no tuition cost providing such accommodations place no hardships on school district resources such as, but not limited to personnel, facilities and program expenses. All stipulations and conditions listed above in this policy shall be applicable to the children of nonresident school faculty and staff seeking to attend or actually attending the Tenafly Public Schools. If such hardships should evolve, the student shall no longer be granted a waiver of tuition. Application for admission must be made to the Superintendent of Schools at least sixty calendar days prior to the anticipated enrollment dates. A new application must be submitted for each school year.
2. Special Students. American Field Service students and other students approved by the National Association of Secondary School Principals may be admitted at no tuition cost at the discretion of the Superintendent.
3. High School Seniors. A student who is a senior and whose family moves from Tenafly or a sending school district after January 1, may be allowed to complete the senior year without further tuition payment.

B. Annual Board of Education – Superintendent of Schools Review of Policy.

The Superintendent of Schools and the Board of Education will annually review the practical results of policy 5111 for the year in progress and discuss implementation of the policy for the coming school year. Particular attention will be given to anticipated enrollments, space and staffing needs. This annual review will be so scheduled that any conclusions reached may be appropriately reflected in the school budget for the coming school year.

The admission of a nonresident student to school free of charge must be approved by the Board. No student otherwise eligible shall be denied admission on the basis of the student's race, color, creed, religion, national origin, ancestry, age marital status, affectational or sexual orientation or sex, social or economic status, or disability. The continued enrollment of any nonresident student shall be contingent upon the student's maintenance of good standards of citizenship and discipline.

[Exhibit R-1 at 8-9.]

When a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal for the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

Similar policies have been upheld as within the discretion of school boards. See, M.M. and V.M. ex rel R.M. v. Bd. of Educ. of Hillsborough, EDU 6744-98, Initial Decision (Oct. 19, 1998), adopted, Comm'r (Oct. 29, 1998).

The Respondent also points to N.J.A.C. 6A:22-2.2, which is brief and to the point;

> Nothing in this chapter shall be construed to limit a district board of education's discretion to admit nonresident students, or the ability of a nonresident student to attend school with or without payment of tuition with the accepting district board of education's consent, pursuant to N.J.S.A. 18A:38-3.a.

N.J.S.A. 18A:38-3(a) reads;

> Admission for nonresident of school district; parent on active duty
>
> a. Any person not resident in a school district, if eligible except for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, and with or without payment of tuition, as the board may prescribe.
>
> b. Any person not resident in a school district, if eligible except for residence, and if that person previously was a resident of the district, shall be admitted to the schools of the district without payment of tuition if that person's parent or guardian is a member of the New Jersey National Guard or a member of the reserve component of the armed forces of the United States and has been ordered into active military service in any

> of the armed forces of the United States in time of war or national emergency, resulting in the relocation of the student out of the district. A school district admitting a student pursuant to this subsection shall not be obligated for transportation costs.

While Petitioners argue that the District abused its discretion in failing to admit the children, the burden it faces in attempting to demonstrate same is daunting. As noted in K.L. and K.L. on behalf of Minor Child M.L. v. Bd. of Educ. of Kinnelon, EDU 1191-08, Initial Decision (April 24, 2008);

> Although there is no explicit authority for a public school district to contract with parents to enroll their children within the district, neither is there explicit authority that denies them this authority. Local boards do possess this authority since they are given a great deal of discretion in determining whether to enroll out-of-district students.
>
> [Id.]

When combined with the statutory and administrative laws detailed above, it is clear that the District has the discretionary power to admit or deny admittance to a non-resident student.

The issue of discretion was discussed at length in Parsippany-Troy Hills Educ. Ass'n v. Board of Educ. of Parsippany-Troy Hills, 188 N.J. Super. 161 (App. Div. 1983), where the Court held;

> These statutory provisions and implementing code regulations leave little doubt that the choice of which courses to offer and, necessarily, the content of those courses, is a discretionary decision left to the local boards of education, subject only to the periodic review of the Commissioner and State Board of Education. In such a case "the decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Tp. Bd. of Ed., 89 N.J. Super. 327, 332 (App.Div.1965). An "action

> of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App.Div.1960).
>
> [Id. at 167-68.]

In explaining the decision not to discretionarily admit the children, Ms. DeMarco noted that Policy 5111 "makes clear that you must be residing in you Tenafly home prior to registering your children for school (and) that owning a home in Tenafly and paying taxes on it does not result in the right to enrollment in our schools." She emphasized the difference between a resident that had been forced to move out of a temporarily uninhabitable residence where they had already been living and "future residents who are renovating a home they have not lived in". (Exhibit P-11)

Ms. DeMarco also advised Petitioners that she consulted the Board attorney prior to making her decision;

> Kindly note that I did consult with the Board attorney prior to my recent response to you to be sure there were no avenues for enrollment that I was overlooking in my review of your documents. It was his shared interpretation that the highly strict enrollment policy in Tenafly did not support your children's enrollment at this time based on the information you have shared with us. To assist President Schwarz with your appeal, I share (sic) the attorney's opinion on this matter with her.
>
> [Exhibit P-12.]

Respondent further argues that if the Board were to make an ad hoc exception to the non-resident student policy, it would "lose integrity" and that it would be "opening the door" to additional non-resident children being enrolled "based on circumstances outside the Board's control". The integrity of the policy itself, "is a legitimate, rational basis to deny Petitioners' request".

I agree with Respondent. The decision to not enroll was clearly not arbitrary, capricious or unreasonable. The policy itself was very narrowly written, with an expressed position that since December 2004, "the Board generally ceased accepting new nonresident tuition-paying students". Then, it very carefully reviewed the Petitioners' situation, acknowledging that "(w)hile our district policy is firm...we recognize that your particular situation suggests further review". (Exhibit P-10).

It is clear from the correspondence with Ms. DeMarco that the matter was taken seriously, leading to a review not only by her, but by the Board attorney, whose opinion was shared with the Board of Education prior to its final decision to deny enrollment. Even assuming that Petitioners' allegations that there were some technical deficiencies in how the decision and subsequent filing deadlines were communicated are true, there is no basis to even suggest that the District's decision was arbitrary or capricious. Further, while a rational person may disagree with the decision to deny enrollment, that alone is certainly no indication that the decision was unreasonable.

As noted above, the policy was very narrowly written, with three limited exceptions, which themselves are limited by the language contained within the exceptions clauses. None of these exceptions can be said to apply to Petitioners' situation even tangentially (unlike Kinnelon's policy in K.L. and K.L. on behalf of Minor Child M.L., supra, where a five week "move-in window" was included). The decision to deny enrollment by the District was consistent with the policy elucidated in Policy 5111 and, even after considering the detailed factual scenario presented by Petitioners, was not unreasonable.

CONCLUSIONS

Given the totality of the evidence, I **CONCLUDE** that at no time relevant to this action were/are Petitioners domiciled in Tenafly.

I further **CONCLUDE** that in addition to being neither arbitrary nor capricious, the ultimate decision to deny enrollment to children was not an unreasonable exercise of discretion.

Given the above, I therefore further **CONCLUDE** that the children are not currently entitled to a free public school education in the Tenafly Boro School District.

I further **CONCLUDE** that Petitioner's children will continue to be ineligible to receive a free education in the Tenafly Boro School District as long as they remain domiciled in a municipality other than Tenafly, New Jersey.

ORDER

Based on the foregoing, Respondent's determination that petitioner's children re ineligible for a free education in the Tenafly Boro School District is hereby **AFFIRMED**.

It is hereby **ORDERED** that summary decision be **ENTERED** on behalf of respondent and that the Petitioner's appeals are **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 27, 2021
DATE

Matthew G. Miller, ALJ

Date Received at Agency: August 27, 2021

Date Mailed to Parties: August 27, 2021

MGM/mm

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

P-1 May 23, 2021 deed to 11 Stanton Road, Tenafly, N.J.

P-2 June 14, 2021 residency appeal petition

P-3 Tenafly sports registrations

P-4 11 Stanton Road utility bills

P-5 Copy of driver's licenses issued March 25, 2021

P-6 11 Stanton Road, Tenafly, N.J. smoke detector and carbon monoxide detector certificate.

P-7 May 11, 2021 e-mail from petitioners to District, re: home renovations

P-8 Undated letter from contractor to District, re: home renovations

P-9 May 6, 2021 e-mail from Petitioners to District, re: Tenafly school enrollment

P-10 May 7, 2021 e-mail from District to Petitioners, re: request for home renovation information

P-11 May 12, 2021 e-mail from District to Petitioners, re: denial of request to enroll

P-12 May 13, 2021 e-mail from District to Petitioners, re: consultation with Board attorney

P-13 May 26, 2021 letter from District to Petitioners, re: confirmation of Board of Education decision to deny enrollment

For respondent:

R-1 Tenafly Board of Education Policy Guide 5111

216-21

216-21SEC

SEC Dkt. No. D04-21
Agency Dkt. No. 134-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of James Anderson,
Somerdale Park Board of Education,
Camden County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent ultimately filed the Disclosure Statements after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 7, 2021
Date of Mailing: October 7, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D04-21
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O James Anderson,
Somerdale Park Board of Education, Camden County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on July 27, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised Respondent that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when the material facts, as here, are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

If a school official fails to file the required Disclosure Statements, the Commission is authorized, pursuant to *N.J.A.C.* 6A:28-3.3(b), to issue an Order to Show Cause. Moreover,

---

[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission (e-mail) only.

failure to timely file the required Disclosure Statements "shall constitute a violation of the ... Act and may result in the reprimand, censure, suspension or removal of a school official pursuant to the recommendation of the Commission as acted upon by the Commissioner [of Education]." *N.J.A.C.* 6A:28-3.3(a).

With the above in mind, Respondent is a returning school official and, therefore, was required to file Disclosure Statements by April 30, 2021. Despite this fact, and even though Respondent received reminders as further detailed below, Respondent failed to file Disclosure Statements within the statutorily required timeframe.

More specifically, throughout the months of June and early July, the Commission's staff sent repeated messages to the Board Secretary advising that Respondent had not yet filed Disclosure Statements. The electronic correspondence to the Board Secretary further advised that if Respondent failed to file Disclosure Statements, the Commission had the authority to issue an OTSC, find Respondent in violation of the Act, and recommend a penalty up to and including removal for non-compliance.

In addition, by electronic correspondence dated July 19, 2021, July 21, and July 23, 2021, Respondent was reminded that his Disclosure Statements had not yet been filed. Respondent was further advised that continued failure to file Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on July 27, 2021. After having been served with the OTSC, Respondent filed his Disclosure Statements, but did not dispute that his filing was untimely, or otherwise submit anything explaining why a penalty should not be imposed.

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because he did not timely file Disclosure Statements. Although Respondent ultimately filed his Disclosure Statements, the filing was several months late, and submitted only after multiple reminders were sent reiterating his statutory obligation to file Disclosure Statements.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that Disclosure Statements are filed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to nine (9) school officials throughout the State for failure to comply with the statutory obligation to file Disclosure Statements. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D04-21

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2021; and

Whereas, Respondent failed to file Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why he failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent filed his Disclosure Statements following issuance of the OTSC, but did not dispute they were untimely filed; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file Disclosure Statements; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

217-21

217-21SEC

SEC Dkt. No. D05-21
Agency Dkt. No. 135-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Noel Cruz,
City of Orange Township Board of Education,
Essex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of censure.[1] Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. Accordingly, respondent is hereby censured for violating the School Ethics Act.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 7, 2021
Date of Mailing: October 7, 2021

[1] Although it was not indicated in the SEC's decision, it appears that respondent is no longer a member of the Board of Education. Therefore, while the penalty for failure to file Disclosure Statements is typically removal, the Commissioner is limited in these circumstances to a penalty of censure.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D05-21
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Noel Cruz,
City of Orange Township Board of Education, Essex County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on July 27, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised Respondent that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when the material facts, as here, are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

If a school official fails to file the required Disclosure Statements, the Commission is authorized, pursuant to *N.J.A.C.* 6A:28-3.3(b), to issue an Order to Show Cause. Moreover,

---

[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission (e-mail) only.

failure to timely file the required Disclosure Statements "shall constitute a violation of the ... Act and may result in the reprimand, censure, suspension or removal of a school official pursuant to the recommendation of the Commission as acted upon by the Commissioner [of Education]." *N.J.A.C.* 6A:28-3.3(a).

With the above in mind, Respondent is a returning school official and, therefore, was required to file Disclosure Statements by April 30, 2021. Despite this fact, and even though Respondent received reminders as further detailed below, Respondent failed to file Disclosure Statements within the statutorily required timeframe.

More specifically, throughout the months of June and early July, the Commission's staff sent repeated messages to the Board Secretary advising that Respondent had not yet filed Disclosure Statements. The electronic correspondence to the Board Secretary further advised that if Respondent failed to file Disclosure Statements, the Commission had the authority to issue an OTSC, find Respondent in violation of the Act, and recommend a penalty up to and including removal for non-compliance.

In addition, by electronic correspondence dated July 19, 2021, July 21, and July 23, 2021, Respondent was reminded that his Disclosure Statements had not yet been filed. Respondent was further advised that continued failure to file Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on July 27, 2021. After having been served with the OTSC, Respondent still failed to file Disclosure Statements, or to otherwise respond to the OTSC.

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because he did not timely file Disclosure Statements.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that Disclosure Statements are filed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to nine (9) school officials throughout the State for failure to comply with the statutory obligation to file Disclosure Statements. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **censure**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D05-21

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2021; and

Whereas, Respondent failed to file Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why he failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent failed to file his Disclosure Statements following issuance of the OTSC; and

Whereas, Respondent failed to file a response to the OTSC; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file Disclosure Statements; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of censure; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

218-21

218-21SEC

SEC Dkt. No. D06-21
Agency Dkt. No. 136-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Oliverto Agosto,
City of Orange Township Board of Education,
Essex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of censure.[1] Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. Accordingly, respondent is hereby censured for violating the School Ethics Act.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 7, 2021
Date of Mailing: October 7, 2021

[1] Although it was not indicated in the SEC's decision, it appears that respondent is no longer a member of the Board of Education. Therefore, while the penalty for failure to file Disclosure Statements is typically removal, the Commissioner is limited in these circumstances to a penalty of censure.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D06-21
Decision for Failure to File Complete Personal/Relative and Financial Disclosure Statements

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I/M/O Oliverto Agosto,
City of Orange Township Board of Education, Essex County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act for failing to file complete Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on July 27, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised Respondent that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when the material facts, as here, are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission (e-mail) only.

When it is determined that a school official's otherwise timely filed Disclosure Statements are incomplete, the filing shall be returned to the school official, and he shall have twenty (20) days from receipt of the returned filing to complete the Disclosure Statements, and to resubmit them to the local board secretary or charter school designee. *N.J.A.C.* 6A:28-3.4(a). At the expiration of the twenty (20) days, or upon receipt of a filing which continues to fail to provide the information required by *N.J.S.A.* 18A:12-25 and/or *N.J.S.A.* 18A:12-26, the Commission shall issue an Order to Show Cause, directing the school official to show cause as to why the Commission should not impose a sanction. *N.J.A.C.* 6A:28-3.4(b). If the school official fails to submit a response within twenty (20) days, or if the response is returned indicating that the school official refuses to properly file, the "Commission may conclude that a school official's incomplete filing is in effect a failure to file and the Commission shall proceed ... pursuant to the procedures set forth in *N.J.A.C.* 6A:28-3.3." As set forth in *N.J.A.C.* 6A:28-3.3(a), failure to timely file the required Disclosure Statements "shall constitute a violation of the ... Act and may result in the reprimand, censure, suspension or removal of a school official pursuant to the recommendation of the Commission as acted upon by the Commissioner [of Education]." *N.J.A.C.* 6A:28-3.3(a).

With the above in mind, Respondent is a returning school official and, therefore, was required to file complete Disclosure Statements by April 30, 2021. Although Respondent filed Disclosure Statements on June 29, 2021, his filing was rejected. Even though Respondent received reminders as further detailed below, Respondent failed to file complete Disclosure Statements.

More specifically, throughout the months of June and early July, the Commission's staff sent repeated messages to the Board Secretary advising that Respondent had not yet filed complete Disclosure Statements. The electronic correspondence to the Board Secretary further advised that if Respondent failed to file complete Disclosure Statements, the Commission had the authority to issue an OTSC, find Respondent in violation of the Act, and recommend a penalty up to and including removal for non-compliance.

In addition, by electronic correspondence dated July 19, 2021, July 21, 2021, and July 23, 2021, Respondent was reminded that he did not file complete Disclosure Statements. Respondent was further advised that continued failure to file complete Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file complete Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on July 27, 2021. After having been served with the OTSC, Respondent still failed to file complete Disclosure Statements, or to otherwise respond to the OTSC.

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because he did not file complete Disclosure Statements.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that Disclosure Statements are filed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to nine (9) school officials throughout the State for failure to comply with the statutory obligation to file Disclosure Statements. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **censure**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to File Complete Personal/Relative and Financial Disclosure Statements
Docket No.: D06-21

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2021; and

Whereas, Respondent failed to file complete Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why he failed to file complete Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1;

Whereas, Respondent failed to file complete Disclosure Statements following issuance of the OTSC, and failed to otherwise respond to the OTSC; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file complete Disclosure Statements; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of censure; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

219-21

219-21SEC

SEC Dkt. No. D07-21
Agency Dkt. No. 137-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Jacquelyn Lake,
The Gray Charter School, Essex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent filed the Disclosure Statements before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. Accordingly, as of the date of this decision, respondent is hereby removed from the board for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 7, 2021
Date of Mailing: October 7, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D07-21
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Jacquelyn Lake,
The Gray Charter School, Essex County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on July 27, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised Respondent that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when the material facts, as here, are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

If a school official fails to file the required Disclosure Statements, the Commission is authorized, pursuant to *N.J.A.C.* 6A:28-3.3(b), to issue an Order to Show Cause. Moreover,

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission (e-mail) only.

failure to timely file the required Disclosure Statements "shall constitute a violation of the ... Act and may result in the reprimand, censure, suspension or removal of a school official pursuant to the recommendation of the Commission as acted upon by the Commissioner [of Education]." *N.J.A.C.* 6A:28-3.3(a).

With the above in mind, Respondent is a returning school official and, therefore, was required to file Disclosure Statements by April 30, 2021. Despite this fact, and even though Respondent received reminders as further detailed below, Respondent failed to file Disclosure Statements within the statutorily required timeframe.

More specifically, throughout the months of June and early July, the Commission's staff sent repeated messages to the Charter School Lead advising that Respondent had not yet filed Disclosure Statements. The electronic correspondence to the Charter School Lead further advised that if Respondent failed to file Disclosure Statements, the Commission had the authority to issue an OTSC, find Respondent in violation of the Act, and recommend a penalty up to and including removal for non-compliance.

In addition, by electronic correspondence dated July 19, 2021, July 21, and July 23, 2021, Respondent was reminded that her Disclosure Statements had not yet been filed. Respondent was further advised that continued failure to file Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on July 27, 2021. After having been served with the OTSC, Respondent still failed to file Disclosure Statements, or to otherwise respond to the OTSC.

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because she did not timely file Disclosure Statements.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that Disclosure Statements are filed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to nine (9) school officials throughout the State for failure to comply with the statutory obligation to file Disclosure Statements. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such

removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D07-21

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2021; and

Whereas, Respondent failed to file Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent failed to file her Disclosure Statements following issuance of the OTSC, and failed to otherwise respond to the OTSC; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file Disclosure Statements; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

220-21

220-21SEC
SEC Dkt. No. D08-21
Agency Dkt. No. 138-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Franklin Pachay,
The Gray Charter School, Essex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act (the Act) for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent filed the Disclosure Statements before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. Accordingly, as of the date of this decision, respondent is hereby removed from the board for violating the Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 7, 2021
Date of Mailing: October 7, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D08-21
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Franklin Pachay,
The Gray Charter School, Essex County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on July 27, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised Respondent that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when the material facts, as here, are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

If a school official fails to file the required Disclosure Statements, the Commission is authorized, pursuant to *N.J.A.C.* 6A:28-3.3(b), to issue an Order to Show Cause. Moreover,

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission (e-mail) only.

failure to timely file the required Disclosure Statements "shall constitute a violation of the ... Act and may result in the reprimand, censure, suspension or removal of a school official pursuant to the recommendation of the Commission as acted upon by the Commissioner [of Education]." *N.J.A.C.* 6A:28-3.3(a).

With the above in mind, Respondent is a returning school official and, therefore, was required to file Disclosure Statements by April 30, 2021. Despite this fact, and even though Respondent received reminders as further detailed below, Respondent failed to file Disclosure Statements within the statutorily required timeframe.

More specifically, throughout the months of June and early July, the Commission's staff sent repeated messages to the Charter School Lead advising that Respondent had not yet filed Disclosure Statements. The electronic correspondence to the Charter School Lead further advised that if Respondent failed to file Disclosure Statements, the Commission had the authority to issue an OTSC, find Respondent in violation of the Act, and recommend a penalty up to and including removal for non-compliance.

In addition, by electronic correspondence dated July 19, 2021, July 21, and July 23, 2021, Respondent was reminded that his Disclosure Statements had not yet been filed. Respondent was further advised that continued failure to file Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on July 27, 2021. After having been served with the OTSC, Respondent still failed to file Disclosure Statements, or to otherwise respond to the OTSC.

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because he did not timely file Disclosure Statements.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that Disclosure Statements are filed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to nine (9) school officials throughout the State for failure to comply with the statutory obligation to file Disclosure Statements. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such

removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D08-21

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2021; and

Whereas, Respondent failed to file Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why he failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent failed to file his Disclosure Statements following issuance of the OTSC, and failed to otherwise respond to the OTSC; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file Disclosure Statements; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

221-21

221-21SEC

SEC Dkt. No. D10-21
Agency Dkt. No. 139-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Jennifer Metzger,
Franklin Township Board of Education,
Gloucester County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent filed the Disclosure Statements before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 60 days.[1] Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law.

[1] The SEC's decision does not indicate why the alternative penalty is a 60-day suspension, when the penalty under similar circumstances is routinely a 30-day suspension. In the absence of specific information in the record before the Commissioner that would support an increased penalty, the Commissioner finds that the appropriate alternative penalty is a 30-day suspension.

Accordingly, as of the date of this decision, respondent is hereby removed from the board for violating the School Ethics Act.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 7, 2021
Date of Mailing: October 7, 2021

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D10-21
Decision for Failure to File Complete Personal/Relative and Financial Disclosure Statements

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I/M/O Jennifer Metzger,
Franklin Township Board of Education, Gloucester County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act for failing to file complete Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on July 27, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised Respondent that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when the material facts, as here, are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission (e-mail) only.

When it is determined that a school official's otherwise timely filed Disclosure Statements are incomplete, the filing shall be returned to the school official, and she shall have twenty (20) days from receipt of the returned filing to complete the Disclosure Statements, and to resubmit them to the local board secretary or charter school designee. *N.J.A.C.* 6A:28-3.4(a). At the expiration of the twenty (20) days, or upon receipt of a filing which continues to fail to provide the information required by *N.J.S.A.* 18A:12-25 and/or *N.J.S.A.* 18A:12-26, the Commission shall issue an Order to Show Cause, directing the school official to show cause as to why the Commission should not impose a sanction. *N.J.A.C.* 6A:28-3.4(b). If the school official fails to submit a response within twenty (20) days, or if the response is returned indicating that the school official refuses to properly file, the "Commission may conclude that a school official's incomplete filing is in effect a failure to file and the Commission shall proceed ... pursuant to the procedures set forth in *N.J.A.C.* 6A:28-3.3." As set forth in *N.J.A.C.* 6A:28-3.3(a), failure to timely file the required Disclosure Statements "shall constitute a violation of the ... Act and may result in the reprimand, censure, suspension or removal of a school official pursuant to the recommendation of the Commission as acted upon by the Commissioner [of Education]." *N.J.A.C.* 6A:28-3.3(a).

With the above in mind, Respondent is a returning school official and, therefore, was required to file complete Disclosure Statements by April 30, 2021. Although Respondent filed Disclosure Statements on June 22, 2021, her filing was rejected. Even though Respondent received reminders as further detailed below, Respondent failed to file complete Disclosure Statements as required by law.

More specifically, throughout the months of June and early July, the Commission's staff sent repeated messages to the Board Secretary advising that Respondent had not yet filed complete Disclosure Statements. The electronic correspondence to the Board Secretary further advised that if Respondent failed to file complete Disclosure Statements, the Commission had the authority to issue an OTSC, find Respondent in violation of the Act, and recommend a penalty up to and including removal for non-compliance.

In addition, by electronic correspondence dated July 19, 2021, July 21, 2021, and July 23, 2021, Respondent was reminded that she did not file complete Disclosure Statements. Respondent was further advised that continued failure to file complete Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file complete Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on July 27, 2021. After having been served with the OTSC, Respondent still failed to file complete Disclosure Statements, or to otherwise respond to the OTSC.

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because she did not file complete Disclosure Statements.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that Disclosure Statements are filed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to nine (9) school officials throughout the State for failure to comply with the statutory obligation to file Disclosure Statements. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **sixty (60) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education. The Commission is recommended a longer period of suspension due to the fact that Respondent was previously reprimanded in connection with *I/M/O Jennifer Metzger, Franklin Township Board of Education, Gloucester County* (Docket No. T21-19).

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (schoolethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

Resolution Adopting Decision for Failure to File Complete Personal/Relative and Financial Disclosure Statements
Docket No.: D10-21

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2021; and

Whereas, Respondent failed to file complete Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file complete Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1;

Whereas, Respondent failed to file complete Disclosure Statements following issuance of the OTSC, and failed to otherwise respond to the OTSC; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file complete Disclosure Statements; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files complete Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a sixty (60) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

222-21

222-21SEC

SEC Dkt. No. D14-21
Agency Dkt. No. 140-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Andrea Maldonado,
Jersey City Board of Education,
Hudson County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of censure.[1] Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. Accordingly, respondent is hereby censured for violating the School Ethics Act.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 7, 2021
Date of Mailing: October 7, 2021

[1] Although it was not indicated in the SEC's decision, it appears that respondent is no longer a member of the Board of Education. Therefore, while the penalty for failure to file Disclosure Statements is typically removal, the Commissioner is limited in these circumstances to a penalty of censure.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D14-21
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Andrea Maldonado,
Jersey City Board of Education, Hudson County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on July 27, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised Respondent that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when the material facts, as here, are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

If a school official fails to file the required Disclosure Statements, the Commission is authorized, pursuant to *N.J.A.C.* 6A:28-3.3(b), to issue an Order to Show Cause. Moreover,

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission (e-mail) only.

failure to timely file the required Disclosure Statements "shall constitute a violation of the ... Act and may result in the reprimand, censure, suspension or removal of a school official pursuant to the recommendation of the Commission as acted upon by the Commissioner [of Education]." *N.J.A.C.* 6A:28-3.3(a).

With the above in mind, Respondent is a returning school official and, therefore, was required to file Disclosure Statements by April 30, 2021. Despite this fact, and even though Respondent received reminders as further detailed below, Respondent failed to file Disclosure Statements within the statutorily required timeframe.

More specifically, throughout the months of June and early July, the Commission's staff sent repeated messages to the Board Secretary advising that Respondent had not yet filed Disclosure Statements. The electronic correspondence to the Board Secretary further advised that if Respondent failed to file Disclosure Statements, the Commission had the authority to issue an OTSC, find Respondent in violation of the Act, and recommend a penalty up to and including removal for non-compliance.

In addition, by electronic correspondence dated July 19, 2021, July 21, and July 23, 2021, Respondent was reminded that her Disclosure Statements had not yet been filed. Respondent was further advised that continued failure to file Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on July 27, 2021. After having been served with the OTSC, Respondent still failed to file Disclosure Statements, or to otherwise respond to the OTSC.

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because she did not timely file Disclosure Statements.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that Disclosure Statements are filed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to nine (9) school officials throughout the State for failure to comply with the statutory obligation to file Disclosure Statements. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **censure**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D14-21

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2021; and

Whereas, Respondent failed to file Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent failed to file her Disclosure Statements following issuance of the OTSC; and

Whereas, Respondent failed to file a response to the OTSC; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file Disclosure Statements; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of censure; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

223-21

223-21SEC

SEC Dkt. No. T01-21
Agency Dkt. No. 141-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Annette Beasley,
Irvington Board of Education,
Essex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent completed training after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2021
Date of Mailing: October 13, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T01-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Annette Beasley,
Irvington Board of Education, Essex County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, and also served on July 27, 2021, via electronic mail.[1] The OTSC directed Annette Beasley (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on July 27, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Irvington Board of Education (Board), located in Essex County. As a result of her position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by March 31, 2021.[2]

On or about May 17, 2021, the NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by March 31, 2021, and the

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.
[2] The March 31, 2021, deadline is because of an April school board of education election.

list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or Business Administrator about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on July 27, 2021.

To date, there is no dispute that Respondent did not complete her required training by March 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement on August 9, 2021. In correspondence to the SEC, Respondent stated, "My failure to complete [training] was simply an oversight ... There was never any ill intent to disregard the training requirement ... With all that has been going on with the COVID 19 [p]andemic, it was simply an oversight."

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to three (3) board of education members (April election) throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of board of education member and charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding board of education members and charter trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of school board members who are elected in April of each year who had not completed their mandated training for year 2020 to the NJSEC, due March 31, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) about mandated training through an email on March 26, 2021, April 15, 2021, and April 22, 2021.

5. Prior to preparing the July 1, 2021 report, NJSBA communicated with school board members about mandated training through an email to all board members to those out of compliance on March 26, 2021, April 15, 2021, April 22, 2021, and May 10, 2021.

6. On August 8, 2021, Annette Beasley was registered to take Governance 2 training and an email with the link was sent to their registered email address.

7. On March 26, 2021, NJSBA sent an email to Annette Beasley, a board member of the Irvington Board of Education, advising that they had not completed Governance 2 for 2020 and provided a link to the online training module.

8. An additional notice was sent to the Irvington Board of Education Business Administrator on March 26, 2021, April 15, 2021, April 22, 2021, and May 10, 2021 advising that Annette Beasley had not completed the Governance 2 training. Phone calls were also made the week of April 8th, 2021.

9. On March 26, 2021, April 15, 2021, April 22, 2021, and May 10, 2021 NJSBA communicated through email with Annette Beasley with the link and instructions for completing Governance 2. Phone calls were also made the week of April 28th, 2021.

10. All members and Business Administrators received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021,

April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

11. Annette Beasley did complete Governance 2 training on August 9, 2021.

August 16, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T01-21

Whereas, Annette Beasley (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her training program by March 31, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by March 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by March 31, 2021; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

224-21

224-21SEC

SEC Dkt. No. T02-21
Agency Dkt. No. 142-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Marcos Garciga,
Cliffside Park Board of Education,
Bergen County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent completed training after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2021
Date of Mailing: October 13, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T02-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Marcos Garciga,
Cliffside Park Board of Education, Bergen County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, and also served on July 27, 2021, via electronic mail.[1] The OTSC directed Marcos Garciga (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on July 27, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Cliffside Park Board of Education (Board), located in Bergen County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 3 training program by March 31, 2021.[2]

On or about May 17, 2021, the NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by March 31, 2021, and the

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.
[2] The March 31, 2021, deadline is because of an April school board of education election.

list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the Business Administrator about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on July 27, 2021.

To date, there is no dispute that Respondent did not complete his required training by March 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement on July 30, 2021, but did not respond to the Commission's OTSC as to why he did not complete training by March 31, 2021.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to three (3) board of education members (April election) throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of board of education member and charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding board of education members and charter trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of school board members who are elected in April of each year who had not completed their mandated training for year 2020 to the NJSEC, due March 31, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) about mandated training through an email on March 26, 2021, April 15, 2021, and April 22, 2021.

5. Prior to preparing the July 1, 2021 report, NJSBA communicated with school board members about mandated training through an email to all board members to those out of compliance on March 26, 2021, April 15, 2021, April 22, 2021, and May 10, 2021.

6. On May 6, 2021, Marcos Garciga was registered to take Governance 3 training and an email with the link was sent to their registered email address.

7. On March 26, 2021, NJSBA sent an email to Marcos Garciga, a board member of the Cliffside Park Board of Education, advising that they had not completed Governance 3 for 2020 and provided a link to the online training module.

8. An additional notice was sent to the Cliffside Park Board of Education Business Administrator on March 26, 2021, April 15, 2021, April 22, 2021, and May 10, 2021 advising that Marcos Garciga had not completed the Governance 3 training. Phone calls were also made the week of April 8th, 2021.

9. On March 26, 2021, April 15, 2021, April 22, 2021, and May 10, 2021 NJSBA communicated through email with Marcos Garciga with the link and instructions for completing Governance 3. Phone calls were also made the week of April 28th, 2021.

10. All members and Business Administrators received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021,

April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

11. Marcos Garciga did complete Governance 3 training on July 30, 2021.

August 16, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T02-21

Whereas, Marcos Garciga (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by March 31, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by March 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by March 31, 2021; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement he was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

225-21

225-21SEC

SEC Dkt. No. T05-21
Agency Dkt. No. 143-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Letizia Pantoliano,
Cliffside Park Board of Education,
Bergen County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent completed training after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2021
Date of Mailing: October 13, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T05-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Letizia Pantoliano,
Cliffside Park Board of Education, Bergen County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, and also served on July 27, 2021, via electronic mail.[1] The OTSC directed Letizia Pantoliano (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on July 27, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Cliffside Park Board of Education (Board), located in Bergen County. As a result of her position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by March 31, 2021.[2]

On or about May 17, 2021, the NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by March 31, 2021, and the

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.
[2] The March 31, 2021, deadline is because of an April school board of education election.

list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or Business Administrator about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on July 27, 2021.

To date, there is no dispute that Respondent did not complete her required training by March 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement on August 24, 2021. In correspondence to the Commission following the issuance of the OTSC, Respondent advised that she had been having ongoing technical issues, specifically, "The web-site continues to be a challenge," and "I have been trying many times in many ways for many months."

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to three (3) board of education members (April election) throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of board of education member and charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding board of education members and charter trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of school board members who are elected in April of each year who had not completed their mandated training for year 2020 to the NJSEC, due March 31, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) about mandated training through an email on March 26, 2021, April 15, 2021, and April 22, 2021.

5. Prior to preparing the July 1, 2021 report, NJSBA communicated with school board members about mandated training through an email to all board members to those out of compliance on March 26, 2021, April 15, 2021, April 22, 2021, and May 10, 2021.

6. On January 6, 2021, Letizia Pantoliano was registered to take Governance 2 training and an email with the link was sent to their registered email address.

7. On March 26, 2021, NJSBA sent an email to Letizia Pantoliano, a board member of the Cliffside Park Board of Education, advising that they had not completed Governance 2 for 2020 and provided a link to the online training module.

8. An additional notice was sent to the Cliffside Park Board of Education Business Administrator on March 26, 2021, April 15, 2021, April 22, 2021, and May 10, 2021 advising that Letizia Pantoliano had not completed the Governance 2 training. Phone calls were also made the week of April 8th, 2021.

9. On March 26, 2021, April 15, 2021, April 22, 2021, and May 10, 2021 NJSBA communicated through email with Letizia Pantoliano with the link and instructions for completing Governance 2. Phone calls were also made the week of April 28th, 2021.

10. All members and Business Administrators received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021,

April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

11. Letizia Pantoliano did complete Governance 2 training on August 24, 2021.

August 25, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T05-21

Whereas, Letizia Pantoliano (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her training program by March 31, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by March 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by March 31, 2021; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

226-21

226-21SEC

SEC Dkt. No. T06-21
Agency Dkt. No. 144-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Neil Abadie,
Learning Community Charter School,
Hudson County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Ultimately, respondent completed the training after the SEC's August 30, 2021 decision. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law.

Accordingly, as of the date of this decision, respondent is hereby suspended from the board for 30 days for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 7, 2021
Date of Mailing: October 7, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T06-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Neil Abadie,
Learning Community Charter School, Hudson County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Learning Community Charter School, located in Hudson County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of his position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

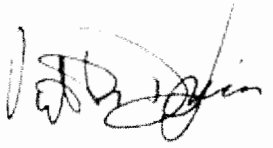
5. On June 14, 2021, Neil Abadie was registered to take Governance 1 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 17, 2021.

6. An additional notice was sent to the Learning Community Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Neil Abadie had not completed the Governance 1 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Neil Abadie with the link and instructions for completing Governance 1.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Neil Abadie did not complete Governance 1 training.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T06-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Neil Abadie (Respondent) is a charter school trustee of the Learning Community Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his Governance 1 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

227-21

227-21SEC

SEC Dkt. No. T07-20
Agency Dkt. No. 145-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Adrienne Doyle,
River Edge Board of Education, Bergen County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, as of the date of this decision, respondent is hereby removed from the board for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 14, 2021
Date of Mailing: October 14, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T07-20
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Adrienne Doyle,
River Edge Board of Education, Bergen County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, and also served on July 27, 2021, via electronic mail.[1] The OTSC directed Adrienne Doyle (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on July 27, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the River Edge Board of Education (Board), located in Bergen County. As a result of her position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by December 31, 2020.

On or about May 17, 2021, the NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2020, and the list provided included Respondent. Prior to this time, multiple communications about mandated

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the Business Administrator about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, the Bergen County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in mid-May 2021, the Commission's staff notified the County that Respondent was identified as a school official who failed to complete training by December 31, 2020. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated June 10, 2021, via electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was served on Respondent, via electronic mail, on July 27, 2021.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2020, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by December 31, 2020, and also failed to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to five (5) board of education members throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon issuance of the Commissioner of Education's decision. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon issuance of the Commissioner of Education's decision.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of board of education member and charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding board of education members and charter trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of school board members who are elected in November of each year who had not completed their mandated training for year 2020 to the NJSEC, due by December 31, 2020.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) about mandated training through an email on December 8, 2020, December 18, 2020, December 22, 2020, February 23, 2021, March 4, 2021, April 16, 2021 and April 22, 2021.

5. Prior to preparing the July 1, 2021 report, NJSBA communicated with school board members about mandated training through an email to all board members to those out of compliance on November 18, 2020, December 7, 2020, December 16, 2020, December 24, 2020, January 22, 2021, February 10, 2021, March 4, 2021, March 24, 2021, April 15, 2021 and April 22, 2021.

6. On January 4, 2021, Adrienne Doyle was registered to take Governance 2 training and an email with the link was sent to their registered email address. An additional email was sent to all board members about mandated training on January 22, 2021.

7. On February 10, 2021, NJSBA sent an email to Adrienne Doyle, a board member of the River Edge Board of Education, advising that they had not completed Governance 2 for 2020 and provided a link to the online training module.

8. An additional notice was sent to the River Edge Board of Education Business Administrator on December 8, 2020, December 18, 2020, December 22, 2020, February 23, 2021, March 4, 2021, April 16, 2021 and April 22, 2021, advising that Adrienne Doyle had not completed the Governance 2 training. Phone calls were also made the week of April 8th, 2021.

9. On March 4, 2021, March 24, 2021, April 15, 2021, and April 22, 2021 NJSBA communicated through email with Adrienne Doyle with the link and instructions for completing Governance 2. Phone calls were also made the week of April 28th, 2021.

10. All members and Business Administrators received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

11. Adrienne Doyle did not complete Governance 2 training.

August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T07-20

Whereas, Adrienne Doyle (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her training program by December 31, 2020; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by December 31, 2020, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by December 31, 2020, and also failed to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon issuance of a final decision by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon issuance of a final decision by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

227-21

227-21SEC+

SEC Dkt. No. T07-20
Agency Dkt. No. 145-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Adrienne Doyle,
River Edge Board of Education, Bergen County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

The Commissioner issued a decision on October 14, 2021, removing respondent from the board. Respondent filed a motion for reconsideration, in which she indicated that she had not received notifications from the SEC. Because respondent therefore did not have an opportunity to respond to the SEC's Order to Show Cause or decision, the Commissioner granted the motion for reconsideration. Respondent subsequently notified the Department of

Education that her term expired on December 31, 2021. Respondent did not complete the required training.

Upon review, the Commissioner concurs with the SEC's conclusion that respondent failed to timely honor an obligation placed upon board members by law. Because respondent is no longer a member of the Board, the penalty that may be imposed is limited to censure. Accordingly, respondent is hereby censured for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 9, 2022
Date of Mailing: February 9, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

228-21

228-21SEC

SEC Dkt. No. T09-20
Agency Dkt. No. 146-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Colm Fidgeon,
Somerdale Board of Education,
Camden County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act (the Act) for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, as of the date of this decision, respondent is hereby removed from the board for violating the Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 14, 2021
Date of Mailing: October 14, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T09-20
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Colm Fidgeon,
Somerdale Board of Education, Camden County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, and also served on July 27, 2021, via electronic mail.[1] The OTSC directed Colm Fidgeon (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on July 27, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Somerdale Board of Education (Board), located in Camden County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by December 31, 2020.

On or about May 17, 2021, the NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2020, and the list provided included Respondent. Prior to this time, multiple communications about mandated

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the Business Administrator about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, the Camden County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in mid-May 2021, the Commission's staff notified the County that Respondent was identified as a school official who failed to complete training by December 31, 2020. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated June 10, 2021, via electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was served on Respondent, via electronic mail, on July 27, 2021.

To date, there is no dispute that Respondent did not complete his required training by December 31, 2020, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by December 31, 2020, and also failed to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to five (5) board of education members throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon issuance of the Commissioner of Education's decision. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon issuance of the Commissioner of Education's decision.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of board of education member and charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding board of education members and charter trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of school board members who are elected in November of each year who had not completed their mandated training for year 2020 to the NJSEC, due by December 31, 2020.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) about mandated training through an email on December 8, 2020, December 18, 2020, December 22, 2020, February 23, 2021, March 4, 2021, April 16, 2021 and April 22, 2021.

5. Prior to preparing the July 1, 2021 report, NJSBA communicated with school board members about mandated training through an email to all board members to those out of compliance on November 18, 2020, December 7, 2020, December 16, 2020, December 24, 2020, January 22, 2021, February 10, 2021, March 4, 2021, March 24, 2021, April 15, 2021 and April 22, 2021.

6. On March 11, 2020, Colm Fidgeon was registered to take Governance 4 training and an email with the link was sent to their registered email address. An additional email was sent to all board members about mandated training on November 18, 2020.

7. On December 7, 2020, NJSBA sent an email to Colm Fidgeon, a board member of the Somerdale Board of Education, advising that they had not completed Governance 4 for 2020 and provided a link to the online training module.

8. An additional notice was sent to the Somerdale Board of Education Business Administrator on December 8, 2020, December 18, 2020, December 22, 2020, February 23, 2021, March 4, 2021, April 16, 2021 and April 22, 2021, advising that Colm Fidgeon had not completed the Governance 4 training. Phone calls were also made the week of April 8th, 2021.

9. On March 4, 2021, March 24, 2021, April 15, 2021, and April 22, 2021 NJSBA communicated through email with Colm Fidgeon with the link and instructions for completing Governance 4. Phone calls were also made the week of April 28th, 2021.

10. All members and Business Administrators received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

11. Colm Fidgeon did not complete Governance 4 training.

August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T09-20

Whereas, Colm Fidgeon (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by December 31, 2020; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by December 31, 2020, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by December 31, 2020, and also failed to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement he was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon issuance of a final decision by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon issuance of a final decision by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

229-21

229-21SEC

SEC Dkt. No. T09-21
Agency Dkt. No. 147-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Keith Davis,
Dr. Lena Edwards Academic Charter School,
Hudson County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent completed training after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2021
Date of Mailing: October 13, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T09-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Keith Davis,
Dr. Lena Edwards Academic Charter School, Hudson County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Dr. Lena Edwards Academic Charter School, located in Hudson County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of his position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement on July 29, 2021, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2021.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

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[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

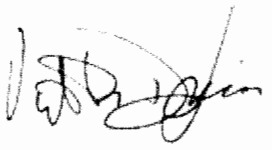
5. On June 18, 2021, Keith Davis was registered to take Governance 1 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 28, 2021.

6. An additional notice was sent to the Dr. Lena Edwards Academic Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Keith Davis had not completed the Governance 1 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Keith Davis with the link and instructions for completing Governance 1.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Keith Davis did complete Governance 1 training on July 29, 2021.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T09-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Keith Davis (Respondent) is a charter school trustee of the Dr. Lena Edwards Academic Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his Governance 1 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2021; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

230-21

230-21SEC

SEC Dkt. No. T10-20
Agency Dkt. No. 148-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Gary Yedman,
Seaside Park Board of Education,
Ocean County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent completed training after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2021
Date of Mailing: October 13, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T10-20
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Gary Yedman,
Seaside Park Board of Education, Ocean County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, and also served on July 27, 2021, via electronic mail.[1] The OTSC directed Gary Yedman (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on July 27, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Seaside Park Board of Education (Board), located in Ocean County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by December 31, 2020.

On or about May 17, 2021, the NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2020, and the list provided included Respondent. Prior to this time, multiple communications about mandated

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the Business Administrator about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, the Ocean County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in mid-May 2021, the Commission's staff notified the County that Respondent was identified as a school official who failed to complete training by December 31, 2020. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated June 10, 2021, via electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was served on Respondent, via electronic mail, on July 27, 2021.

To date, there is no dispute that Respondent did not complete his required training by December 31, 2020, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement on July 29, 2021, but did not respond to the Commission's OTSC as to why he did not complete training by December 31, 2020.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to five (5) board of education members throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of board of education member and charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding board of education members and charter trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of school board members who are elected in November of each year who had not completed their mandated training for year 2020 to the NJSEC, due by December 31, 2020.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) about mandated training through an email on December 8, 2020, December 18, 2020, December 22, 2020, February 23, 2021, March 4, 2021, April 16, 2021 and April 22, 2021.

5. Prior to preparing the July 1, 2021 report, NJSBA communicated with school board members about mandated training through an email to all board members to those out of compliance on November 18, 2020, December 7, 2020, December 16, 2020, December 24, 2020, January 22, 2021, February 10, 2021, March 4, 2021, March 24, 2021, April 15, 2021 and April 22, 2021.

6. On March 31, 2021, Gary Yedman was registered to take Governance 4 training and an email with the link was sent to their registered email address. An additional email was sent to all board members about mandated training on April 15, 2021.

7. On April 22, 2021, NJSBA sent an email to Gary Yedman, a board member of the Seaside Park Board of Education, advising that they had not completed Governance 4 for 2020 and provided a link to the online training module.

8. An additional notice was sent to the Seaside Park Board of Education Business Administrator on December 8, 2020, December 18, 2020, December 22, 2020, February 23, 2021, March 4, 2021, April 16, 2021 and April 22, 2021, advising that Adrienne Doyle had not completed the Governance 2 training. Phone calls were also made the week of April 8th, 2021.

9. On March 4, 2021, March 24, 2021, April 15, 2021, and April 22, 2021 NJSBA communicated through email with Gary Yedman with the link and instructions for completing Governance 4. Phone calls were also made the week of April 28th, 2021.

10. All members and Business Administrators received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

11. Gary Yedman did complete Governance 4 training on July 29, 2021.

August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T10-20

Whereas, Gary Yedman (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by December 31, 2020; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by December 31, 2020, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by December 31, 2020; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement he was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

231-21

231-21SEC

SEC Dkt. No. T10-21
Agency Dkt. No. 149-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Joseph DiFeo,
Dr. Lena Edwards Academic Charter School,
Hudson County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent completed training after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2021
Date of Mailing: October 13, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T10-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Joseph DiFeo,
Dr. Lena Edwards Academic Charter School, Hudson County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Dr. Lena Edwards Academic Charter School, located in Hudson County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of his position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement on August 16, 2021, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2021.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

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[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

5. On June 1, 2021, Joseph DiFeo was registered to take Governance 4 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 11, 2021.

6. An additional notice was sent to the Dr. Lena Edwards Academic Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Joseph DiFeo had not completed the Governance 4 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Joseph DiFeo with the link and instructions for completing Governance 4.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Joseph DiFeo did not complete Governance 4 training.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T10-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Joseph DiFeo (Respondent) is a charter school trustee of the Dr. Lena Edwards Academic Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his Governance 4 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2021; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

232-21

232-21SEC

SEC Dkt. No. T11-21
Agency Dkt. No. 150-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Leah Fabian,
The John P. Holland Charter School,
Passaic County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent completed training after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2021
Date of Mailing: October 13, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T11-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Leah Fabian,
The John P. Holland Charter School, Passaic County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of The John P. Holland Charter School, located in Passaic County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement on August 4, 2021, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2021.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

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[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

5. On June 19, 2020, Leah Fabian was registered to take Governance 1 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 11, 2021.

6. An additional notice was sent to the John P Holland School Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Leah Fabian had not completed the Governance 1 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Leah Fabian with the link and instructions for completing Governance 1.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Leah Fabian did complete Governance 1 training on August 4, 2021.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T11-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Leah Fabian (Respondent) is a charter school trustee of The John P. Holland Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her Governance 1 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2021; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

233-21

233-21SEC

SEC Dkt. No. T12-21
Agency Dkt. No. 151-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Karen Flores,
Red Bank Charter School,
Monmouth County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Ultimately, respondent completed the training after the SEC's August 30, 2021 decision. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law.

Accordingly, as of the date of this decision, respondent is hereby suspended from the board for 30 days for violating the School Ethics Act.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 7, 2021
Date of Mailing: October 7, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T12-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Karen Flores,
Red Bank Charter School, Monmouth County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Red Bank Charter School, located in Monmouth County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

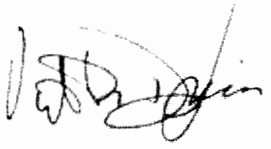
5. On July 22, 2020, Karen Flores was registered to take Governance 2 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 11, 2021.

6. An additional notice was sent to the Red Bank Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Karen Flores had not completed the Governance 2 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Karen Flores with the link and instructions for completing Governance 2.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Karen Flores did not complete Governance 2 training.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T12-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Karen Flores (Respondent) is a charter school trustee of the Red Bank Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her Governance 2 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

234-21

234-21SEC

SEC Dkt. No. T13-21
Agency Dkt. No. 152-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Tracye Gilliam,
The Pace Charter School,
Mercer County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act (the Act) for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, as of the date of this decision, respondent is hereby removed from the board for violating the Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 14, 2021
Date of Mailing: October 14, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T13-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Tracye Gilliam,
The Pace Charter School, Mercer County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of The Pace Charter School, located in Mercer County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

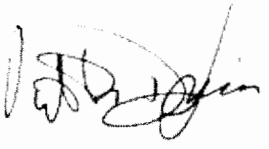
5. On November 19, 2020, Tracye Gilliam was registered to take Governance 1 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 11, 2021.

6. An additional notice was sent to the Pace Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Tracye Gilliam had not completed the Governance 1 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Tracye Gilliam with the link and instructions for completing Governance 1.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Tracye Gilliam did not complete Governance 1 training.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T13-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Tracye Gilliam (Respondent) is a charter school trustee of The Pace Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her Governance 1 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

236-21

236-21SEC

SEC Dkt. No. T15-21
Agency Dkt. No. 154-8/21

New Jersey Commissioner of Education
Final Decision

In the Matter of Charles Hall,
The Gray Charter School,
Essex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Ultimately, respondent completed the training after the SEC's August 30, 2021 decision. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law.

Accordingly, as of the date of this decision, respondent is suspended from the board for 30 days for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 7, 2021
Date of Mailing: October 7, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T15-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Charles Hall,
The Gray Charter School, Essex County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Gray Charter School, located in Essex County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of his position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

5. On July 28, 2021, Charles Hall was registered to take Governance 2 training and an email with the link was sent to their registered email address.

6. An additional notice was sent to the Gray Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Charles Hall had not completed the Governance 2 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Charles Hall with the link and instructions for completing Governance 2.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Charles Hall did not complete Governance 2 training.

August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T15-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Charles Hall (Respondent) is a charter school trustee of the Gray Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his Governance 2 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

237-21

237-21SEC

SEC Dkt. No. T16-21
Agency Dkt. No. 155-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Lori Henderson-Manning,
Bergen Arts and Science Charter School,
Bergen County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent completed training after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2021
Date of Mailing: October 13, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T16-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Lori Henderson-Manning,
Bergen Arts and Science Charter School, Bergen County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Bergen Arts and Science Charter School, located in Bergen County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement on July 31, 2021, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2021.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

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[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

5. On June 21, 2021, Lori Henderson-Manning was registered to take Governance 4 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 28, 2021.

6. An additional notice was sent to the Bergen Arts and Science Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Lori Henderson-Manning had not completed the Governance 4 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Lori Henderson-Manning with the link and instructions for completing Governance 4.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Lori Henderson-Manning did complete Governance 4 training on July 31, 2021.

August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T16-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Lori Henderson-Manning (Respondent) is a charter school trustee of the Bergen Arts and Science Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her Governance 4 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2021; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

238-21

238-21SEC

SEC Dkt. No. T18-21
Agency Dkt. No. 156-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Tamour Kousha,
Community Charter School of Paterson,
Passaic County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act (the Act) for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, as of the date of this decision, respondent is hereby removed from the board for violating the Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 14, 2021
Date of Mailing: October 14, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T18-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Tamour Kousha,
Community Charter School of Paterson, Passaic County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Community Charter School of Paterson, located in Passaic County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of his position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

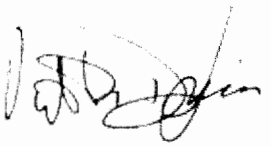
5. Tamour Kousha has not been registered to take Governance 4 training.

6. An additional notice was sent to the Community Charter School of Paterson Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Tamour Kousha had not completed the Governance 4 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Tamour Kousha with the link and instructions for completing Governance 4.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Tamour Kousha did not complete Governance 4 training.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T18-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Tamour Kousha (Respondent) is a charter school trustee of the Community Charter School of Paterson; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his Governance 4 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

239-21

239-21SEC

SEC Dkt. No. T20-21
Agency Dkt. No. 157-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Jacquelyn Lake,
The Gray Charter School,
Essex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act (the Act) for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, as of the date of this decision, respondent is hereby removed from the board for violating the Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 14, 2021
Date of Mailing: October 14, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T20-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Jacquelyn Lake,
The Gray Charter School, Essex County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Gray Charter School, located in Essex County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

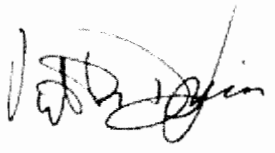
5. On September 29, 2020, Jacquelyn Lake was registered to take Governance 2 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 11, 2021.

6. An additional notice was sent to the Gray Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Jacquelyn Lake had not completed the Governance 2 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Jacquelyn Lake with the link and instructions for completing Governance 2.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Jacquelyn Lake did not complete Governance 2 training.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T20-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Jacquelyn Lake (Respondent) is a charter school trustee of the Gray Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her Governance 2 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

240-21

240-21SEC

SEC Dkt. No. T21-21
Agency Dkt. No. 158-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Jeanmarie Lamme,
Ocean Academy Charter School,
Ocean County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act (the Act) for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, as of the date of this decision, respondent is hereby removed from the board for violating the Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 14, 2021
Date of Mailing: October 14, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T21-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Jeanmarie Lamme,
Ocean Academy Charter School, Ocean County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Ocean Academy Charter School, located in Ocean County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

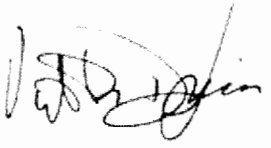
5. On February 4, 2021, Jeanmarie Lamme was registered to take Governance 2 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 11, 2021.

6. An additional notice was sent to the Ocean Academy Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Jeanmarie Lamme had not completed the Governance 2 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Jeanmarie Lamme with the link and instructions for completing Governance 2.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Jeanmarie Lamme did not complete Governance 2 training.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T21-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Jeanmarie Lamme (Respondent) is a charter school trustee of the Ocean Academy Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her Governance 2 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

241-21

241-21SEC

SEC Dkt. No. T23-21
Agency Dkt. No. 160-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Minzhi Liu,
Princeton Charter School,
Mercer County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act (the Act) for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, as of the date of this decision, respondent is hereby removed from the board for violating the Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 14, 2021
Date of Mailing: October 14, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T23-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Minzhi Liu,
Princeton Charter School, Mercer County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Princeton Charter School, located in Mercer County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

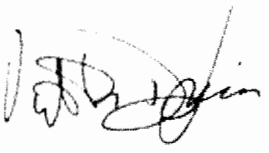
5. On May 5, 2020, Minzhi Liu was registered to take Governance 1 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 11, 2021.

6. An additional notice was sent to the Princeton Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Minzhi Liu had not completed the Governance 1 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Minzhi Liu with the link and instructions for completing Governance 1.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Minzhi Liu did not complete Governance 1 training.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T23-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Minzhi Liu (Respondent) is a charter school trustee of the Princeton Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her Governance 1 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

241-21SEC+

SEC Dkt. No. T23-21
Agency Dkt. No. 160-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Minzhi Liu,
Princeton Charter School,
Mercer County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

The Commissioner issued a decision on October 14, 2021, removing respondent from the board. Respondent filed a motion for reconsideration, in which she indicated that she had not received notifications from the SEC. Because respondent did not therefore have an opportunity to respond to the SEC's Order to Show Cause or the subsequent decision, the

Commissioner granted the respondent's motion for reconsideration. Respondent's motion also indicated that she had completed the required training, which was confirmed by the SEC.

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is suspended from the board for 30 days for violating the School Ethics Act. Because respondent has not acted as a member of the board since the issuance of the prior decision on October 14, 2021, and more than 30 days have passed since that date, the Commissioner deems respondent's 30-day suspension to have been previously served. Respondent may resume the duties of a member of the board immediately.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 9, 2022
Date of Mailing: February 9, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

242-21

242-21SEC

SEC Dkt. No. T24-21
Agency Dkt. No. 161-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Felise Matlock-Brown,
Englewood on the Palisades Charter School,
Bergen County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent completed training after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2021
Date of Mailing: October 13, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T24-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Felise Matlock-Brown,
Englewood on the Palisades Charter School, Bergen County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Englewood on the Palisades Charter School, located in Bergen County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 3 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement on July 30, 2021, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2021.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

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[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

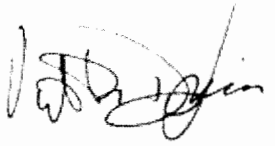
5. On July 19, 2021, Felise Matlock-Brown was registered to take Governance 3 training and an email with the link was sent to their registered email address.

6. An additional notice was sent to the Englewood on Palisades Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Felise Matlock-Brown had not completed the Governance 3 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Felise Matlock-Brown with the link and instructions for completing Governance 3.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Felise Matlock-Brown did complete Governance 3 training on July 30, 2021.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T24-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Felise Matlock-Brown (Respondent) is a charter school trustee of the Englewood on the Palisades Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her Governance 3 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2021; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

243-21

243-21SEC

SEC Dkt. No. T28-21
Agency Dkt. No. 162-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Mayokun Oshin,
Achievers Early College Prep Charter School,
Mercer County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent completed training after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2021
Date of Mailing: October 13, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T28-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Mayokun Oshin,
Achievers Early College Prep Charter School, Mercer County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Achievers Early College Prep Charter School, located in Mercer County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of his position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement on July 30, 2021, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2021.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

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[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.



Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

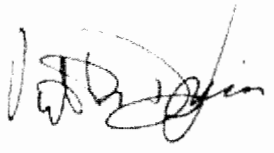
5. On June 22, 2021, Mayokun Oshun was registered to take Governance 2 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 28, 2021.

6. An additional notice was sent to Achievers Early College Prep Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Mayokun Oshun had not completed the Governance 2 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Mayokun Oshun with the link and instructions for completing Governance 2.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Mayokun Oshun did complete Governance 2 training on July 30, 2021.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T28-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Mayokun Oshin (Respondent) is a charter school trustee of the Achievers Early College Prep Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his Governance 2 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2021; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

244-21

244-21SEC

SEC Dkt. No. T29-21
Agency Dkt. No. 163-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Natasha Persaud,
Soaring Heights Charter School,
Hudson County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent completed training after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2021
Date of Mailing: October 13, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T29-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Natasha Persaud,
Soaring Heights Charter School, Hudson County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Soaring Heights Charter School, located in Hudson County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement on August 12, 2021, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2021.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

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[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.



Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

5. On July 14, 2021, Natasha Persaud was registered to take Governance 2 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on July 15, 2021.

6. An additional notice was sent to the Soaring Heights Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Natasha Persaud had not completed the Governance 2 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Natasha Persaud with the link and instructions for completing Governance 2.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Natasha Persaud did complete Governance 2 training on August 12, 2021.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T29-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Natasha Persaud (Respondent) is a charter school trustee of the Soaring Heights Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her Governance 2 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2021; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

245-21

245-21SEC

SEC Dkt. No. T30-21
Agency Dkt. No. 164-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Nikil Puri,
Learning Community Charter School,
Hudson County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent completed training after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2021
Date of Mailing: October 13, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T30-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Nikil Puri,
Learning Community Charter School, Hudson County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Learning Community Charter School, located in Hudson County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of his position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement on August 1, 2021, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2021.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

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[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

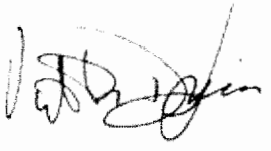
5. On May 27, 2021, Nikil Puri was registered to take Governance 2 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 11, 2021.

6. An additional notice was sent to the Learning Community Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Nikil Puri had not completed the Governance 2 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Nikil Puri with the link and instructions for completing Governance 2.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Nikil Puri did complete Governance 2 training on August 1, 2021.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T30-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Nikil Puri (Respondent) is a charter school trustee of the Learning Community Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his Governance 2 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2021; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

246-21

246-21SEC

SEC Dkt. No. T31-21
Agency Dkt. No. 165-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Elizabeth Rainey-Goka,
University Heights Charter School,
Essex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act (the Act) for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, as of the date of this decision, respondent is hereby removed from the board for violating the Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 14, 2021
Date of Mailing: October 14, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T31-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Elizabeth Rainey-Goka,
University Heights Charter School, Essex County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the University Heights Charter School, located in Essex County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 3 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

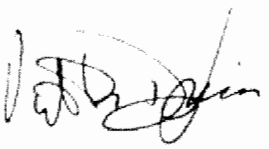
5. On April 27, 2021, Elizabeth Rainey-Goka was registered to take Governance 3 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 11, 2021.

6. An additional notice was sent to the University Heights Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Elizabeth Rainey-Goka had not completed the Governance 3 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Elizabeth Rainey-Goka with the link and instructions for completing Governance 3.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Elizabeth Rainey-Goka did not complete Governance 3 training.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T31-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Elizabeth Rainey-Goka (Respondent) is a charter school trustee of the University Heights Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her Governance 3 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

246-21

246-21SEC+

SEC Dkt. No. T31-21
Agency Dkt. No. 165-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Elizabeth Rainey-Goka,
University Heights Charter School,
Essex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

The Commissioner issued a decision on October 14, 2021, removing respondent from the board. Respondent filed a motion for reconsideration, in which she indicated that she had not received notifications from the SEC. Because respondent did not, therefore, have an opportunity to respond to the SEC's Order to Show Cause or decision, the Commissioner

granted the motion for reconsideration. Respondent subsequently completed the required training.

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is suspended from the board for 30 days for violating the School Ethics Act. Because respondent has not acted as a member of the board since the issuance of the prior decision on October 14, 2021, and more than 30 days have passed since that date, the Commissioner deems respondent's 30-day suspension to have been previously served. Respondent may resume the duties of a member of the board immediately.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 9, 2022
Date of Mailing: February 9, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

247-21

247-21SEC

SEC Dkt. No. T32-21
Agency Dkt. No. 166-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Leslie Rosen,
The John P. Holland Charter School,
Passaic County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act (the Act) for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, as of the date of this decision, respondent is hereby removed from the board for violating the Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

DATE OF DECISION: October 14, 2021

DATE OF MAILING: October 14, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T32-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Leslie Rosen,
The John P. Holland Charter School, Passaic County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of The John P. Holland Charter School, located in Passaic County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

5. On June 19, 2020, Leslie Rosen was registered to take Governance 2 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 11, 2021.

6. An additional notice was sent to the John P Holland School Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Leslie Rosen had not completed the Governance 2 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Leslie Rosen with the link and instructions for completing Governance 2.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Leslie Rosen did not complete Governance 2 training.

August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T32-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Leslie Rosen (Respondent) is a charter school trustee of The John P. Holland Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her Governance 2 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

248-21SEC

SEC Dkt. No. T33-21
Agency Dkt. No. 167-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of David Serede Asige,
Jersey City Community Charter School,
Hudson County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act (the Act) for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, as of the date of this decision, respondent is hereby removed from the board for violating the Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 14, 2021
Date of Mailing: October 14, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T33-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O David Serede Asige,
Jersey City Community Charter School, Hudson County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Jersey City Community Charter School, located in Hudson County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of his position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

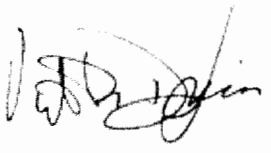
5. On July 30, 2020, David Serede Asige was registered to take Governance 4 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 11, 2021.

6. An additional notice was sent to the Jersey City Community Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that David Serede Asige had not completed the Governance 4 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with David Serede Asige with the link and instructions for completing Governance 4.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. David Serede Asige did not complete Governance 4 training.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T33-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, David Serede Asige (Respondent) is a charter school trustee of the Jersey City Community Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his Governance 4 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

249-21

249-21SEC

SEC Dkt. No. T34-21
Agency Dkt. No. 168-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Kimaada Sills,
University Heights Charter School,
Essex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent completed training after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2021
Date of Mailing: October 13, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T34-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Kimaada Sills,
University Heights Charter School, Essex County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the University Heights Charter School, located in Essex County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 3 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement on July 28, 2021, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2021.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

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[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

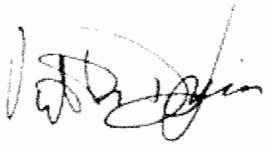
5. On March 16, 2021, Kimaada Sills was registered to take Governance 3 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 11, 2021.

6. An additional notice was sent to the University Heights Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Kimaada Sills had not completed the Governance 3 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Kimaada Sills with the link and instructions for completing Governance 3.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Kimaada Sills did complete Governance 3 training on July 28, 2021.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T34-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Kimaada Sills (Respondent) is a charter school trustee of the University Heights Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her Governance 3 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2021; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

250-21

250-21SEC

SEC Dkt. No. T36-21
Agency Dkt. No. 169-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Tara Tymann,
Learning Community Charter School,
Hudson County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, as of the date of this decision, respondent is hereby removed from the board for violating the Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 14, 2021
Date of Mailing: October 14, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T36-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Tara Tymann,
Learning Community Charter School, Hudson County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Learning Community Charter School, located in Hudson County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (schoolethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

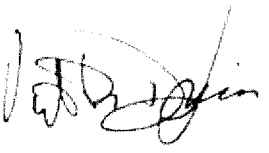
5. On May 21, 2020, Tara Tymann was registered to take Governance 1 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 11, 2021.

6. An additional notice was sent to the Learning Community Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Tara Tymann had not completed the Governance 1 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Tara Tymann with the link and instructions for completing Governance 1.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Tara Tymann did not complete Governance 1 training.



August 12, 2021

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Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T36-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Tara Tymann (Respondent) is a charter school trustee of the Learning Community Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her Governance 1 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

251-21

251-21SEC

SEC Dkt. No. T39-21
Agency Dkt. No. 170-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Lily Zou,
Princeton Charter School,
Mercer County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act (the Act) for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, as of the date of this decision, respondent is hereby removed from the board for violating the Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 14, 2021
Date of Mailing: October 14, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T39-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Lily Zou,
Princeton Charter School, Mercer County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Princeton Charter School, located in Mercer County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 3 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

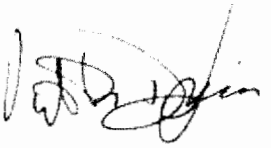
5. On July 28, 2021, Lily Zou was registered to take Governance 3 training and an email with the link was sent to their registered email address.

6. An additional notice was sent to the Princeton Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Lily Zou had not completed the Governance 3 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Lily Zou with the link and instructions for completing Governance 3.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Lily Zou did not complete Governance 3 training.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T39-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Lily Zou (Respondent) is a charter school trustee of the Princeton Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her Governance 3 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

251-21SEC+

SEC Dkt. No. T39-21
Agency Dkt. No. 170-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Lily Zou,
Princeton Charter School,
Mercer County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act (the Act) for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Subsequent to the issuance of the SEC's decision, the Commissioner received information demonstrating that respondent has not been a member of the Board of Trustees of the Princeton Charter School since 2019. Accordingly, respondent was not required to complete board member training in 2021. Therefore, the Commissioner concludes that respondent has not violated the School Ethics Act. The decision of the SEC is hereby reversed; and therefore, no penalty is imposed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 4, 2021
Date of Mailing: November 4, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T39-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Lily Zou,
Princeton Charter School, Mercer County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Princeton Charter School, located in Mercer County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 3 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

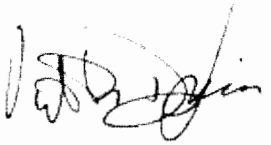
5. On July 28, 2021, Lily Zou was registered to take Governance 3 training and an email with the link was sent to their registered email address.

6. An additional notice was sent to the Princeton Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Lily Zou had not completed the Governance 3 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Lily Zou with the link and instructions for completing Governance 3.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Lily Zou did not complete Governance 3 training.



August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T39-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Lily Zou (Respondent) is a charter school trustee of the Princeton Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her Governance 3 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

252-21

252-21SEC

SEC Dkt. No. T19-21
Agency Dkt. No. 177-9/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Roger Lai,
Environment Community Opportunity
Charter School, Camden County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent completed training after the issuance of its Order to Show Cause. Respondent filed exceptions to the recommended penalty, indicating that he relied on information from the school business administrator that his required training has been completed and that he then completed the training immediately upon receiving the Order to Show Cause and realizing that that information was mistaken. Respondent further indicates that he does not dispute that he failed to complete the training by the deadline but asks the Commissioner to reconsider the sanction.

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Respondent's exceptions do not provide a basis for modifying the recommended penalty when

respondent does not dispute that he failed to complete the training in a timely manner. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2021
Date of Mailing: October 13, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T19-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Roger Lai,
Environment Community Opportunity Charter School, Camden County

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I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Environment Community Opportunity Charter School, located in Camden County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of his position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 3 training program by June 30, 2021.

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement on July 28, 2021.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

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[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (schoolethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: September 9, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T19-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Roger Lai (Respondent) is a charter school trustee of the Environment Community Opportunity Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his Governance 3 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent completed his training requirement; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

253-21

253-21SEC

SEC Dkt. No. T26-21
Agency Dkt. No. 178-9/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Sam Mikhail,
Beloved Community Charter School,
Hudson County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent completed training after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2021
Date of Mailing: October 13, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T26-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Sam Mikhail,
Beloved Community Charter School, Hudson County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Beloved Community Charter School, located in Hudson County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of his position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. However, after being served with the OTSC, Respondent did complete training on July 29, 2021. In addition, in correspondence to the Commission thereafter, Respondent stated, "Unfortunately, I was unable to complete my second year training by June 30, 2021. As with many others in the State, the COVID-19 pandemic had a significant impact on my family. In addition to my professional obligations, I invested so much time in my family's health and well-being and I lost focus on my training obligation." Of importance, Respondent did not deny that he did not complete training in a timely fashion.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include

[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: September 9, 2021

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T26-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Sam Mikhail (Respondent) is a charter school trustee of the Beloved Community Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his Governance 2 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent completed his training requirement, and submitted a response to the OTSC detailing why he did not complete training by June 30, 2021; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

254-21

New Jersey Commissioner of Education

Decision

Board of Education of the Township of Lakewood, Ocean County,

Petitioners,

v.

New Jersey Department of Education, and Kathleen Ehling,

Respondents.

Synopsis

This matter involves the determination of the New Jersey Department of Education (DOE) that the Lakewood Board of Education must set aside 15% of its Individuals with Disabilities Education Act (IDEA) funding for the 2021-2022 school year for comprehensive coordinated early intervention services (CCEIS) in order to address significant racial disproportionalities with respect to the Board's identification, placement, and discipline of special education students. This determination came after an analysis of data showing that Lakewood had exceeded the 3.0 percent risk ratio threshold set by the DOE for three consecutive years in five different areas. The Board appealed, arguing that in making this determination, DOE failed to include data on Lakewood's large population of private school students and that if required to set aside funds, it should only be required to set aside a percentage of the IDEA funds allocated to public schools. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: the DOE complied with the IDEA as written, and the Board's disagreement with the outcome here does not make the DOE's interpretation of the IDEA arbitrary, capricious, or unreasonable; the State is not required to consider nonpublic students, so failing to do so is not arbitrary and capricious; in fact, making an exception solely for Lakewood in this matter would be arbitrary and capricious, with no statutory or administrative support for such a decision; the Board does not have authority over the nonpublic schools or their students to the extent necessary to address disproportionate identification, placement, or discipline of disabled students; further, including the large number of white nonpublic students in the calculation may prevent the uncovering of disproportionalities, which is the purpose of the CCEIS funds; and the IDEA does not provide for subdividing the total funding into public and nonpublic allocations when calculating the amount of CCEIS funds to be set aside. The ALJ held that the DOE's determination of a 3.0 percent risk ratio is not arbitrary, as the same ratio is used by 20 other states. The ALJ concluded that while the facts support the Board's claim of the unintended application of the regulation for Lakewood, that conclusion is insufficient to support judicial intervention in the allocation, which is solely at the discretion of the Commissioner. Summary decision was granted in favor of DOE.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion herein but disagreed that the Commissioner has discretion to reduce the amount of CCEIS funds that the Board is required to set aside. Accordingly, summary decision was granted in favor of the DOE and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

254-21
OAL Dkt. No. EDU 7831-20
Agency Dkt. No. 152-7/20

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Lakewood, Ocean County,

Petitioner,

v.

New Jersey Department of Education, and Kathleen Ehling,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the Lakewood Board of Education (Board) pursuant to *N.J.A.C.* 1:1-18.4, and respondents' reply thereto, have been reviewed and considered.

This matter involves the New Jersey Department of Education's (DOE) determination that the Board must set aside 15% of its Individuals with Disabilities Education Act (IDEA) funding for the 2021-2022 school year for comprehensive coordinated early intervention services (CCEIS) to address significant racial disproportionalities with respect to the Board's identification, placement, and discipline of special education students. Through a data analysis, the DOE determined that Lakewood exceeded the 3.0 percent risk ratio threshold set by the DOE for three consecutive years in five areas: identification of white students for autism, intellectual disabilities, and all eligibilities; placement of white students in separate settings; and disciplinary removals of Black students. The Board appealed, arguing that the DOE should have

included data regarding Lakewood's large population of private school students[1] and that, if required to set aside funds, it should only be required to set aside a percentage of the IDEA funds allocated to public schools.[2]

Following cross-motions for summary decision, the ALJ found that the DOE did not violate the Board's right to procedural due process, as there is no requirement that the DOE provide early notification to a district prior to it being identified as significantly disproportionate, and Lakewood was not entitled to attend the stakeholder meetings held by the DOE as part of setting the risk ratio thresholds. The ALJ also held that the Board does not have any substantive due process rights because, on the facts of this matter, the IDEA does not afford a fundamental due process right to a school district.

The ALJ concluded that the DOE complied with the regulations and requirements of the IDEA as they are written, and while the Board takes issue with the outcome as it applies to their school district, this does not make the DOE's interpretation or application of the IDEA arbitrary, capricious, or unreasonable. The ALJ found that the State is not required to consider nonpublic students, so failing to do so is not arbitrary and capricious; in fact, the ALJ noted that making an exception solely for Lakewood would be arbitrary and capricious, with no statutory or administrative support for such a decision. The ALJ indicated that the Board does not have authority or control over the nonpublic schools or their students to the extent necessary to address disproportionate identification, placement, or discipline of disabled students; further,

[1] According to the parties' stipulation of facts, more than 85% of the students in Lakewood attend nonpublic schools chosen by their parents, and less than 15% of students attend Lakewood Public Schools. Approximately 7,683 students with disabilities attend nonpublic schools (of whom 99.8% are white), and 1,669 students with disabilities attend public schools (of whom 84% are non-white).

[2] Lakewood IDEA funding for the 2020-2021 school year is $9,619,588. Of those funds, approximately $7.7 million is allocated to nonpublic schools and $1.8 million is allocated to public schools. 15% of the total funding equals $1,442,938. 15% of the public school funding equals approximately $270,000.

including the large number of white nonpublic students in the calculation may prevent the uncovering of disproportionalities, which is the purpose of the CCEIS funds. The ALJ found that the IDEA does not provide for subdividing the total funding into public and nonpublic allocations when calculating the amount of CCEIS funds to be set aside. The ALJ also noted that, while the Board implied that it will be unable to provide a free appropriate public education (FAPE) to its public school students if it is required to set aside 15% of its total IDEA funding, the Board is not prohibited from allocating some of the CCEIS funds toward other students and groups if it is necessary to ensure that all public students are receiving FAPE. The ALJ held that the DOE's determination of a 3.0 percent risk ratio is not arbitrary, noting that the same ratio is used by 20 other states. The ALJ concluded that while the facts support the Board's claim of the unintended application of the regulation for Lakewood, that conclusion is insufficient to support judicial intervention in the allocation.[3]

In its exceptions, the Board argues that it is seeking to have Lakewood treated the same as every other district in New Jersey by having the majority of its entire student population included in the disproportionality calculations. According to the Board, by failing to do so, the DOE is treating Lakewood differently and, therefore, its actions are arbitrary and capricious, as well as a violation of the Board's due process rights. The Board alleges that basing the disproportionality calculations on only 15% of Lakewood's total student population – its public school students – makes the resulting calculations inaccurate and unreliable, and the only way to treat Lakewood fairly is to include nonpublic school students in the calculations.[4]

[3] The ALJ noted that any relief falls in the discretion of the Commissioner.

[4] The Board offers that the formula could be changed for all school districts, and that any impact resulting from the change on other districts would be minimal because of the relatively small percentages of nonpublic school students in districts other than Lakewood.

The Board also argues that the DOE failed to demonstrate that the districts included in stakeholder meetings were representative of the population. According to the Board, the DOE advised districts that they would be provided notice if they were at risk for significant disproportionality, and that since Lakewood did not receive such notice, and in fact at one time received notice to the contrary, it was reasonable for the Board to believe that it was not at risk. The Board takes exception to certain statements in the Initial Decision regarding the lack of nonpublic school data, noting that data is available regarding identification and placement, and is only unavailable regarding discipline. According to the Board, the ALJ erroneously held that Lakewood cannot know whether its disproportionality is due only to the number of parents who choose to send their children to nonpublic schools, because this phenomenon is well-known, including to the DOE.

Finally, the Board argues that the Commissioner should exercise her discretion to reduce the CCEIS amount to be set aside by Lakewood based on its unique status. The Board contends that its disproportionality cannot be solved by the allowable and mandatory uses of CCEIS funds, because the parent choice phenomenon is the sole factor contributing to the district's disproportionality. The Board notes that if it is required to set aside $1.4 million, it would be left with less than $400,000 to supplement the special education needs of its students.

In reply, the DOE argues that the plain language of federal regulations refers to students enrolled in the district and that it therefore properly excluded students enrolled in private schools from its calculations. The DOE notes that all data used in its calculations came from Lakewood, such that the Board should have been aware of the possibility that the district would be found to be significantly disproportionate. The DOE contends that the Board's procedural and substantive due process rights were not violated, for the reasons outlined in the Initial Decision. Finally, the DOE argues that it has no discretion in determining the amount of funds that must be set aside.

In addition to its exceptions, the Board filed a motion to supplement the record, seeking to include: 1) documents related to a training session that the DOE hosted for school districts in July 2021; 2) discipline data recalculated by the Board following the training session; 3) Board resolutions identifying its action plan to resolve issues raised during these proceedings; and 4) email correspondence between the parties in July and August 2021, scheduling a meeting to discuss the topics at issue in this matter. The Board contends that these materials are relevant to this matter, were not available prior to the issuance of the Initial Decision, and will not prejudice the DOE if they are included in the record.

In response to the motion to supplement the record, the DOE argues that the Uniform Administrative Procedure Rules (UAPR) preclude the admission of evidence after the record is closed. The DOE further notes that portions of the Board's exceptions which rely on documents that were not a part of the record before the ALJ should be disregarded.

The Board's motion to supplement the record is denied. There is no provision in either the UAPR or *N.J.A.C.* 6A:3 allowing for the filing of such a motion or the acceptance of evidence outside of the record following an Initial Decision. Furthermore, pursuant to *N.J.A.C.* 1:1-18.4(c), "[e]vidence not presented at the hearing shall not be submitted as part of an exception, nor shall it be incorporated or referred to within exceptions." Accordingly, the certifications and documents attached to the Board's motion to supplement were not considered, nor were they considered to the extent that they were relied upon in the Board's exceptions.

Upon review, the Commissioner concurs with the ALJ's conclusion that the DOE was not arbitrary, capricious, or unreasonable – and accordingly did not violate the Board's substantive due process rights – in setting the risk ratio for disproportionality at 3.0 percent or in applying a uniform methodology statewide and determining not to make an exception for the specific circumstances of Lakewood's private-school population. Portions of the Board's

exceptions consist of information that was outside the record and was therefore not considered.[5] The remaining portions of the exceptions reiterate arguments made below that were addressed by the ALJ, and the Commissioner does not find them persuasive, for the reasons thoroughly detailed in the Initial Decision.

The Commissioner concludes that the DOE was not obligated to deviate from its chosen calculation methodology to address Lakewood's private school population. As the ALJ found, the DOE complied with the federal regulations and requirements of the IDEA as they are written, and the fact that the Board disagrees with the outcome as it applies to its school district does not make the DOE's interpretation or implementation of the law arbitrary, capricious, or unreasonable. While the Board argues that the federal regulations permit the DOE to include private school students in the disproportionality calculations, the Board does not point to any provision that requires the DOE to do so, and the Commissioner finds no such requirement in the applicable law. Moreover, 34 *C.F.R.* §300.647, which sets forth how to determine whether significant disproportionality exists, repeatedly refers to students "enrolled in the LEA"[6] or "within the LEA," supporting the DOE's decision to include only public school students in the disproportionality calculations.

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[5] For purposes of clarity, the arguments that the Commissioner has determined are based on information outside the record, and which were therefore not considered, are summarized as follows: The Board argues that the DOE's calculations were inconsistent, based on data received in April 2021, following the close of the record. The Board also contends that the DOE failed to include in its calculations public school students who were placed in out-of-district schools, based on Exhibit 9 to its exceptions, which was not a part of the record on summary decision. The Board alleges that the DOE incorrectly calculated disciplinary removals by incident, rather than by student, and performed calculations for disciplinary removals of Black students even though the number of students involved was below the DOE-set minimum threshold, based on training materials from a DOE webinar in July 2021, following the close of the record. Finally, the Board argues that it can develop targeted policies to address disproportionality in discipline at a lower cost than $1.4 million, based on information from July 2021, after the close of the record. While the Commissioner has not considered these arguments, she does note that the Board filed a cross-motion for summary decision, in which it represented that there were no material facts in dispute.

[6] Local education agency (LEA) is defined by 34 *C.F.R.* §300.28(a) as a public board of education or other public authority for the administrative control or direction of public elementary or secondary schools.

The Board asserts – and alleges that the DOE knows – that the root cause for Lakewood's disproportionality is that many white parents in Lakewood send their white children to private schools. However, while the DOE is aware of those demographic circumstances, it does not necessarily follow that the demographics are the root cause of disproportionality among Lakewood's public school students. The purpose of calculating significant disproportionality and setting aside CCEIS funds is to identify and address contributing factors, 34 *C.F.R.* §300.646, and the Commissioner does not agree with the Board that an assumption based on Lakewood's demographics sufficiently analyzes or addresses possible causes. Moreover, with regard to some of the areas of disproportionality, such as discipline, it would be illogical to include private school students, whom the district is not responsible for disciplining, in a risk calculation to determine whether the district is disproportionality disciplining students. The DOE reasonably determined to evaluate Lakewood's disproportionality based on Lakewood's own actions, and not those of private schools.

The Commissioner further concludes that the DOE's actions did not violate the Board's procedural due process rights. The essential requirements of procedural due process are notice and an opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill*, 470 *U.S.* 532, 546 (1985). Here, there is no dispute that the DOE issued a notice to the Board when it was found to be significantly disproportionate, and while the Board argues that it should have received notice in advance of that finding, as the ALJ noted, there is no such requirement in the regulations.[7] Furthermore, as it is currently participating in the administrative law process to contest the DOE's finding, the Board clearly has been afforded an opportunity to be heard. The Board's opportunity to be heard does not entitle it to participation in the stakeholder meetings the DOE

[7] Additionally, the record and the Board's own exceptions identified two occasions where the DOE notified Lakewood that it was trending towards disproportionality.

held as part of determining the risk ratio threshold, as there is no fundamental or property right implicated by attendance at such meetings. Additionally, the federal regulations have no specific requirements regarding how many or what kinds of school districts must be included in stakeholder meetings, such that the DOE has discretion to invite participants.

The Commissioner further concurs with the ALJ's conclusion that the proper implementation of the finding of significant disproportionality results in requiring the Board to set aside $1,442,938 – 15% of its total IDEA grant funds – to CCEIS programs at Lakewood's public schools. However, the Commissioner disagrees with the ALJ that any relief from the set-aside requirement is in the discretion of the Commissioner. Pursuant to 20 *U.S.C.S.* §1418(d)(2), in the case of a determination of significant disproportionality, a state *shall require* the district to reserve the maximum amount of funds to provide CCEIS (emphasis added). Pursuant to 20 *U.S.C.S.* §1413(f)(1), the maximum amount of funds is 15% of the amount the district receives under the IDEA. These provisions do not afford the Commissioner any discretion to reduce the amount of CCEIS funds that the Board is required to set aside.

Accordingly, the Board's motion for summary decision is denied, the DOE's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[8]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 18, 2021
Date of Mailing: October 19, 2021

[8] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 7831-20
AGENCY DKT. NO. 152-7/20

TOWNSHIP OF LAKEWOOD, BOARD OF EDUCATION, OCEAN COUNTY,
Petitioner,
v.
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, and KATHLEEN EHLING,
Respondents.

Michael I. Inzelbuch, Esq., co-counsel for petitioner

Edward J. Dauber, Esq., co-counsel for petitioner (Greenberg, Dauber, Epstein & Tucker, P.C., attorneys)

Aimee Blennar, **Christopher Weber,** and **Michal Czarnecki**, Deputy Attorneys General, for respondents New Jersey State Department of Education and Kathleen Ehling (Andrew J. Bruck, Acting Attorney General of the State of New Jersey, attorney)

Record Closed: March 18, 2021 Decided: July 20, 2021

BEFORE **JOSEPH A. ASCIONE**, ALJ:

STATEMENT OF THE CASE

In this matter arising under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 to -1482 (IDEA), the issue is whether respondent New Jersey Department of Education's (Department or NJDOE) properly required petitioner Lakewood Township Board of Education (District or Lakewood) to set aside certain federal funds for early intervention services to address a significant racial or ethnic disportionality with respect to Lakewood's identification, placement, and/or discipline of special education students.

The IDEA attempts to ensure that students with a disability are provided with a free appropriate public education (FAPE) that is tailored to their individual needs. To help achieve this goal, the federal government provides the States, including New Jersey, with grants, which are then allocated to the LEAs. In exchange for federal assistance, the IDEA requires, for instance, States to determine if there is "significant disportionality based on race and ethnicity" in terms of "the identification of children as children with disabilities," "the placement in particular educational settings of such children," and disciplinary actions in any LEA within a State. 20 U.S.C. § 1418(d). If a State finds any such significant disportionality in a particular LEA, the State may require the LEA to "reserve the maximum amount of funds . . . to provide comprehensive coordinated early intervening services to serve children" in the LEA. Ibid.

In the present case, Lakewood is due to receive $9,619,588 in federal funds for the 2021–22 school year. Of those funds, approximately $7,800,000 goes to private schools and $1,800,000 goes to the District's public schools. The Department identified the District for significant disproportionality for the 2020–21 school year. As a result of that determination, approximately $1,433,000 would be required to be taken from the funds received and allocated to specific programs in the public schools to address the disproportionality. The District maintains that this allocation, itself, is disproportionate, as the District does not control the funds going to the private schools. The District maintains that the allocation is arbitrary, capricious, and unreasonable.

PROCEDURAL HISTORY

On July 1, 2020, Lakewood filed a Verified Petition with the Commissioner of Education. On August 26, 2020, the NJDOE's Bureau of Controversies and Disputes transmitted the matter to the Office of Administrative Law (OAL), pursuant to N.J.A.C. 1:1-8.2. On August 13, 2020, an answer was filed by the NJDOE and Commissioner Ehling. On March 4, 2021, the NJDOE filed a motion for summary decision in accordance with N.J.A.C. 1:1-12.5. On or about March 18, 2021, petitioner filed a cross-motion for summary decision. The OAL had previously scheduled hearing dates for April 16, 21, and 30, and May 3, 2021. The scheduled hearings were cancelled to consider the within motion and cross-motion. The tribunal held oral argument by Zoom © on May 19, 2021.

FACTUAL DISCUSSION

The parties have provided a Joint Stipulation of Facts containing sixty-six paragraphs which are set forth below. I accept those statements and therefore **FIND** as **FACT**:

1. More than 85% of the students in Lakewood attend parent-chosen nonpublic schools, with less than 15% attending Lakewood Public Schools. Ex. A (Petition) at ¶ 10.

2. With respect to special education, approximately 9,352 children are identified as having a disability. Ex. A (Petition) at ¶ 12.

3. Approximately 7,683 of these students attend nonpublic schools, while approximately 1,669 attend public schools. Ex. A (Petition) at ¶ 13.

4. With respect to racial and ethnic demographics, Lakewood's nonpublic-school population is predominantly white (a conservative estimate is that upwards of 95% of nonpublic school students are white), with nearly all of Lakewood's minority students attending public schools. Ex. A (Petition) at ¶ 15.

5. Of all students with disabilities placed by their parents in nonpublic schools, approximately 7,527 (or 99.8%) are white. Ex. A (Petition) at ¶ 18.

6. Accordingly, less than 5% of Lakewood's total public-school population are white students with disabilities and less than 20% of Lakewood's public school students with disabilities are white students. DOE81.

7. Of the roughly 5,900 students who attend public schools in Lakewood, 1,669 of them have disabilities, of whom approximately 84% are non-white.

8. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq., is a federal statute that, among other things, is intended to improve special education services in schools. See 20 U.S.C. § 1400.

9. The IDEA creates a mechanism for providing federal funding to states that must be distributed to eligible school districts to be used to supplement special education services within those districts. See, e.g., 20 U.S.C. § 1411.

10. For the 2020–21 school year, Lakewood's Basic and Preschool IDEA grant is $9,619,588. This grant is based on the total number of students with disabilities in both the public and nonpublic schools in Lakewood. See 20 U.S.C. § 1411(f)(1)(B).

11. This grant is then allocated by the State between public and nonpublic schools, with approximately $7.8 million allocated to nonpublic schools and $1.8 million allocated to public schools. Ex. A (Petition) at ¶ 23.

12. One of the requirements for receiving IDEA funding is that states must analyze whether there is overidentification or disproportionate representation by race and ethnicity of children with disabilities. 33 U.S.C. § 1412(a)(24).

13. The overrepresentation of specific racial and ethnic minority groups in special education is a national issue, with rates of overrepresentation steady across states. Rb1–2; 2007 Memorandum from Director, Exhibit A to Respondents' SD Motion.

14. This is an issue because minority children have continuously been identified for special education services at a higher rate than would be expected based on the percentage of minority children in the general school population. Rb2; 2007 Memorandum from Director, Exhibit A to Respondents' SD Motion.

15. As minority children continue to comprise an increasing percentage of public school students, the federal government has taken steps to respond to the growing needs of an increasingly diverse society. Rb2; 2007 Memorandum from Director, Exhibit A to Respondents' SJ Motion.

16. Disproportionality refers to the phenomenon that occurs when there are more individuals from a particular group who are experiencing a given situation than one would expect based on that group's representation in the general population. Rb2.

17. Disproportionality is considered "significant" in the context of classification of students for special education services when overrepresentation of a group exceeds a risk ratio threshold, which is set by each individual state. 34 C.F.R. §§ 300.647(a)(7) and (b)(1)(ii); Rb2.

18. A risk ratio is the measure of a specific racial or ethnic group's risk, as compared to all other children, of receiving special education and related services. Rb2.

19. The United States Department of Education (USDOE) has promulgated regulations which guide a state's analysis of whether disproportionality exists and the consequences of such a finding. See 33 C.F.R. § 300.646, 647.

20. Under the Regulations, states have an obligation to collect and examine data to determine whether significant disproportionality based on race or ethnicity is occurring in LEAs of the state. 20 U.S.C. § 1418(d); 34 C.F.R. § 300.646; Rb4.

21. The Regulations set forth fourteen categories of analysis in which the state must calculate risk ratios to determine whether significant disproportionality exists. 34 C.F.R. §§ 300.647(b)(3) and (4); Rb6.

22. In December 2016, the USDOE amended the IDEA Regulations and imposed new requirements regarding acceptable methods for calculating risk ratios used to determine whether significant disproportionality exists (the "2016 Amendments"). Ex. A (Petition) at ¶ 34.

23. The 2016 Amendments required states to use risk ratios to analyze disparities across racial and ethnic groups, while providing each state with the discretion to determine the appropriate risk ratio threshold that would be used to determine significant disproportionality. 81 Fed. Reg. 10968, 34 C.F.R. § 647(a)(6); Rb7.

24. The 2016 Amendments took effect on January 18, 2017; however, the USDOE set the compliance date for the states at July 1, 2018, to "provide states time to plan for implementing these final regulations, including to the extent necessary, time to amend the policies and procedures necessary to comply." 81 Fed. Reg. at 92378; Rb7.

25. There were delays throughout the nation in the implementation of the 2016 Amendments for various reasons, including litigation over the regulations and concerns that they would encourage districts to implement de facto quotas. Ex. A (Petition) at ¶ 34.

26. In February 2018, the USDOE issued a Notice of Proposed Rulemaking proposing to "postpone the compliance date [of the 2016 Regulations] by two years, from July 1, 2018 to July 1, 2020." Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities, 83 Fed. Reg. 8396 (Feb. 27, 2018); Rb8.

27. Citing concerns that the 2016 Amendments would create an incentive for LEAs to establish de facto quotas, the USDOE issued its final rule postponing the compliance date of the 2016 Regulations by two years. Final Rule Delaying

Compliance Date Regarding Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities, 83 Fed. Reg. 31306, 31308 (July 3, 2018); Rb8–9.

28. This permitted the states to choose whether to implement the methodology from the 2016 Amendments or to continue to choose their own methodology for identifying significant disproportionality. 83 Fed. Reg. at 31309; Rb9.

29. On July 12, 2018, the Council of Parent Attorneys & Advocates, Inc. (Council) filed suit against the USDOE requesting that the Delay Regulations be enjoined, arguing that the Delay Regulations would reduce the number of LEAs identified as significantly disproportionate and that the 2016 Amendments would provide a more accurate calculation. Council of Parent Attys. & Advocates, Inc. v. Devos, 365 F. Supp. 3d 28, 37 (D.D.C. 2019). The court found in favor of the Council, stating that the argument that the 2016 Amendments could not be implemented because it would incentivize LEAs to use racial quotas did not have adequate support in the record. See page 48. As such, the court held that the Delay Regulations should be vacated and that the 2016 Amendments would take effect immediately, on the date of its March 7, 2019, decision. See pages 55–56.

30. Pursuant to the Regulations, the states were directed to calculate whether disproportionality existed in numerous different areas, including, based on seven different racial categories, as applied to seven different special education categories, and seven different special education settings. 34 C.F.R. § 300.647(b)(2)–(4).

31. The Regulations permit a state to use different ratios, data or formulas for the various calculations. See 34 C.F.R. § 300.647.

32. The Regulations required states to schedule, set up and conduct stakeholder meetings with school districts in their states to provide input and recommendations to assist the states in determining these various flexibilities. 34 C.F.R. § 300.647(b)(1).

33. In preparation for the implementation of the 2016 Regulations, NJDOE held meetings with stakeholders on May 18, 2017, and October 19, 2017, to discuss the appropriate number at which to set the risk ratio threshold, as required by 34 C.F.R. § 300.647(b)(1)(i)(a). Rb7; Certification of Kathleen Ehling (Ehling Cert.), dated February 17, 2021, at ¶ 7.

34. At both meetings, NJDOE conducted discussions on appropriate risk ratio thresholds.[1] Ehling Cert., ¶7.

35. NJDOE also consulted with federal technical assistance centers such as the IDEA Data Center, the National Center for Systemic Improvement, and the Center for IDEA Fiscal Reporting. Ehling Cert. at ¶7; Rb8.

36. The stakeholder committee was directed to focus on making recommendations about: thresholds for each of three components (identification; placement; and discipline), minimum cell size and n-size.[2]

37. The stakeholders were also asked to make recommendations for the "threshold for each category." DOE408.

38. At the stakeholder meetings, NJDOE provided examples of ratio calculations. DOE413–419.

39. The October 19, 2017, Stakeholder Meeting Presentation included slides asking the stakeholder group to provide feedback regarding their experience in using comprehensive coordinated early intervention services (CCEIS) funding, including their "successes and challenges in utilizing CCEIS funds to address significant disproportionality." Certification of Aimee Rousseau (Rousseau Cert.), dated February 17, 2021, at Ex. G.

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[2] Minimum cell size is "the minimum number of children experiencing a particular outcome, to be used as the numerator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups." 34 C.F.R. § 300.647(a).

Minimum n-size is "the minimum number of children enrolled in an LEA with respect to identification, and the minimum number of children with disabilities enrolled in an LEA with respect to placement and discipline, to be used as the denominator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups." Ibid.

40. Respondents invited Collingswood, Elizabeth, Jersey City, Manasquan, Montgomery, Moorestown, Ocean City, Princeton, Swedesboro, West Windsor Plainsboro, Riverbank Charter School of Excellence, and Brookfield to participate in the stakeholder meetings. Ex. C, Stakeholder List; Ex. D, Stakeholder Sign-in Sheet.

41. The attendees of the May 18, 2017, and October 19, 2017, stakeholder meetings discussed New Jersey's implementation of the 2016 Amendments and the decisions to be made to implement those revisions, including the numerous ratio thresholds and minimum data sizes. Ehling Cert. at ¶ 7; Rousseau Cert. at Ex. F (May 18, 2017, Stakeholder Meeting Presentation); Ex. G (October 19, 2017, Stakeholder Meeting Presentation); DOE350, 5/18/17 Meeting Agenda.

42. At both meetings, meeting participants discussed the updates to the calculation of significant disproportionality and were afforded the opportunity to ask questions about its application and to give recommendations for New Jersey's risk ratio thresholds. Ehling Cert. at ¶ 7.

43. Stakeholders provided feedback regarding the topics discussed, which was compiled and analyzed by respondents. 5/18/17 Feedback.

44. At the May 18, 2017, meeting, the State acknowledged that it had numerous flexibilities in applying the disproportionality regulations, including to "select a reasonable threshold," "select reasonable minimum cell size," and "select a reasonable minimum n-size." The State further acknowledged that it was to make these determinations for "each of the 14 measures" of disproportionality that it was required to measure under the Regulations. Rousseau Cert. at Exhibit F (May 18, 2017, Stakeholder Meeting Presentation) at DOE381.

45. Following the stakeholder meetings, NJDOE decided that the risk ratio threshold for every category would be 3.0. Similarly, the State also decided that the minimum cell size (numerator) would be 10 and the minimum n-size (denominator) would be 30. Ehling Cert. at ¶ 8; Rousseau Cert. at Ex. H (State Application for IDEA Funding) at DOE612–625; R-1 at 8.

46. States were required to set a "reasonable" risk ratio, pursuant to 34 C.F.R. § 300.647(b)(1)(i)(A). The USDOE explained that: Reasonable means a sound judgment in light of all of the facts and circumstances that bear upon the choice. When choosing a risk ratio threshold, a state may consider its unique characteristics, such as the racial and ethnic composition of the state and LEAs, enrollment demographics, and factors correlated with various disabilities or disability categories. See Freeman Cert. at Ex. T (Significant Disproportionality Questions and Answers) at DOE88.

47. On March 9, 2020, Lakewood received a notice from the NJDOE advising that new IDEA regulations had been implemented and that as "a result of the new calculation, districts will be identified for significant disproportionality that had not been identified in previous years." Freeman Cert. at Ex. H (3/9/20 Letter).

48. On April 6, 2020, Lakewood received notification from the NJDOE ("April 6 Notice") that "[b]ased upon a data analysis, your district has been identified for Significant Disproportionality for the 2020–21 school year." Pursuant to the breakdown attached to the notification, respondents advised that, for the past three years, Lakewood's risk ratios exceeded the State threshold of 3.0 in five categories:

> Category NJDOE Risk Ratio (2019–2020)
> White—Autism 6.85
> White—Intellectual Disability 13.87
> White—All Eligibilities 3.35
> White—Separate Settings 14.38
> Black—Total Disciplinary Removals 8.42
>
> [Freeman Cert. at Ex. A (Petition) at ¶ 28, Exhibit A (April 6 Notice).]

49. On April 6, 2020, Lakewood was advised that it would be "required to set aside 15% of [its] IDEA Basic and Preschool Grant" for CCEIS. Freeman Cert. at Exhibit A (Petition) at ¶ 30.

50. After issuing the April 6 Notice, Lakewood was invited to attend training sessions: A session called "Significant Disproportionality" which would provide technical assistance and was scheduled for April 28, 2020; a session called "Cultural Responsiveness" which would help districts create better policies and practices to address cultural responsiveness on April 30, 2020; and a session called "Learning Strategies to Support the Needs of Diverse Learners" which would help districts improve classroom engagement skills for all learners on May 6, 2020. DOE111–162, 4/27/20 Training PowerPoint; DOE468–498, 4/30/20 Training PowerPoint; P-3 at ¶ 4; P-4; P-5.

51. At the April 28, 2020, session, an employee for Lakewood submitted a question about whether the 15% CCEIS deduction should be for both public and nonpublic allocations. Weisz Cert. at ¶ 5. Respondents' response was that "CCEIS is included within the public budgeted amount and is intended to be used to address the needs of the public students . . . ." Weisz Cert. at ¶ 6; Freeman Cert. at Ex. R (Q&A from April 28 Training).

52. On May 13, 2020, Lakewood employee and supervisor Devorie Stareshefsky sent an e-mail to Director Ehling, with questions regarding how the State calculated Lakewood's disproportionality ratios, including which data was used. On May 20, 2020, Director Ehling responded to the e-mail. Lakewood 92–97, 5/20/20 Email.

53. The first four categories for which Lakewood was identified as significantly disproportionate involve identification of students with special needs (autism, intellectual disability, and all eligibilities) and placement in special settings. Freeman Cert. at Ex. A (Petition).

54. The fifth category for which Lakewood was identified as significantly disproportionate relates to discipline and removals of black students with disabilities. See generally Freeman Cert. at Ex. A (Petition).

55. Following respondents' April 6 Notice, Lakewood retained Sue Gamm, Esq., to analyze Lakewood's student population as well as respondents' findings of disproportionality. Freeman Cert. at Ex. A (Petition) at ¶ 38.

56. After analyzing relevant facts and data provided by Lakewood, Ms. Gamm issued a report on June 1, 2020, in which she calculated Lakewood's ratios, using data from public and nonpublic schools. Freeman Cert. at Ex. A (Petition) at ¶ 41, Exhibit C (Sue Gamm Report).

57. Ms. Gamm also calculated the disciplinary removal ratios based on data provided by Lakewood. Since Lakewood nonpublic schools do not maintain data related to disciplinary removals, Mr. Gamm was unable to recalculate the ratios utilizing data from Lakewood's entire student population.

58. Shortly after receiving Ms. Gamm's report, Lakewood reached out to Director Ehling on June 4, 2020, to advise of Ms. Gamm's findings and calculations; to request that the NJDOE reevaluate its conclusions as to Lakewood; and to request that the NJDOE request IDEA Data Center's assistance to reevaluate its conclusion. Freeman Cert. at Ex. K (6/4/20 Email).

59. Having received no reply to the June 4 letter, Lakewood sent a follow-up letter to Director Ehling on June 12, 2020. Ex. A (Petition) at ¶ 70.

60. On June 17, 2020, Director Ehling responded and provided her explanation for the decision to use only public-school data for respondents' analysis. Freeman Cert. at Ex. M (6/17/20 Letter); Ex. A (Petition) at ¶ 71.

61. On June 24, 2020, respondents sent an e-mail to Lakewood providing the raw data used by respondents to calculate the disciplinary removal findings. Lakewood 000160–000161.

62. On June 28, 2020, petitioner sent another letter to Director Ehling, responding to her June 17, 2020, letter and requesting additional information from respondents regarding the disproportionality finding and its consequences. Lakewood 000162–165.

63. Lakewood submitted its IDEA funding application on June 12, 2020, prior to the June 28, 2020, deadline. Freeman Cert. at Ex. A (Petition) at ¶ 73; see also Lakewood 40–41, May 7 Notice re IDEA grants, Lakewood 42–70, Grant Awards by District, Lakewood 166, Lakewood Grant Allocation.

64. Based on the disproportionality finding, Lakewood was required to allocate 15% of its IDEA grant towards CCEIS. Freeman Cert. at Ex. A (Petition) at ¶ 74.

65. On June 22, 2020, NJDOE approved Lakewood's IDEA grant application for the 2020–2021 school year, as submitted and described above. Freeman Cert. at Ex. A (Petition) at ¶ 75; Lakewood 71–72, Substantially Approvable, Lakewood 73, Approved.

66. The purpose of CCEIS is to ensure that students receive appropriate services needed to reduce behavioral and academic challenges, ultimately obviating the need for their referral for special education services. Rb5.

LEGAL DISCUSSION

Summary decision, or as it is known in judicial matters, summary judgment, is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute and the application to that set of material facts of the applicable law and standard of proof lead to a determination of the case without the necessity of a hearing at which evidence and testimony need be taken. The procedure is equally applicable in judicial and executive-branch administrative cases. N.J.A.C. 1:1-12.5.

The standards for deciding motions for summary decision are contained in Judson v. People's Bank & Trust Co. of Westfield, 17 N.J. 67, 74–75 (1954). The Supreme Court later elaborated on the motion and its standard in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). Under the Brill standard, as in Judson, a motion for summary decision may only be granted where there is no "genuine issue" of "material fact." The determination as to whether genuine issues of material fact exist is made after

a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits, and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" issues of material fact. The facts upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful, frivolous, gauzy or merely suspicious.'" Judson, 17 N.J. at 75 (citations omitted). The Brill decision focuses on the analytical procedure for determining whether a purported issue of material fact is "genuine" or is of an "insubstantial nature." Brill, 142 N.J. at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary-decision motions. "[T]he essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, 142 N.J. at 536 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52 (1986)).

In searching the proffered evidence to decide the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" that would apply at trial on the merits, whether that is the preponderance-of-the-evidence standard or the clear-and-convincing-evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held. Id. at 535.

As a condition of receiving federal funds through Part B of the IDEA, each state and the LEAs within the state must collect and examine data to determine if there is a significant disproportionality in the identification, placement, or discipline of students in the state based on their race and ethnicity and/or their category of disability. 34 C.F.R. §

300.646(a) (2020). Any LEA that is identified as significantly disproportionate according to the state's standards must reserve the maximum amount of funds required under 20 U.S.C. § 1413(f) in order to provide CCEISto address the factors contributing to the significant disproportionality. This requires the LEA to set aside 15 percent of the funds received under this Act toward providing CCEIS. 20 U.S.C. § 1413(f)(1). The purpose of the CCEIS fund allocation is for the LEA to identify and address any factors that are contributing to the significant disproportionality, including addressing any policies, practices, or procedures the LEA identifies as contributing to the issue. 34 C.F.R. § 300.646(d)(1) (2020).[3]

Whether there is significant disproportionality is determined by the risk ratio threshold, minimum cell size, and n-size established by each state, 34 C.F.R. § 300.647(b)(1)(i) (2020). The standards must be based on advice from stakeholders and are subject to monitoring and enforcement by the U.S. Department of Education's Secretary according to 20 U.S.C. § 1416. 34 C.F.R. § 300.647(b)(1)(iii) (2020). Each state must report all risk ratio thresholds, minimum cell and n-sizes, and the standards for measuring reasonable progress (if this flexibility option is chosen by the state), along with the rationales for each of these standards to the U.S. Department of Education. 34 C.F.R. § 300.647(b)(7) (2020). A risk ratio threshold is reasonable based on "sound judgment in light of all of the facts and circumstances that bear upon the choice." 34 C.F.R. § 300.647(b)(1)(i)(A) (2020).[4] A state may consider its unique characteristics (e.g., racial and ethnic composition of the state and its LEAs) and other facts that correlate with disabilities or disability categories.

Only when an LEA exceeds the established risk ratio threshold for a specific racial or ethnic group in disability category for three consecutive years will that LEA be identified as having a significant disproportionality, at which point the state must notify the LEA of

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[3] See IDEA Data Center, A Comparison of Mandatory Comprehensive Coordinated Early Intervening Services (CCEIS) and Voluntary Coordinated Early Intervening Services (CEIS) (Mar. 2017), https://ideadata.org/sites/default/files/media/documents/2017-09/idc_ceis_chart.pdf.

[4] U.S. Dep't of Educ., Office of Special Educ. Programs, IDEA Part B Regulations, Significant Disproportionality: Essential Questions and Answers (Mar. 2017), at 5, https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/significant-disproportionality-qa-03-08-17.pdf; see also id. at 9–10 for a description and rationale of establishing a minimum n-size and cell-size.

the disproportionality. If a state has chosen to implement the flexibility option of reasonable progress, then an LEA will not be identified as having a significant disproportionality even if it has exceeded the risk ratio threshold for three consecutive years, as long as the LEA demonstrated reasonable progress in decreasing the risk ratio (or alternate risk ratio) for that group and category in the two prior consecutive years.

Here, there is not a factual dispute about the mathematical calculations, rather the dispute is over whether students placed in private schools should be considered in computing the ratio to determine disproportionality. Petitioner also questions the reasonableness of including the total amount of grants going to private schools when determining the percentage of the grant funding to be designated for CCEIS. Petitioner argues a lack of procedural due process, a lack of substantive due process, and that the Department's actions are arbitrary, capricious, and unreasonable.

Fifteen percent of the total $9,619,588 grant funding equals $1,442,938. It is this latter amount that the regulations require be allocated to CCEIS programs, as a result of the finding of disproportionality. Application of the regulation to Lakewood is disproportionate to the grant sums allocated to the public schools in Lakewood. The regulations provide the states discretion in the application of the provisions of the regulation. The regulations do not consider the negative implications to Lakewood as a result of the extensive allocation of the grant funds to private schools. The regulations do not provide for the separate calculation of grant funds only designated to public-school application, nor the negative impact on Lakewood, as a result of the entire inclusion of grant funds in the application of the disproportionality designation of the amounts to be used for CCEIS.

A. Procedural Due Process

The U.S. Supreme Court has held that the essential requirements of due process are notice and an opportunity to be heard. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545–46 (1985). A hearing satisfies the latter requirement by providing "[t]he opportunity to present reasons, either in person or in writing, why [the] proposed action should not be taken." Id. at 546. Due-process standards require the right to "timely and

adequate notice detailing the reasons" for the agency action, and "an effective opportunity to defend by confronting any adverse witnesses" and to present the appellant's own arguments and evidence. Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970). This requires a right to notice, reasonably calculated under all the circumstances, to inform the parties of all issues against them. Alfonso v. Bd. of Review, 89 N.J. 41, 43 (1982).

However, if after considering the "practicalities and peculiarities of the case," the requirements of notice and an opportunity to be heard are reasonably met, then the requirement of procedural due process is satisfied. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314–15 (1950). "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." Id. at 315. Because due process is flexible, what protections are required depends on the situation; due process does not require that "the procedures used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error." N.S. v. AmeriChoice of New Jersey, Inc., 2005 N.J. AGEN LEXIS 496 at *8 (September 12, 2005).

Lakewood alleges they were not given early notice that they had exceeded the risk ratio thresholds prior to being identified as significantly disproportionate. There is no requirement for early notification since an LEA is only significantly disproportionate after three consecutive years of exceeding the state's established risk ratio threshold. The State did provide Lakewood with notice of the change in risk ratio thresholds and that it had a risk ratio over 1.5 for both identification/placement and discipline in October 2018. See Petitioner's Ex. I. That Lakewood chose not to follow up with the State or to look at the data it was submitting annually to the State and perform its own calculations does not mean that the State failed to provide adequate notice to the LEA.[5]

Lakewood was not entitled to attend the stakeholder meetings the State held to determine the risk ratio thresholds and minimum n-size or cell-size. The due-process requirement of notice and opportunity to be heard applies when a fundamental right or

[5] Since the method for calculating risk ratios is widely available online, and the data used to calculate the risk ratios is publicly available on the State's Department of Education website, Lakewood could have proactively discovered that it would be identified as significantly disproportionate based on its data trends.

property right may be lost. While Lakewood may have unique socio-demographic circumstances compared to other New Jersey school districts, that does not entitle them to attend a stakeholder meeting. There are requirements for who must be included in the stakeholder meetings, including state and local education officials, but there are no other specific requirements regarding how many or which kinds of LEAs must be included in the State Advisory Panel. 20 U.S.C. § 1412(a)(21)(B); 34 C.F.R. § 300.647(b)(1)(iii) (2020). Lakewood has provided no indication of evidence that the State acted unreasonably when it determined which LEAs to invite to the stakeholder meeting. The Department did not include Lakewood (even with its unique characteristics) as one of the 574 school districts that was invited.[6]

B. Substantive Due Process

Generally, unless fundamental rights are involved, "a state statute does not violate substantive due process if the statute reasonably relates to a legitimate legislative purpose and is not arbitrary or discriminatory." United Prop. Owners Ass'n of Belmar v. Bor. of Belmar, 343 N.J. Super. 1, 27 (App. Div. 2001). Substantive due process requires "only that a law shall not be unreasonable, arbitrary or capricious, and that the means selected shall bear a rational relation to the legislative object sought to be obtained." Joseph H. Reinfeld, Inc. v. Schieffelin & Co., 94 N.J 400, 413 (1983).

Lakewood has argued that the State's interpretation and application of the IDEA requirements, as they pertain to Lakewood, are arbitrary, capricious, and unreasonable, and therefore violate Lakewood's substantive due-process rights. The "thorough and efficient" education clause in New Jersey's constitution does provide for publicly-funded education for all students. See Robinson v. Cahill, 62 N.J. 473, 513 (1973); Abbott v. Burke, 119 N.J. 287 (1990). However, this claim is brought primarily under the federal law, where there is no applicable fundamental right. The IDEA provides for certain protections for children, and the parents of children, with disabilities, but these protections likewise do not invoke a fundamental right of due-process analysis for the facts of this matter. See 34 C.F.R. §§ 300.500 to -300.520 (2020). Since there is no fundamental

[6] There are currently 584 operating school districts in the state. N.J. Dep't of Educ., New Jersey Public Schools Fact Sheet, https://www.state.nj.us/education/data/fact.htm.

right for the Lakewood School District at issue, the determination must look at whether the IDEA regulations, as interpreted and applied by the State, are arbitrary, capricious, or unreasonable.

C. Arbitrary, Capricious, and Unreasonable

In general, the standard of review of an agency decision is substantial credible evidence. Similarly, the interpretation of a statute by the agency charged with its enforcement is also entitled to substantial weight. Klumb v. Bd. of Educ. of Manalapan-Englishtown Reg. High Schl. Dist., 199 N.J. 14, 28–29 (2009); State v. Council of N.J. State College Locals, 153 N.J. Super. 91 (App. Div. 1977); In re Hackensack Board of Educ., 184 N.J. Super. 311, 319 (App. Div.). The agency's determination must be given substantial deference and should only be reversed if it is plainly unreasonable. Patel v. N.J. Motor Vehicle Comm'n, 200 N.J. 413, 420 (2009); Oberhand v. Dir., Div. of Taxation, 193 N.J. 558, 568 (2008); see also In re Hackensack Bd. of Educ., 184 N.J. Super. at 319 (court not bound by interpretations that are clearly wrong).

An action is determined to be arbitrary and capricious based on four inquiries: 1) was the action in violation of the State or Federal Constitution; 2) did it violate any express or implied legislative policies; 3) does the record contain substantial evidence to support the findings on which the agency based its action; and, 4) when applying the legislative policies to the facts, did the agency clearly err in reaching a conclusion which couldn't have been made on a showing of the relevant factors. Brady v. Bd. of Review, 152 N.J. 197, 210–11 (1997): see also In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 385–86 (2013). Consequently, the challenging party bears the burden of proving that the agency action was arbitrary, capricious, and unreasonable by the preponderance of the credible evidence. J.P. & M.P. v. Bd. of Educ. of South Brunswick, Middlesex Cty., 2002 N.J. AGEN LEXIS 952 at *10–12 (December 17, 2002). N.J. Soc'y for Prevention of Cruelty to Animals v. N.J. Dep't of Agriculture, 196 N.J. 366, 385 (2008); In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 415, 432 (2004); N.J. State League of Municipalities v. Dep't of Cmty. Affairs, 158 N.J. 211, 222 (1999); In re the 1999–2000 Abbott v. Burke Implementing Regulations, 348 N.J. Super. 382, 395 (App. Div. 2002).

According to the record and the undisputed facts by the parties, the State has complied with the regulations and requirements of the IDEA as they are written. While Lakewood takes issue with the outcome as it applies to their school district, this does not make the interpretation or application of the IDEA arbitrary, capricious, or unreasonable. While the IDEA accounts for providing services and funding to students with disabilities attending nonpublic schools, the primary focus of the IDEA is toward public-school students, since the government has limited control over the management, policies, procedures, and practices of nonpublic schools.

The Department's decision in excluding nonpublic students in the computation of the risk ratio threshold is not arbitrary and capricious. The legislation did not contemplate **that a significant majority of an LEA's student population would attend** private schools. It did not require the states to consider that population, as the legislation focused on **the location where most recipients of IDEA services would be located, i.e.,** public schools. As there is no requirement that the State consider private-school students, to do so would make an exception for only Lakewood. That would be arbitrary and capricious, with no statutory or administrative support for such a decision.

It would be unreasonable to require the State to decide whether Lakewood is complying with the risk ratio thresholds. Lakewood acknowledged in their briefs and exhibits that it does not have data necessary to calculate the risk ratio or alternate risk ratios for all the necessary groups and categories. See Petitioner's Brief in Support of Petition at 12 (cannot calculate discipline rates for all schools in the LEA as this data is neither collected nor reported by the nonpublic schools).

Lakewood is correct in claiming that its risk ratios in the identified categories would drastically decrease if it could count data from the nonpublic students. This is because the comparison group (i.e., the denominator) would in effect remain the same while the target group (i.e., the numerator) would increase exponentially. But Lakewood does not have authority or control over the nonpublic schools or their students to the extent necessary to address disproportionate identification, placement, or discipline of disabled students. By including the large number of white nonpublic students who in comparison

have significantly less disabled students than the public-school students, Lakewood may prevent itself or the parents in the LEA from uncovering over- or under-identification of special-education students.

Lakewood implies that by the State requiring that the mandatory 15 percent of the IDEA funds be allocated toward CCEIS, Lakewood will be unable to provide FAPE to the rest of the students in its public schools. As an initial matter, the funds allocated toward CCEIS may be used to serve students who are not currently identified as needing special-education services, but need additional support to succeed in a general-education environment, as well as students who are currently identified as needing special-education services.[7] 20 U.S.C. § 1413(f)(1); 34 C.F.R. § 300.646(d)(2) (2020). Lakewood may spend these funds to serve the groups that were particularly significantly overidentified through the risk ratio calculations, but the IDEA states that it may not exclusively use the CCEIS funds for these groups. Therefore, Lakewood is not prohibited from allocating some of the CCEIS funds toward other students and groups, if it is necessary to ensure that all public students are receiving FAPE. See 20 U.S.C. § 1413(f)(2). Lakewood is only required to reserve the CCEIS funds until it can decrease the risk ratio threshold for the identified categories. Lakewood contends that this can never be achieved because of its racial and ethnic demographics and the choices of the parents.

Lakewood claims that the reason for the disproportionality is that a substantial portion of students residing in Lakewood attend nonpublic schools, thus affecting the public-school ratios. The data shows that the schools Lakewood has control over are disproportionality identifying white students over non-white students. Uncovering the factor(s) causing the discrepancy is the purpose of the CCEIS fund allocation. Lakewood cannot know without an actual investigation into the underlying facts whether the over-identification is due only to the number of parents who choose to send their children to nonpublic schools.

[7] IDEA Data Center, A Comparison of CCEIS and CEIS.

The IDEA requires that the funds reserved for CCEIS must come from the total amount of the subgrants the LEA receives, there is nothing providing for the subdivision of these funds into the public/nonpublic sections before calculating the 15 percent. See U.S. Dep't of Educ., Office of Special Educ. Programs, OSEP QA 21-03, Questions & Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools, at 42–43 (Dec. 2020), https://sites.ed.gov/idea/files/qa-parentally-placed-private-schools-12-2020.pdf (providing that an LEA must calculate the proportional share for nonpublic students and the CCEIS from the total grant amount received).

Finally, Lakewood posits that the determination of a 3 percent risk ratio is arbitrary. An analysis of thirty-three states provides the following risk ratio thresholds: 3.0 (twenty-one states), 2.0 (six states), and 2.5 (six states). U.S. Dep't of Educ., 2020 Part B FFY 2018 SPP/APR Indicator Analysis Booklet, at 89–90, https://sites.ed.gov/idea/files/PartB-IndicatorAnalysis-FFY2018.pdf. It cannot be said that the 3 percent risk ratio is arbitrary. See also Rationale from New Jersey's stakeholder meeting on choosing the risk ratio threshold and general explanation of significant disproportionality. N.J. Dep't of Educ., Office of Fiscal & Data Services, Significant Disproportionality (2019), at 13–16, https://www.nj.gov/education/specialed/CEISTraining1.pdf.

CONCLUSION

After reviewing the papers and arguments of petitioner and respondents and considering the documents and certifications submitted:

I **CONCLUDE** that petitioner has not shown by a preponderance of the evidence that the Department has acted unreasonably, arbitrarily, or capriciously in setting the risk ratio of disportionality at 3 percent, nor unreasonably in determining not to make an exception for the specific circumstances of the District's private-school population.

I **CONCLUDE** that the proper implementation of the finding of significant disproportionality results in the requirement that Lakewood allocate $1,442,938 of the IDEA grant funds to CCEIS programs at the public schools of Lakewood.

I **CONCLUDE** that the facts do support petitioner's claim of the potentially unintended application of the regulations to the allocation of the IDEA grant funding for Lakewood.

I **CONCLUDE** that the previous conclusion is insufficient to support judicial intervention in the allocation; that relief falls entirely in the discretion of the Commissioner of Education.

I **CONCLUDE** that the Department of Education has shown by a preponderance of the evidence that the Department is entitled to prevail in its application for summary disposition in this matter.

ORDER

It is hereby **ORDERED** that petitioner's request for summary disposition is **DENIED**.

It is further hereby **ORDERED** that respondent's motion for summary disposition is **GRANTED**.

It is further hereby **ORDERED** that the allocation of the IDEA grant funding to CCEIS programs be in an amount as directed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 20, 2021
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

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APPENDIX

LIST OF EXHIBITS

For Petitioner:

P-1 March 2021, Ex. A, Petitioner's Petition

P-2 Notice of Identification for Significant Disproportionality, dated April 6, 2020

P-3 Certification of Adina Weisz, dated March 18, 2021

P-4 E-mail from Damian Petino regarding training sessions for Significant Disproportionality and Cultural Responsiveness, dated April 27, 2020

P-5 E-mail from Damian Petino regarding training sessions for Support for Diverse Learners, dated April 27, 2020

P-6 Question and Answer document from training on significant disproportionality, dated April 28, 2020

P-7 Report by Sue Gamm, Esq., dated June 1, 2020

P-8 Letter from Michael Inzelbuch, Esq., to Kathleen Ehling, dated June 4, 2020

P-9 Letter from Kathleen Ehling to Michael Inzelbuch, dated June 17, 2020

For Respondents:

R-1 Respondents' April 1, 2021, Brief

R-2 U.S. Department of Education, Significant Disproportionality: Essential Questions and Answers, dated March 2017

R-3 Letter from Peggy McDonald to Laura Winters, dated March 9, 2020

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255-21
OAL Dkt. No. EDU 02396-21
Agency Dkt. No. 243-12/20

New Jersey Commissioner of Education

Final Decision

Francisco Realpe,

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County

Respondent.

The record of this matter, the proposed Stipulation of Settlement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Several paragraphs within the Agreement reference certain actions to be taken by the parties on specific dates. Some of the time frames referenced in the Agreement have preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 18, 2021
Date of Mailing: October 19, 2021

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 02396-21

AGENCY DKT. NO. 243-12/20

FRANCISCO REALPE,

Petitioner,

v.

JERSEY CITY PUBLIC SCHOOLS,

Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch, Porwich & Feintuch, attorneys)

Cherie L. Adams, Esq. (Adams, Gutierrez & Lattiboudere, attorneys)

Record Closed: August 24, 2021 Decided: September 3, 2021

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On February 19, 2021, the above referenced matter was transmitted to the Office of Administrative Law ("OAL") for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The matter was scheduled for a conference on May 21, 2021, but the date was adjourned because the parties reached a settlement of all issues in dispute. The signed Settlement Agreement indicating the terms of settlement was forwarded to the undersigned on August 24, 2021 and is attached and fully incorporated herein.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 3, 2021

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: September 3, 2021

Date Mailed to Parties: September 3, 2021

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OAL Dkt. No. EDU 07405-21
Agency Dkt. No. 129-8/21

New Jersey Commissioner of Education

Order on Emergent Relief

R.C., on behalf of minor child, N.G.,

Petitioner,

v.

New Jersey State Board of Education,

Respondent.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 19, 2021
Date of Mailing: October 19, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
MOTION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 07405-21
AGENCY DKT. NO. 129-8/21

R.C. O/B/O MINOR CHILD N.G.,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EDUCATION,
Respondent.

R.C., appearing pro se

Michael Czarnecki, Deputy Attorney General, appearing for respondent (Andrew J. Bruck, Acting Attorney General of New Jersey)

Record Closed: September 8, 2021 Decided: September 22, 2021

BEFORE **WILLIAM T. COOPER, III**, ALJ:

STATEMENT OF THE CASE

Petitioner filed this action against respondent, the New Jersey Board of Education (BOE), as an emergent-relief request and petition. The petition alleges certain action of

the BOE to be in violation of (N.J.S.A.) Title 18A and seeks emergent relief pursuant to N.J.A.C. 6A:3-1.6 by stating;

> "I am filing an EMERGENT petition asking for relief on behalf of my minor child NG and all the children in New Jersey. The school year will be starting in a little over a week and I am in fear for the children to attend their public-school buildings. They have all suffered emotional, psychological, and harmful treatment due to the NJ STATE BOARD OF EDUCATION. This is deprivation of children's rights. Allegations of factual violations, supporting documents, and evidence are attached."

The BOE contends that petitioner has failed to meet the necessary criteria required for the granting of emergent relief.

BACKGROUND AND PROCEDURAL HISTORY

On August 27, 2021, the petitioner filed a "Pro Se Petition of Appeal" seeking emergent relief with the Department of Education. The Commissioner of Education transmitted the matter as "emergent" to the Office of Administrative Law (OAL), where it was filed on September 1, 2021. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On September 8, 2021, respondent submitted both opposition to the emergent relief request together with a Notice of a Cross Motion seeking dismissal of the underlying petition for failure to state a claim upon which relief can be granted and improper venue.

Oral argument was held on September 8, 2021. Petitioner requested and was granted additional time to respond to the opposition submitted, accordingly petitioner had until close of business on Friday September 10, 2021, to submit a response. On September 10, 2021, Adam Elias, Esq. advised the court of his entry into the case on behalf of the petitioner and requested additional time to provide a response, DAG Czarnecki consented, and a ten-day extension was granted. Petitioner had until Monday September 20, 2021, to respond to the opposition filed by respondent.

On September 17, Mr. Elias advised he was no longer representing the petitioner and he was directed to file a formal motion to withdraw.

Petitioner did not provide any further response, and the record closed on September 20, 2021.

FACTS

After carefully reviewing all the materials and exhibits submitted, I **FIND** the following **FACTS**: Petitioner is the mother of N.G., a minor who will be attending first grade in the Township of Chesterfield public school district (school district). Petitioner attached several documents to the petition that include copies of pages from an unnamed textbook that may be used in the Lawrence Township school district. These pages exhibit anatomically correct drawings of people that would be appropriate in a physical health class to show the physical differences between men and women, as well as how the bodies age over time. The pages also exhibit individuals in bed in what appear to be a sexual scenario. Petitioner claims these materials are used in a fourth-grade health studies class but did not provide any proof beyond her unsupported claim.

Petitioner alleges that actions by the BOE violated N.J.S.A. 18A:35-4.6 and 4.7 "when the New Jersey State School Board voted the new learning standards and core curriculum into regulation-without any option for parents or guardians to opt out. The material from the unidentified textbook was submitted as proof of this alleged violation. In addition, the petitioner alleges that N.J.S.A.18A:36-36 was violated when respondent implemented the "model of equity in public school buildings resulting in prejudice reduction curriculum and hindering all children to meet a political agenda of equity". Petitioner also provided materials from the school district pertaining to the "Comprehensive Equity Plan" and documents from the "Affirmative Action Team" in support of this alleged violation.

Petitioner believes the foregoing violations are a "deprivation of rights, harmful and abusive school setting, clear violations of Title 18A". As a result, petitioner seeks the following relief;

1. The N.J. State School Board to amend their current unlawful policies, curriculum content.
2. N.J. State School Board to undergo a full audit and investigation into their implementation of district equity plans, N.J. Learning Standards that were voted into place in 2020 and the decisions made on implementing the new core curriculum standards.
3. N.J. State School Board to beheld lawfully accountable, and legally and civilly liable for their negligence when caring for children, and power revoked for knowingly causing detrimental long-term harm and pain to the children they were to protect. For using children for experimentation like "lab rats" to produce and collect data for political purposes such as equity.
4. A parental Committee for community members to volunteer and rotate having a seat at the table for the public portions of every N.J. State School Board meetings.
5. Voting Rights to elect who sits on the N.J. State Board of Education and term limits.

Respondent denies petitioner is entitled to emergent relief as she fails to meet any of the criteria necessary to prevail on such a claim. Respondent further argues that petitioner fails state a claim upon which relief could be granted and that the requested relief is beyond the venue of this court.

LEGAL ANALYSIS

I. Emergent Issues

The standards which must be met by the moving party in an application for emergent relief in a matter involving "a district board of education or any party subject to the jurisdiction of the Commissioner" are embodied in N.J.A.C. 6A:3-1.6(b), "an application for emergent relief shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126, 132–34 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

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.

The moving party has the burden to prove each of the above standards by clear and convincing evidence. Brown v City of Paterson, 424 N.J. Super 176, 183 (App. Div. 2012); Waste Mgmt. of N.J. v Union Cty. Utils. Auth., 399 N.J. Super 508, 520 (App. Div. 2008).

Accordingly, each of the standards of the statute must be analyzed:

1. Whether petitioner will suffer irreparable harm if the application is not granted.

One of the principles for emergent relief is that relief should only be ordered to prevent irreparable harm to the petitioner. Crowe, 90 N.J. at 132–33. Harm is irreparable when it cannot be addressed with monetary damages. Ibid. This standard contemplates that the harm also be both substantial and immediate. Subcarrier Commc'ns, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). "In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief." Crowe, 90 N.J. at 133. "Pecuniary damages may be inadequate because of the nature of the injury or of the right affected." Ibid.

Petitioner's minor child N.G. is only in the first grade and as such is not yet of an age wherein "physical health" would be included in his curriculum, thus he will not be taking a course wherein the objectionable materials will be used. Petitioner does not limit

this claim to only her child as she alleges that "no children of the fourth grade in New Jersey should not be shown materials of an explicit nature" but provides no evidence as to what if any harm could be caused. Petitioner's chief complaint expressed during oral argument was that the materials do not support abstinence in violation of State statute.

In this matter, petitioner makes broad claims of statutory violations with no factual or legal support for same and more importantly that would prove irreparable harm will in fact be suffered.

Accordingly, I **CONCLUDE** that the petitioner has failed to sufficiently demonstrate that irreparable harm will be suffered by ether her son or any student if the emergent relief is not granted.

2. Whether the legal right underlying petitioner's claim is well settled.

Petitioner alleged that the BOE violated N.J.S.A. 18A:35-4.6 the "Parents Rights to Conscience Act of 1979", and 18A:35-4.7 "Parent's statement of conflict with conscience" in allowing the use of certain materials in physical health course and not allowing any option for parents or guardians to opt their children out. No proof was offered to verify this claim and the BOE in both its moving papers and oral argument affirmatively indicated that the parents still enjoy the benefits enumerated in N.J.S.A. 18A:35-4.7.

The BOE further argued that the State legislature enacted legislation requiring school districts incorporate instructions on diversity and inclusion beginning in the 2021-2022 school year. N.J.S.A. 18A:35-4.36a(a) requires instruction "to highlight and promote diversity, including equity, inclusion, tolerance and belonging in connection with "gender and sexual orientation". As such, the BOE is required by the legislation to promote the diversity and inclusion of all persons in the state regardless of their gender or sexual orientation in school curriculums, and the BOE is permitted to use their expertise and superior knowledge of its field to implement any such legislative requirements. N.J. Div. of Youth & Family Servs. v. T.B., 207 N.J. 294, 301 (2011).

Petitioner also alleged a violation of N.J.S.A. 18A:36-36 "Pupil information, certain, classroom materials; rules." In section (a) the statute reads "a pupil in a public school shall not be required to supply information regarding the pupil's race, ethnicity, migrant status or economically disadvantaged status on any materials distributed in class." In section (b) the statute prohibits the distribution of materials that would include obvious indicators of a student's race, ethnicity, migrant status or economically disadvantaged status. Lastly section (c) specifically delegates to the BOE the ability to promulgate rules to effectuate the intent of the act. Petitioners has failed to demonstrate that the respondent is in violation of this statute.

Petitioner has failed to provide any support that would demonstrate the alleged statutory violations enumerated in the petition. Conversely, the BOE is promulgating policies that implement the laws properly enacted by the legislature.

Accordingly, I **CONCLUDE** that the petitioner has failed to establish that her claims are well settled.

3. Whether petitioner is likely to be successful on the merits of its claim.

Petitioner must demonstrate at the emergent hearing that she is likely to prevail on the merits. A pleading must allege sufficient facts that give rise to a cause of action, mere conclusions are inadequate. Glass v. Suburban Restoration Co. 317 N.J. Super. 574, 582 (App. Div. 1985). Here, petitioner's claims lack specificity and/or clarity that are necessary to show her claims are more than just bare conclusions. In addition, there is doubt as to the ability of this tribunal to grant any of the relief petitioner is requesting.

The first item of relief requested for the BOE to "amend their current unlawful policies, curriculum content" lacks any specificity as to what policies are "unlawful" and more important, why they are unlawful. This request seemingly ignores N.J.A.C. 6A:6-4.1 which affords an interested party the ability to petition the BOE to "adopt or amend or repeal" an existing rule. Petitioner provides no explanation as to why she has not availed herself of as this process or what specific rule she would "amend, or repeal".

The second item of relief requested that the BOE "undergo a full audit and Investigation" into their "implementation of policies voted into place in 2020 and decisions made on implementing the new core curriculum standards." Hereto, the petitioner fails to provide any factual or legal basis that would support an order for such relief. Moreover, the request ignores the well-established process by which the BOE implements policies and curriculum standards. Without any factual claims to support how that process may have been flawed no relief can be granted.

The third item of relief requests civil liability against the BOE and alleges negligence without any detail as to what actions may give rise to civil liability. Claims against governmental entities is already addressed under the N.J. Tor Claims Act N.J.S.A. 59:1-1 et seq. The last part of this item of relief suggests a Revocation of the BOE's "power" and broadly alleges "knowingly causing detrimental long-term harm and pain to the children" and "using children for experimentation" without any indication of what actions may give rise to such claims.

The fourth item of relief requests envisions the creation of a "voluntary committee of community members to have a "seat at the table" of every BOE meeting. Here, such relief that is well beyond this tribunal's authority, and ignores the fact that the BOE is an established governmental entity and any proposed changes to it must be made through the legislative process.

Lastly, petitioner seeks to have "voting rights" to elect who sits on the BOE. Pursuant to N.J.S.A. 18A:4-4 the Governor is responsible for the appointment of BOE members, and this tribunal is without authority to amend or overturn this power.

Based upon the foregoing, I **CONCLUDE** petitioner is not likely to be successful on the merits of these claims.

4. Whether the petitioner will suffer greater harm than respondent if the requested relief is not granted.

The court must weigh the relative hardship of the parties and balance the equities. Petitioner is a concerned mother whose is taking action to protect her son, fortunately he is not yet of an age wherein he will be required to attend sex education and thus will not be exposed to the materials complained of herein. Further, to grant her the requested relief would require the BOE to invalidate all of the physical health education curriculums in in all of the school districts in the state.

Accordingly, I **CONCLUDE** the equities in this matter are with respondent.

After weighing the statutory standards, the petitioner has failed to prove by clear and convincing evidence that she is entitled to emergent relief. Accordingly, the request for emergent relief must be **DENIED**.

ORDER

The Petitioner having failed to meet the standards of N.J.A.C., the application for emergent relief is **DENIED**.

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

September 22, 2021
DATE

WILLIAM T. COOPER, III, ALJ

lr

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

September 01, 2021, Petition with Attachments

For respondent:

September 8, 2021, Opposition and Motion to Dismiss

257-21

257-21E
OAL Dkt. No. EDU 07404-21
Agency Dkt. No. 128-8/21

New Jersey Commissioner of Education

Order on Emergent Relief

R.C., on behalf of minor child, N.G.,

Petitioner,

v.

Board of Education of the Township of Chesterfield, Burlington County,

Respondent.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 19, 2021
Date of Mailing: October 19, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 07404-21
AGENCY REF. NO. 128-8/21

R.C.[1] **ON BEHALF OF MINOR CHILD N.G.,**
Petitioner,
v.
BOARD OF EDUCATION OF TOWNSHIP OF CHESTERFIELD, BURLINGTON,
Respondent.

R.C., on behalf of N.G., petitioner, pro se

William S. Donio, Esq., for respondent (Cooper Levenson, PA, attorneys)

Kasi Marie Gifford, Esq., Co-counsel for respondent, (Cooper Levenson, PA, attorneys)

BEFORE **JEFFREY N. RABIN**, ALJ:

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[1] Petitioner is not the sole parent of N.G.; she is separated from his father and opted to file this without N.G.'s father being a party to this litigation.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner has challenged the school mask mandate imposed by the respondent Township of Chesterfield Board of Education (Board or Chesterfield) effective August 9, 2021, and a medical examination of minor child N.G. by the school nurse from April 2021, claiming these violate Title 18A of the New Jersey statutes.

The within motion for emergent relief was filed by petitioner on August 27, 2021, with the New Jersey Department of Education (DOE), Office of Controversies and Disputes (OCD). The motion for emergent relief was transmitted to the Office of Administrative Law (OAL) on September 1, 2021. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Due to the Covid-19 pandemic, an emergent hearing in this matter took place via Zoom on September 8, 2021. Neither party indicated that there would be any issues remaining once the within issues for emergent relief were resolved, and therefore there would be no need for a full due process hearing.

FINDINGS OF FACT

Based on petitioner's Petition for emergent relief and respondent's Answer, and the documentation and testimony proffered by both parties, and solely for the purpose of deciding this emergent appeal, I **FIND** the following to be the undisputed facts:

1. On March 12, 2021, Chesterfield advised petitioner that it would be conducting its annual student "Universal health screenings," to measure height, weight, body mass, blood pressure, vision and hearing. Petitioner replied by email that she was opting to forego N.G. receiving such screening, and would provide the same data from his last private doctor's visit. On April 27, 2021, Chesterfield conducted a universal health screening of N.G. Petitioner confirmed to the school that she had not consented to N.G. receiving a universal health screening.
2. New Jersey Governor Philip Murphy instituted a mandate that all public school students must wear masks indoors in schools due to the Covid-19 pandemic, with certain exemptions, by way of Executive Order #251,

effective August 9, 2021. Respondent Chesterfield adopted the Governor's mandate effective August 9, 2021.

3. Petitioner, R.C., is one of the parents of minor child, N.G., who was scheduled to begin first grade at Chesterfield Elementary School on September 8, 2021. Because petitioner felt N.G. should have been exempted from the school's mask requirement, R.C. opted to keep N.G. home from school on September 8, 2021.

TESTIMONY

For petitioner:

R.C. served as her own counsel and as a witness. She testified that learning was difficult for her son, N.G., during the 2020-21 school year due to changes caused by the Covid-19 pandemic. Excessive time in front of a screen led to migraine headaches, resulting in the school implementing a 504 accommodation plan for N.G. N.G.'s migraines were made worse by wearing a mask and he had issues wearing a mask in hot weather. Mask-wearing and social distancing affected N.G.'s ability to socialize with his peers. N.G. was not happy about going to school because teachers forced him to wear a mask and this led to sleep and bladder issues. Wearing a mask went against R.C.'s religious beliefs as a Christian and her moral beliefs; she believes in "freedom."

Her testimony was not credible. R.C. spoke of N.G. suffering migraines and sleep and bladder issues without proffering any medical evidence or medical testimony. All the unsubstantiated medical issues raised by R.C. were from the school year before the mask mandate of August 9, 2021, and thus predated the mask mandate she was challenging. Petitioner offered no evidence except her personal opinion that masks were harmful or failed to be effective in preventing the spread of Covid-19. Although R.C. claimed N.G. could not go to school because of his issues with masks, it was R.C. who voluntarily kept her child home from school. Respondent acknowledged that there was an exemption from the mask mandate for health reasons, but petitioner had never submitted medical notes from doctors requesting that N.G. be exempted from the mask mandate. Finally, her claims of harm to N.G. did not jibe with the fact that the first day of school subsequent

to the mask mandate was to be on September 8, 2021, but R.C. testified that she had chosen to keep N.G. home from school on September 8, 2021, and therefore there was no actual harm befalling N.G. as a result of the mask mandate dated August 9, 2021.

For respondent:

Respondent counsel, **Kasi Marie Gifford**, Esq., presented the Board's case, with assistance from the Chesterfield Superintendent of Schools, **Scott Heino**. Unlike petitioner, respondent addressed the four-pronged test for emergent relief set out in N.J.A.C. 6A: 3-1.6 and Crowe v. DeGioia, 90 N.J. 126 (1982), as set out below. Gifford stated that there could be no irreparable harm because the mask mandate had just gone into effect and the school year was just beginning. Further, the Board was simply complying with Governor Murphy's August 9, 2021, mask mandate. As set forth in respondent's Answer, the Board had no discretion to ignore Governor Murphy's Executive Order #251, per N.J.S.A. 18A:11-1 and N.J.S.A. 18A:12-24.1(a). Respondent further asserted in its Answer that funds to the District could be withheld by the Commissioner of Education if a local school board ignored its statutory duties, per N.J.S.A. 18A:55-2.

Gifford stated that there were medical exemptions to the mask mandate, but that petitioner never requested an exemption and failed to provide any medical documentation in support of a medical exemption, and therefore should be precluded from emergent relief because she failed to pursue all administrative remedies. There was no exemption for religious or moral beliefs.

The law in New Jersey was settled in favor of a mask mandate because Governor Murphy issued an Executive Order, which had the effect of law. Accordingly, there was no likelihood that petitioner would succeed in overturning a school board mask mandate effectuated pursuant to a governor's Executive Order.

Finally, regarding the fourth prong, the balancing of equities, Gifford stated that the Chesterfield Board of Education was responsible for the health, safety and welfare of all students in the district, not just student N.G.

LEGAL ANALYSIS

The issue is whether petitioner has proven by a preponderance of the evidence that she has met the standard for emergent relief, and that she is entitled to relief.

Petitioner has alleged that the Board committed the following violations of New Jersey law:

N.J.S.A. 18A:6-1, alleging that the Board employed corporal punishment by forcing students to wear masks to prevent the spread of Covid-19;

N.J.S.A. 18A:6-1.1, alleging the forced wearing of masks was akin to forcing students to take experimental drugs or medications;

N.J.S.A. 18A:11-8, alleging the Board violated its own dress code by requiring masks, and imposing such requirement without public hearings or input from parents, or an opt-out option for parents;

N.J.S.A. 18A:35-4.6 and 4.7, alleging the Board's mandate of mask-wearing went against the statute prohibiting parents from being forced to behave in a manner that conflicts with their conscience. Petitioner, R.C., opposed masks because they conflicted with her moral and religious beliefs;

N.J.S.A. 18A:35-4.8, alleging the Board conducted a medical examination of N.G. even though petitioner R.C. had specifically denied consent and refused such examination for her son;

N.J.S.A. 18A:36-20, alleging the Board discriminated against N.G. by denying him the right to attend school without fear of retaliation;

N.J.S.A. 18A:37-14, alleging the Board committed acts of harassment, intimidation or bullying (HIB) against N.G. by enforcing the mask-wearing mandate and mocking and bullying students into conforming with the mask mandate;

N.J.S.A. 18A:38-5.1, alleging the mask mandate violated her right of religion, creed, and religious and moral beliefs; and

N.J.S.A. 18A:40-12.3, alleging the mask mandate violated the statute permitting students to self-administer medications, because she had not consented to N.G. wearing a mask.

The relief sought by petitioner is for the Board to reverse its current mask policy or amend it to give parents the option to "opt-out" of the requirement; for there to be an audit and investigation of how the Board handled the Covid-19 pandemic over the last two years; that the Board be held liable for negligence based on detrimental long-term harm caused to students by the way it cared for students; that a voluntary parent committee be formed to oversee day-to-day operations of the school district alongside the superintendent of schools, and that the committee have a seat alongside the Board at monthly school board meetings; and that the Board acknowledge that it is in violation of open public meeting acts/"Sunshine" laws by not holding in-person school board meetings.

N.J.S.A. 18A:6-9 authorizes the Commissioner of Education to consider controversies between a parent and a school board. OAL is the appropriate venue for hearing an appeal of a school board findings and OCD properly forwarded this matter to OAL for this emergent appeal to be heard.

As stated above, pursuant to N.J.A.C. 6A: 3-1.6 and the case of Crowe v. DeGioia, 90 N.J. 126 (1982), a petitioner must show by a preponderance of the evidence that four prongs/prerequisites have been met in petitioner's favor in order to be eligible for emergent relief. The form of Petition executed and filed by petitioner on August 27, 2021, contained a Section VI clearly setting forth petitioner's obligation to demonstrate that the

four prongs have been met, and providing petitioner with the four-prong test and legal citations to the regulatory code section and Crowe.

A petitioner bears the burden of proving the four prongs for emergent relief. B.W. ex rel. D.W. v. Lenape Reg'l High Sch. Dist., OAL Dkt. No. EDS 06933-05, Agency Ref. No. 2006-10522E, at 8 (N.J. Adm); see also J.G. ex rel. Q.B. v. Bd. of Educ. of Lakewood, OAL Dkt. No. EDU 10073-03, Agency Dkt. No. 466-12/03, at 6 (N.J. Adm); R.D. ex rel. C.D. v. Willingboro Bd. of Educ., 95 N.J.A.R.2d 190, at 2.

Per N.J.A.C. 6A: 3-1.6 and Crowe, emergent relief may be granted if the judge determines from the proofs that the following four prongs have been met:

i. The petitioner will suffer irreparable harm if the requested relief is not granted;

ii. The legal right underlying the petitioner's claim is settled;

iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

iv. 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.

Section VI of the Pro Se Petition of Appeal filed by petitioner required that a petitioner's appeal be accompanied by a memorandum addressing the four-pronged Crowe standard for relief. Petitioner attached a list of statutory violations to her petition; however, petitioner failed to address the Crowe standard for emergent relief. There was no mention of the Crowe test, nor were any of the four prongs raised at all. Further, despite being reminded of the importance of the Crowe test at the within hearing, petitioner failed to offer legal arguments proving that she met the Crowe prerequisites for emergent relief.

1. The petitioner will suffer irreparable harm if the requested relief is not granted.

Petitioner failed in her filings and at the hearing to offer any evidence of irreparable harm to N.G. resulting from the Board's imposition of the mask mandate on August 9, 2021, or to result if this court does not overturn the Board's mask mandate. In fact, the school year was to begin on September 8, 2021, the date of the within hearing, and petitioner did not explain how N.G. could have suffered irreparable harm before the school year even began; petitioner testified that she was not allowing N.G. to go to school on September 8, 2021, and therefore no irreparable harm could have yet been suffered by N.G.

Petitioner failed to prove that the wearing of masks to prevent the spread of Covid-19 met the legal definition of "corporal punishment." She failed to assert any irreparable harm suffered by her child due to wearing a mask at school pursuant to the mask mandate of August 9, 2021, and failed to produce any medical evidence or testimony showing any medical issues from wearing a mask the previous school year, and no medical evidence or testimony indicating irreparable harm which might occur in the current school year if the mask mandate would not be overturned. She failed to prove that the wearing of masks to prevent the spread of Covid-19 was the same as forcing someone to take experimental drugs or medication or that, if it was the same, N.G. had suffered any irreparable harm from wearing a mask. She failed to demonstrate what the current dress code was and how the mask mandate violated that code, and failed to demonstrate that school policy or State statutes, regulations or caselaw required public hearings specifically regarding amendments to a dress code. She also failed to allege any irreparable harm caused by any perceived changes to the dress code. Petitioner stated that masks went against her conscience, morals and religious beliefs, without asserting what the moral issue was or what her religion was or what her religious beliefs were. Upon questioning, petitioner revealed that she is a Christian and that she believes in "freedom," but she failed to show how wearing a mask to prevent a contagious disease went against those beliefs, or what irreparable harm was caused by the perceived violations of her conscience, morals or beliefs.

While it appears clear that the Board conducted a universal health screening in April of 2021, in contravention of R.C.'s wishes, petitioner failed to assert what irreparable

harm was caused by said screening, and failed to prove that she had complied with the exception to the universal health screening dictate by failing to provide evidence that she submitted screening results to the Board for N.G. from N.G.'s personal physician.[2] The fact that this issue arose more than four months ago also indicated that any possible relief would not be available on an emergent basis.

Petitioner failed to offer any proof that the Board discriminated against N.G. by denying him the right to attend school without fear of retaliation; no dates were given for any retaliatory behavior, no examples of acts of retaliation by the school were offered by petitioner, nor were any examples of mocking, bullying or intimidation offered by petitioner with any evidence to support such allegations. Further, even if such HIB acts had taken place, no evidence was provided that such acts were specifically against N.G., and no claims of specific irreparable harm tied to such alleged acts were cited.

Petitioner offered no scientific or medical evidence—no expert testimony, scientific materials, or doctors' reports from examinations of N.G.—to show that N.G. had been harmed by wearing a mask or suffered irreparable harm by the imposition of the mask mandate. Conversely, the Board asserted that its mask mandate was imposed in order to comply with Governor Murphy's mask mandate in order to protect the health, safety and welfare of the students in its school district.

Neither side provided evidence regarding the effectiveness of wearing masks. Regardless, I **FIND** that masks may be a valuable tool in stopping or limiting the spread of a contagious disease like Covid-19, based on the guidelines promulgated by the Center for Disease Control (CDC), American Academy of Pediatrics, and Dr. Anthony S. Fauci, Director of the National Institute of Allergy and Infectious Diseases (NIAID) and Chief Medical Advisor to President Donald J. Trump and President Joseph R. Biden. Preventing death and debilitating disease is the opposite of irreparable harm; it is a life-affirming benefit.

[2] When confronted with the fact that there was no way to go back in time and undo the school's universal health screening of N.G. from April 2021, R.C. acknowledged that there was no relief that this court could provide her. Petitioner wanted to be clear for any future screenings, however, that she continues not to consent to the school conducting those screenings of N.G.

Additionally, petitioner failed to explain why she did not seek to take advantage of the exemptions to the Governor's mask mandate. Respondent stated that there was a medical exemption to the mask mandate, but that petitioner never requested an exemption and failed to provide any medical documentation in support of a medical exemption. There was no exemption for religious or moral beliefs. There was also an exception for wearing masks in excessive heat and during "rigorous activity" in gym class, but petitioner provided no evidence that heat and gym activity had caused irreparable harm. Petitioner discussed social distancing in the school playground, but that was not a location covered by the Governor's or respondent's mask mandate.

Accordingly, I **CONCLUDE** that petitioner failed to show that this first prong of the Crowe test for emergent relief had been met in favor of the petitioner.

2. The legal right underlying the petitioner's claim is settled.

Petitioner did not address the legal right underlying her claim in neither her Petition and accompanying documentation nor during the hearing, except to allude to two "dress codes" cases that did not involve masks. Petitioner did not state any legal grounds for her position that the Board's imposition of the Governor's mask mandate was improper and should be overturned. She acknowledged that New Jersey courts had not yet settled the propriety of mask mandates.

Mask mandates are a new and unique issue, resulting from the current Covid-19 pandemic. This is a case of first impression before this court, and neither party offered any precedential caselaw setting out legal guidelines concerning mask mandates. Petitioner failed to proffer any caselaw which supports her position or which purports to show that this matter is settled with regards to schools in New Jersey. Until the legal rights underlying petitioner's claims regarding mask policies in schools are settled, relief cannot be provided on an emergent basis.

Regarding petitioner's claims that Governor Murphy's mandate, which respondent was enforcing, violated the Constitution, it appeared that the law was settled in favor of the Governor. According to Article V of the State Constitution, the Governor of New

Jersey can declare a Public Health Emergency and State of Emergency to "protect the health, safety and welfare of the people of New Jersey," which is what Governor Murphy did first through his first Executive Order (Executive Order #103). While he ended the State of Emergency this summer, it was pursuant to the New Jersey Constitution that Governor Murphy issued his mask mandate via Executive Order #251 on August 9, 2021.

Accordingly, I **CONCLUDE** that petitioner failed to show that the second prong of the Crowe test for emergent relief had been met in favor of the petitioner.

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim.

Petitioner did not address her likelihood of prevailing on the merits of her underlying claims. She offered no evidence to support her claim or to show a likelihood of success in a full due process hearing. She set out no caselaw showing that this matter has been decided elsewhere in New Jersey in such a way as to serve as precedent in the within manner. Petitioner offered no caselaw, statute or regulation demonstrating that a school board has discretion to ignore its governor's emergency actions, or that Governor Murphy himself acted in an improper or illegal manner when setting forth a mask mandate. In fact, it has long been held that local governmental entities have a great deal of discretion when taking action to promote the health, safety and welfare of its citizens.

It must also be noted that, although petitioner offered a list of statutes she alleged had been violated as a result of the respondent's mask mandate, she failed to meet her burden of proving that each of those education statutes had in fact been violated. Unsupported allegations do not show a likelihood of success in a full due process hearing; in fact, allegations unsupported by evidence show that there is a likelihood that petitioner would not prevail on the merits of the underlying case.

Although it appears undisputed that the universal health screening was conducted without R.C.'s consent, petitioner failed to prove that she supplied an examination report from N.G.'s own physician addressing the elements of the universal health screening, which was the requirement sent by the school to R.C., if she had wished to opt out of the

screening. Without such evidence, there is an argument that the school acted properly in administering the universal health screening.

Accordingly, I **CONCLUDE** that petitioner failed to show that the third prong of the Crowe test for emergent relief had been met in favor of the petitioner.

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.

Petitioner failed to address this fourth prong of the Crowe test. She claimed that wearing a mask interfered with N.G.'s ability to socialize with his peers, but she failed to argue that such an issue would outweigh any harm to respondent.

Most difficult in conducting this balancing test without input from the petitioner is that petitioner, in her formal Petition, set out a list of desired relief which cannot legally or reasonably be provided by this court.

For instance, this court has no legal authority to appoint a committee to serve alongside a superintendent of a school district. There are statutes and regulations which guide the hiring of a superintendent of schools, none of which were provided to this court by petitioner. In balancing petitioner's prayer for relief against the potential harm to respondent, there is a much greater likelihood that a school district and its student body would suffer greater harm by having unqualified citizens running the day-to-day operations of an entire school district. Certainly, there must be guidelines for how school board meetings are conducted, but none were provided by petitioner to this court. There was also no evidence provided as to violations of any open public meetings law by respondent, nor did petitioner provide citations or caselaw covering open public meetings. Further, violations of open public meetings by respondent were not the transmitted cause of action in this matter and, therefore, are outside the purview of this emergent matter. This court has no authority to require a school board to publicly acknowledge alleged violations that are not before this court, and which have not been proven.

Without medical evidence of harm since implementation of the mask mandate by the Board on August 9, 2021, the within balancing test is therefore between a student's and parents' liberties and moral and religious beliefs, versus the public health and welfare, in particular the spread of a contagious disease which has killed over 600,000 Americans, and for which there is not yet a vaccine for those age twelve and under. Petitioner failed to prove by a preponderance of the evidence that the mask policy and enforcement of same by the respondent caused specific irreparable harm to her son, N.G.

Conversely, prevailing medical guidelines are for masks to be worn by unvaccinated people in order to stop the spread of Covid-19. Of the millions of people who have contracted Covid-19, more than 600,000 Americans have lost their lives. Balancing the saving of students' lives against one student's vague and unspecified beliefs and unproven claims of harm, the balancing clearly leans in favor of the respondent Board's position. As the current scientific opinions are that wearing masks and receiving vaccines are the way for our society as a whole to defeat the scourge of Covid-19, allowing parents to violate a mask policy for unvaccinated minor students, without proof of irreparable harm, would most likely cause harm to the entirety of the Chesterfield School District.

Accordingly, I **CONCLUDE** that petitioner failed to show that the fourth prong of the Crowe test for emergent relief had been met in favor of the petitioner.

Therefore, I **CONCLUDE** that petitioner failed to show by a preponderance of the evidence that she met any of the four prongs of the Crowe test for emergent relief. I **CONCLUDE** that petitioner failed to prove that she was entitled to emergent relief in this matter.

ORDER

The petitioner's motion for emergent relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who 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 the **COMMISSIONER 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.

September 9, 2021
DATE

JEFFREY N. RABIN, ALJ

JNR/dw

APPENDIX

BRIEFS/EXHIBITS

For petitioner:

Petitioner's Pro Se Petition of Appeal and accompanying documents, dated August 27, 2021

For respondent:

Respondent's Answer dated September 3, 2021

WITNESSES

For petitioner:

R.C., pro se petitioner and witness

For respondent:

Scott Heino, Chesterfield Township Superintendent of Schools

258-21

258-21

New Jersey Commissioner of Education

Final Decision

Friends of Team Charter School, Inc.,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

Synopsis

This matter involves a challenge by the petitioner to the respondent Board's attempt to exercise its right of reversion regarding the Maple Avenue School – one of several properties that were transferred from the respondent Board to the Newark Housing Authority (NHA) under the terms of a 2016 site disposition and development agreement (Agreement) in which the NHA agreed to convey the buildings to third parties for the benefit of the Board and the City of Newark. Petitioner purchased Maple Avenue School from a third party in March 2020 and is developing it as a public charter school. In April 2020, the Board filed suit in Superior Court against the NHA, seeking to exercise its right to reversion based on the argument that NHA had failed to complete a site project and that the property was not being used for one of the Agreement's permitted uses. Petitioner subsequently filed the within matter, alleging that the Board was not authorized to file the Superior Court complaint and had failed to comply with facilities regulations.

The ALJ found, *inter alia*, that: the issues for determination herein are whether this matter arises under the school laws and whether the appeal was timely filed; the fact that school buildings were sold by the Board to NHA does not make the purpose of the Agreement a school facility project; under *N.J.A.C* 6A:3-1.3(i), a petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency that is the subject of the case; petitioner herein was put on notice of the Superior Court action when it was served with the amended complaint on May 4, 2020. The ALJ concluded that the Agreement is not a school facilities project and therefore this matter does not arise under the school laws; further, the petition of appeal was untimely because petitioner filed its appeal in April 2021, which was not within ninety days of becoming aware of the Superior Court complaint in May 2020. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon independent review of the record, the Commissioner denied the Board's motion for summary decision and remanded the matter to the OAL for further proceedings. In so doing, the Commissioner found, *inter alia*, that: the petition was timely; the ALJ overlooked the specific school laws which petitioner alleges the Board has violated; and the ALJ erred in concluding, as a matter of summary decision, that this matter is not a school facilities project.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

258-21
OAL Dkt. No. EDU 04320-21
Agency Dkt. No. 55-4/21

New Jersey Commissioner of Education

Final Decision

Friends of Team Charter School, Inc.,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto, have been reviewed and considered.

This matter involves the transfer of twelve school buildings from the Board to the Newark Housing Authority (NHA), pursuant to a 2016 site disposition and development agreement (Agreement) in which the NHA agreed to convey the buildings to third parties for the benefit of the Board and the City of Newark. The Agreement provided that any sites conveyed to the NHA would be subject to a right of reversion, which the Board could exercise if the NHA had not developed a site project or demonstrable plans for a site within three years of the Agreement. The NHA sold one of the sites – the Maple Avenue School – to a third party in 2017, and that party sold the property to petitioner, which is developing the property as a public charter school.

On April 6, 2020, the Board filed a complaint against the NHA in Superior Court, seeking to enforce its rights to reversion of the Maple Avenue School property on the grounds that a site project had not been completed and the property was not being used for one of the Agreement's permitted uses. Petitioner was served with an amended complaint, adding petitioner as a defendant, on May 4, 2020. In December 2020, petitioner's motion to dismiss was denied by the Superior Court.

On January 21, 2021, petitioner filed Open Public Records Act (OPRA) requests with the Board, seeking Board resolutions authorizing the filing of the Superior Court complaint. The Board responded on March 5, 2021, indicating that no such documents were maintained. Petitioner made a second OPRA request on April 7, 2021, seeking facilities applications to the Department of Education (DOE). The Board responded on April 21, 2021, indicating that no such applications exist.

On April 13, 2021, petitioner filed the petition of appeal in this matter, alleging that the Board was not authorized to file the Superior Court complaint and had failed to comply with facilities regulations. The ALJ granted the Board's motion for summary decision, concluding that the Agreement is not a school facilities project and that the petition of appeal was untimely because petitioner did not file within ninety days of becoming aware of the Superior Court complaint in May 2020.

In its exceptions, petitioner argues that it did not – and could not have – become aware that the Board had not authorized the filing of the Superior Court complaint or submitted facilities applications to the DOE until it received the Board's response to its OPRA requests. Petitioner therefore contends that the Board's OPRA response provided the notice to petitioner that triggered the 90-day limitations period, and the petition of appeal was timely because it was filed within 90 days of that date. Petitioner also claims that, because the Board is seeking to acquire

property through the Superior Court lawsuit, it constitutes a school facilities project, and that the Board has failed to comply with school facilities regulations. Finally, petitioner argues that there are disputed issues of material fact, particularly regarding the Board's intentions for the property, that preclude summary decision.

In reply, the Board argues that the action triggering the 90-day limitations period was service of the amended Superior Court complaint on petitioner. The Board notes that the OPRA requests were not filed until January 15, 2021, 256 days after petitioner was on notice of the Superior Court complaint, and that the Board's meeting minutes were publicly available on its website in time for petitioner to investigate and file a timely petition of appeal. The Board also contends that the Commissioner lacks jurisdiction over this matter because a lawsuit does not constitute a school facilities project. Finally, the Board argues that summary decision was appropriate because the Board's potential future plans for the property are immaterial and the Board will comply with any applicable school facilities regulations if and when it undertakes such projects.

Upon review, the Commissioner disagrees with the ALJ that the petition was untimely. Pursuant to *N.J.A.C.* 6A:3-1.3(d), the 90-day period for appeal to the Commissioner begins when the affected individuals have received adequate notice. In order for the notice to be adequate, the individuals must have been alerted to the existence of facts which give rise to a cause of action. *Kaprow v. Bd. of Educ. of Berkeley Twp.*, 131 *N.J.* 572, 586-587 (1993). By characterizing the subject of the case as the filing of the Superior Court complaint, and focusing on the date of service on petitioner, the ALJ overlooked the specific school laws which petitioner alleges the Board has violated: failure to authorize the complaint, and failure to comply with school facilities regulations.

Regarding the alleged failure to authorize the complaint, while the Board points out in briefing that its meeting minutes were publicly available on its website, no evidence has

been presented to demonstrate that fact.[1] Moreover, due to the onset of the Covid-19 pandemic shortly before the Superior Court complaint was filed, minutes reflecting the Board's actions were broad and vague, and it is not unreasonable for petitioner to have been uncertain about whether the complaint was authorized by the Board, particularly when the complaint itself indicates it was filed by the Board. Additionally, payment for legal services for the Superior Court litigation is presumably ongoing, and if petitioner is correct that those payments are being made in violation of school laws, each one could give rise to a new cause of action.

Regarding the alleged violation of facilities regulations, the Commissioner can discern no way for petitioner or any member of the public to know, without an OPRA request, that the Board had not filed paperwork with the DOE related to school facilities projects. Additionally, the Board's failure to file paperwork – if petitioner is correct that such filing is required – is an ongoing failure.

It was not until the receipt of the Board's responses to the OPRA requests that petitioner had the information that led it to believe that the complaint had not been authorized and that the Board had violated facilities regulations. As the petition of appeal was filed within 90 days of those responses, the Commissioner concludes that it was timely.

The Commissioner further finds that the ALJ erred in concluding, as a matter of summary decision, that this matter is not a school facilities project. The ALJ noted that the purpose of the Agreement is not a school facility project solely because the properties sold were school buildings. However, this finding mischaracterizes the issue. While the Agreement itself is not a school facilities project, the Board's pursuit of litigation to exercise the right of reversion contained in the Agreement could constitute land acquisition and/or a school facilities project,

[11] Petitioner has also indicated in briefing that the Board's minutes reveal that the Board did not take any action regarding the property. However, this statement contains no indication of when those minutes were posted and demonstrates only that they were posted at the time of briefing.

subject to applicable statutes and regulations. At minimum, petitioner has raised sufficient issues of material fact to preclude summary decision on this topic.

The Commissioner does not reach the issues of jurisdiction, standing, or whether the Board has violated any school laws, as the record is insufficient at this stage to reach any such conclusions. Accordingly, the Board's motion for summary decision is denied. The matter is remanded for further proceedings consistent with this decision.

IT IS SO ORDERED.

Angelina Allen McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 19, 2021
Date of Mailing: October 19, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT.NO. EDU 04320-21
AGENCY DKT. NO. 55-4/21

FRIENDS OF TEAM CHARTER SCHOOL, INC,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Thomas O Johnston, Esq. for petitioners (Johnston Law Firm LLC, attorneys)

Matthew J. Tharney, Esq., for respondent, (Sattiraju & Tharney, LLP, attorneys)

Record Closed: July 14, 2021 Decided: July 23, 2021

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter having been opened before the Office of Administrative Law by Matthew J. Tharney Esq., attorney for respondent on motion for summary decision on

May 3, 2021, in lieu of an answer to the petition. Petitioner filed opposition to the motion on June 23, 2021. Respondent filed a reply to the opposition on July 14, 2021.

FACTUAL DISCUSSION

By way of background, in April 2016, Newark Board of Education (Board or NPS or respondent) entered into a site disposition and development agreement (Agreement) with the Newark Housing authority (NHA). The Board agreed to transfer twelve school buildings to NHA. NHA agreed to convey those buildings to third parties for the benefit of the Board and the City of Newark.

There is also a provision in the agreement that states Article 5.2 which states "Any sites conveyed to the NHA shall be subject to a right of reversion exercisable by NPS (Newark Public Schools) if and to the extent the NHA has not developed a site project or demonstrable plans for such site within three years from the date of execution of this agreement.

The agreement clearly states in Article 5.4(1) Site Projects that NHA shall work diligently to investigate and identify feasible housing, redevelopment and economic development opportunities at each site project.

Maple Avenue School was included in the agreement. The Board transferred title of Maple Avenue School to NHA on June 30, 2016.

Petitioner alleges that on November 16, 2017, the Board executed and delivered a second Bargain and Sale deed to the property with a covenant against Grantor's acts which states that it has done no acts to encumber the property. Petitioner also states that an affidavit of title dated November 16, 2017, stated that the Board has not allowed any interest to be created which affects its ownership and use of the property and that there are no other legal obligations that can be asserted against the property. Petitioner did

not include the bargain and sale deed or the affidavit of title in the opposition or the petition.

On or about December 27, 2017, NHA sold the Maple Avenue School property 33 Maple Avenue Urban renewal LLC (33 Maple LLC). On March 12, 2020, 33 Maple LLC sold the property to petitioner. Petitioner is developing the property as a public school.

On April 6, 2020, the Board filed a complaint in Superior Court Chancery Division Essex County titled Newark Board of Education v. Newark Housing Authority Docket No ESX-C 67-20. The Complaint is for breach of covenant of good faith and fair dealing, tortious interference with contract, and unjust enrichment. The Board sought to enforce its rights to reversion to the Maple Avenue School on the grounds that a site project had not been completed and the property was not being used for one of the agreements permitted uses.

On April 27, 2020, an amended complaint was filed naming plaintiff as a defendant. The amended complaint was served on plaintiff on May 4, 2020. The Board filed a second amended complaint on August 31, 2020. Plaintiff filed a motion to dismiss the Superior Court Complaint on October 2, 2020. That motion was denied on December 20, 2020. Petitioner alleges that the filing of the Complaint and amended complaint were not duly authorized by the Board, because it was not listed in the Board's minutes from July 1, 2019, to January 15, 2021. Petitioner alleges that there were no resolutions authorizing the complaint. Petitioner filed this matter with the New Jersey Department of Education on or about April 13, 2021.

LEGAL ANALYSIS AND CONCLUSION

Respondent seeks to summarily dismiss petitioner's claim. The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. These provisions mirror the language of Rule 4:46-2 and the New Jersey Supreme Court's decision in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954).

Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

N.J.S.A. 18a:6-9 provides:

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioner. For the purposes of this Title, controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws.

The issue is whether this matter arises under school laws. Count One of the petition states school district expenditures must be approved by a school board. There is a question of fact as to whether this matter arises out of school laws.

N.J.A.C. 6A: 26-1.2 defines school facility project as:

> "School facilities project" means the acquisition, demolition, construction, improvement, repair, alteration, modernization, renovation, reconstruction, or capital maintenance of all or any part of a school facility or any other personal property necessary for, or ancillary to, any school facility. School facilities project includes, but is not limited to, fixtures; furnishings and equipment; site acquisition; site development; services of design professionals such as engineers and architects; construction management; legal services; financing costs; and administrative costs and expenses incurred in connection with the project. To qualify as a school facilities project, the project must be new construction to meet the housing needs of

> unhoused students, or rehabilitation to keep a school facility functional for its original purpose or for a new purpose accomplished within the gross square footage of the original building. Maintenance projects intended solely to achieve the design life of a school facility and routine maintenance do not constitute school facilities projects.

In this matter, the Site Disposition and Development Agreement between the Board and NHA states the purpose of the agreement is for NPS to realize expense savings and generate revenue for capital improvement, while also increasing the tax ratables for the City and enhancing job and employment opportunities for city residents. The fact that school buildings were sold by NPS to NHA does not make the purpose of the agreement a school facility project. The agreement clearly states in Article 5.4(1) Site Projects that NHA shall work diligently to investigate and identify feasible housing, redevelopment and economic development opportunities at each site project. The Agreement also has a reversion of property to NPS "if and to the extent the NHA has not developed a site project or demonstrable plans for such site within three years from the date of execution of this agreement." The Board wants to enforce this provision in the superior court case. The Board by its Complaint in Superior court is attempting to enforce a term of the agreement with NHA.

I **CONCLUDE** that this matter is not a school facilities matter.

N.J.A.C. 6A:3-1.3(i) requires that:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.
>
> Such a rule represents a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws and falls within the scope of authority granted to the Commissioner. Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 582 (1993). The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Ibid. Its purposes are to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may

have a fair opportunity to defend and to penalize dilatoriness and serve as a measure of repose by giving security and stability to human affairs. Id. at 587.

The ninety-day requirement is to be strictly construed and is mandatory. Wise v. Bd. of Educ. of the City of Trenton, EDU 160-00, Comm'r (September 11, 2000), aff'd, State Bd. of Educ. (January 3, 2001), <http://lawlibrary.rutgers.edu/oal/search.html>. A petitioner must file a petition within ninety days from a notice of adverse action and not within ninety days of her exhaustion of other avenues and mechanisms she might have employed in seeking renewal of employment. Id. Informal attempts to resolve a dispute do not serve to toll the statute of limitations. See Kaprow supra at 588. Also, the ninety-day period for filing a petition of appeal commences when a petitioner learns of facts that would enable her to file a timely claim. Id. at 587. "Adequate notice must be 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." Ibid. (citation omitted).

N.J.A.C. 6A:3-1.13 states:

The rules in this chapter shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of the Commissioner in connection with, the determination of controversies and disputes under the school laws. Where such rules do not reflect a specific statutory requirement or an underlying rule of the OAL, they may be relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

Petitioner was put on notice of the Superior Court action when it was served with the amended complaint on May 4, 2020. Petitioner knew of the Superior Court matter and filed a motion to dismiss the superior court matter on October 2, 2020. Petitioner 's belief that the Superior Court complaint was not filed does not negate the fact that petitioner was notified of the action and did not file a petition with the Department of Education within ninety days of May 4, 2020.

I **CONCLUDE** that the petition was not timely filed.

ORDER

Based on the foregoing, it is **ORDERED** that the Motion of the Board for summary decision is **GRANTED**. Because the petition was not filed timely, it is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 22, 2021

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: July 22, 2021

Date Mailed to Parties: July 22, 2021

ljb

259-21

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES
TENURE HEARING

~~~~~~~~~~~~~~~~~~~~~~~~~~~~

In the Matter of the Arbitration Between:

ATLANTIC CITY BOARD OF EDUCATION

PETITIONER

AND

JOHN TOLAND

RESPONDENT

OPINION

AND

AWARD

~~~~~~~~~~~~~~~~~~~~~~~~~~~~

DOCKET DOE 167-8/20

ARBITRATOR: GERARD G. RESTAINO, ASSIGNED BY THE NEW JERSEY DEPARTMENT OF EDUCATION IN ACCORDANCE WITH C.18A:6-17.1

APPEARANCES:

FOR THE PETITIONER

TRACY RILEY, ESQ. — COUNSEL FOR ATLANTIC CITY BOARD OF EDUCATION

BARRY CALDWELL — SUPERINTENDENT OF SCHOOLS

FOR THE RESPONDENT

ARNOLD MELLK, ESQ. — COUNSEL FOR RESPONDENT

JOHN TOLAND — RESPONDENT

COURT REPORTERS:

THERESA MASTROIANNI – MARCH 22, APRIL 23, 2021

DAWN MARIE TURPIN – AUGUST 17, 2021

PROCEDURAL BACKGROUND

This proceeding takes place pursuant to P.L. 2012, Chapter 26 of the laws of the State of New Jersey. The Respondent, John Toland, hereinafter referred to as Mr. Toland/Respondent, is a tenured health and physical education teaching staff member in the School District of the City Atlantic City, Atlantic County. The Petitioner School District is hereinafter referred to as the Board/District. The Respondent is assigned has a Certificate of Completion for Lifeguarding/First Aid/CPR/AED.

On January 14, 2019, an incident occurred in the pool at the High School involving a special needs student. The Respondent was the assigned teacher of record. A special needs student K.S. was in the pool and lost consciousness requiring cardiopulmonary resuscitation and the use of a defibrillator to regain a pulse. K.S. was transported to a local hospital for treatment. The Respondent acknowledges that a camera is located within the pool area of the High School.

On January 14, 2019, the respondent submitted an incident report concerning the issue that had occurred with K.S.

On July 3, 2020, Tracy Riley, Esq. on behalf of the Petitioner, filed with the Commissioner of Education six (6) tenure charges with various specifications against the Respondent. Included with the Tenure Charges was a Certificate of Determination prepared by Superintendent, Barry Caldwell. On August 19, 2020, Arnold Mellk, Esq. on behalf of the Respondent submitted answers to the Tenure Charges.

Incorporated in the various documents submitted to the Commissioner's Office by the Petitioner was a USB drive (See exhibit 8) which is a video of the January 14,

2019 pool incident. The video is identified as Exhibit 13H, and the Respondent has challenged the admissibility of the video.

On August 24, 2020, in accordance with N.J.S.A. 18A:6-16, the Commissioner of Education (Controversies and Disputes) referred the charges to the undersigned.

On September 2, 2020, a conference call with counselors Riley, Mellk and the arbitrator was held to discuss scheduling for the instant matter. It was agreed that hearings were to be scheduled for November 30, December 1-4, 2020

On November 18, 2020, in conformance with N.J.S.A. 18A:6-17.1(b)(3), Mr. Toland submitted his statement of evidence to the District. That statute states:

> *"Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony to the employing board or its representative. The employee shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses."*

On November 23, 2020, the Respondent, John Toland, moved *in limine* to *"prohibit the Petitioner, Atlantic City Board of Education, from proffering the testimony of any witness not properly identified pursuant to N.J.S.A. 18A:6-17.1(b)(3). Mr. Toland further moves to prohibit the consideration of admission into evidence of any documents or other evidence likewise not identified and provided to Mr. Toland in conformance with that statute."*

On November 25, 2020, the Petitioner (District) submitted its arguments to set aside Mr. Toland's Motion in Limine position.

POSITIONS OF THE PARTIES

Motion in Limine

For the Petitioner

The Petitioner strongly argues that, based upon the severity of the charges against the Respondent, the Motion in Limine should be denied. Moreover, on May 28, 2020, *"Mr. Toland received a copy of the filed Tenure Charges by regular and certified mail. Contained within those tenure charges is specific allegations and evidence that the District would be relying upon to present those charges to the Board. Those charges went unanswered."*

Furthermore, on "*July 3, 2020, a Certification and Statement of Charges and Specifications, certificate of determination by Supt. Barry Caldwell, along with evidence the District would rely upon to present those charges were served on John Toland, the Respondent. Those charges and specifications were answered by Mr. Toland."*

The Petitioner contends that the *"intent of the legislation listed above to provide the opposing party with a list of witnesses, is to provide a reasonable opportunity and notice of the identity of the witnesses and the nature of their knowledge as it relates to a particular matter.* The Petitioner asserts that *a party may call another party to testify as a party. The Petitioner intends to call the Respondent to testify."* In support of this position, the Petitioner argues they" can *call the opposing party to testify as parties are fully aware of the charges and evidence supporting the case, all communicated via the notice of tenure charges as indicated above. Included within the evidence supplied by the Board is a written statement prepared by Mr. Toland. The*

Respondent has been aware of the contents of the allegations and supporting evidence for over six months."

For the above stated reasons, the Board asks that the Motion in Limine be denied.

For the Respondent

The Respondent argues that N.J.S.A. 18A:6-17.1(b)(3), is controlling and states: the Board *"shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment."* Mr. Toland strenuously argues that *"other than the tenure charges and documents submitted",* the Petitioner did not submit a list of witnesses and a summary of their testimony as the statue requires.

Additionally, the statue in question *"is strictly construed, and self-executing and absent contrary legislative intent, statutes are to be given their plain meaning."*

This case *"was referred to an arbitrator on August 24, 2020, therefore, the Board was notified and aware that this was the referral date. The term referral in* N.J.S.A. *18A:6-17.1(b)(3) does not include a hard date, i.e., a specific number of days after referral of the case to arbitration for the Board to furnish its witness list. The statute does, however, contain a hard date-10 days - with respect to the employer's providing his witness list.* The Respondent further argues that *"it would be an absurd interpretation of N.J.S.A. 18A:6-17.1(b)(3) to allow the employer to identify new witnesses after the employee is statutorily foreclosed from doing so."*

The Respondent contends that N.J.S.A. *18A:6-17.1(b)(3) is a* statute that requires mandatory adherence to its clean language. It is not permissive. *"If the Board had wished to provide the required witness lists and summaries of testimony, it had every opportunity to do so. The allegations in this case date back to January 2019:*

they are nearly two years old." Moreover, Mr. Toland has only the limited window between referral, and hearing, to set forth his defenses. *"The statute cannot and does not permit a board of education to shrink that window by failing to adhere to the strict timelines of*

N.J.S.A. 18A:6-17.1(b)(3. To do so would eviscerate the procedure which has been implemented to protect the Due Process rights of teaching staff members defending tenure charges."

For the foregoing reasons, the Respondent, John Toland, asks that his Motion in Limine be granted.

Decision on Motion in Limine

On November 27, 2020, I rendered my decision on the Respondent's Motion in Limine as set forth below:

> *"I reviewed all 6 charges and accompanying specifications submitted by the Petitioner. Those charges and specifications do show what the Petitioner will use for its case in chief. The only named Board employees found on the Charges, Specifications and Certificate of Determination are Barry Caldwell, Superintendent of Schools, Angela Brown, Board Secretary, Sherry Yahn, Assistant Superintendent, and Diane Saunders, Director of Human Resources. I can infer that Superintendent Caldwell, because of his intimate knowledge of the Charges and Specifications, may very well testify*
>
> *What is missing from the Petitioner's exhibits is a list of witnesses with a complete summary of their testimony. Contrast that omission with the Respondent's Statement of Evidence dated November 18, 2020. The Respondent complied with all requirements of N.J.S.A. 18A:6-17.1(b)(3).*
>
> *That omission was addressed in DOE 267-9/14, Marie Ebert vs. the State-Operated School District, City of Newark, by arbitrator Tia Schneider Denenberg. In that case, based upon the specific language of the above cited statute, the Respondent submitted a motion to have the tenure charges dismissed.*

Arbitrator Denenberg determined that "the Respondent's motion to dismiss the charges is granted on the basis of the District's substantial and unexplained failure to meet the timeliness mandate in N.J.S.A. 18A:6-17.1(b)(3)." The arbitrator determined that the "dismissal is without prejudice to the District's right to file charges again."

The Petitioner's response to the Motion in Limine falls short of full compliance with N.J.S.A. 18A:6-17.1(b)(3) due to the lack of a witness list with a complete summary of their testimony. The language of the statute is clear and unambiguous, and not subject to varied interpretations that the Petitioner would have me accept.

Hearings in the matter at bar are scheduled to start on Monday, November 30, 2020, and continue to December 4, 2020. The Respondent has not made a motion to dismiss as was done in the Ebert case, supra.

The purpose of N.J.S.A. 18A:6-17.1(b)(3) is to guarantee that a tenure teacher is guaranteed due process when tenure charges are filed against that individual. Part of due process is compliance with a specified time frame. In this matter, the Petitioner was required to submit its witness list and summary of their testimony no later than November 20, 2002. They failed to do so and I have no recourse other than to adhere to the language of the statue. I do not have the authority to state that the Petitioner complied with N.J.S.A. 18A:6-17.1(b)(3) in spirit.

The specifics of the Legislative intent do not grant me leave to ignore the requirements of the statute. The language in question is specific not general and must be given its full force and weight.

The Respondent's Motion in Limine to bar the testimony of previously undisclosed witnesses is granted."

Additional arguments presented by the Petitioner and Respondent will be addressed below.

A court reporter was present at each hearing and I received a copy of the transcripts. Reference to the transcripts will be as follows: March 22, 2021, TR 1, April 23, 2021, TR 2, August 17, 2021, TR 3

Motion To Dismiss The Tenure Charges With Prejudice.

For the Petitioner

The Petitioner continues to assert that Exhibit 13H, the video is admissible for 2 reasons. Mr. Toland's statement (see Exhibit 13e) is in evidence, and that Superintendent Caldwell can testify about the video because it was presented to him as part of the tenure charges. More importantly, he is a *"non-voting member of the Board and as the person who put forward these charges, that reviewed the evidence to put forth these charges, he has the ability to testify what happened in the pool area based upon his review of all the evidence."*[1] Additionally, "*it is not the law that he had to physically be there to testify about it. It's not the law."*[2]

The District strenuously argues that *"they have the right to call the Respondent as a witness because he is a party to this case."*[3] The Petitioner acknowledged that it was always their intent to call the Respondent as a witness.

The Petitioner contends that: *"both Caldwell's testimony and Toland's own incident report and response to the charges, which were admitted as admissions, not as business records, are competent evidence that the arbitrator should have used to both substantiate the charges and authenticate the video."*

Moreover, the Board offers in support of its position in the matter at bar that rules of evidence do not apply in administrative agency proceedings. DeBartolomeris v. Bd. Of Review, 341 N.J. Super. 80,83 (App.Div. 2001) "Even if New Jersey's evidence

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[1] TR 2 – 68:18-23
2 TR 2 – 68/69: - 25/1

[3] TR3 – 84/85: 24-25/4-6

rules are to be applied strictly, however, there is more than sufficient evidence that the videotape is an accurate reproduction of that which it purports to represent and the reproduction is of the scene at the time the incident took place." State v. Loftin, 287 N.J. Super. 76, 98 (App. Div. 1996)

The Petitioner asserts that *"when the videotape in question purports to represent a contemporaneous recording of the actual events, like the videotape in the present case showing what occurred as it was occurring, the proponent of the evidence need not comply with the four-part test set forth in Balian, nor does admission require the testimony of an actual eyewitness to the event in question."* Balian v. General Motors, 121 N.J. Super. 118 (App. Div. 1972)

In furtherance of its position, the Petitioner reaffirms that the rules of evidence of relaxed in arbitration, the arbitrator properly ruled that Superintendent Caldwell could offer hearsay testimony based upon information about the incident he had received, and then immediately prevented him from offering this exact type of testimony. The Petitioner relies on N.J.S.A. 18A:6-17 and N.J.A.C. 1:15.5 concerning the use of hearsay evidence and the weight accorded too same.

The Board incorporates all of its previous arguments that have already been briefed at length as to *"whether parties to an arbitration must be disclosed in order to call them as witnesses, and Barry Caldwell's capacity to authenticate the videotape as issue, without repeating them at length."*

For the foregoing reasons, the Board has *"met its burden to substantiate the tenure charges. Therefore, the Board is seeking the termination of John Toland."*

For the Respondent

The Respondent strongly argues that *"in the absence of any competent testimony, and the absence of any authenticated video evidence, there is simply no competent evidence standing for the proposition that Mr. Toland engaged in any conduct unbecoming a teaching staff member."* Additionally, *"arbitrators in TEACH NJ Tenure cases have not hesitated to dismiss tenure charges when this burden is not met."*

The arbitrators November 27, 2020, Motion in Limine has not been modified and is still controlling in the matter at bar. The District did not comply with N.J.S.A. 18A:6-17.1(b)(3), and as such there is no credible evidence to support and/or prove the tenure charges filed against Mr. Toland.

Since the District never supplied a witness list and a summary of their testimony. Mr. Toland cannot be a witness for the Petitioner. The statute, N.J.S.A. 18A:6-17.1(b)(3), establishes that the employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. Most importantly, the video footage found on the USB Drive (see Exhibit H) cannot be used a weapon for the Petitioner. Mr. Toland objects to the playing of the video because *"there has been no foundation laid whatsoever for its authenticity. We do not know who operated it, we do not know the conditions under which it was operated. This witness (referring to Superintendent Caldwell) has no firsthand*

knowledge of what occurred at the pool." Superintendent Caldwell "did acknowledge that the video was silent and he couldn't hear what people were saying.

Mr. Toland contends that *"[I]n order to constitute competent, admissible evidence, video footage must be properly authenticated".* State v. Wilson, 135 N.J. 4, 17 (1994). The Board has *"failed to furnish any evidence which would permit it to meet its burdens vis-à-vis the authentication requirements as set forth in Wilson supra."*

The Respondent stresses that *"[N]*either Mr. Toland's answer, nor his purported statement, confirm the creation, compilation or preservation of the subject video footage. Mr. Toland's statement (see Exhibit 13) is just that, a statement that was not subject to any direct or cross examination. Nor were there any facts established as to how that statement was drafted.

The Respondent argues *"that New Jersey recognizes and applies the residuum rule. It is settled New Jersey Law that finding of fact made in administrative proceedings must be supported by some residuum of competent, non-hearsay evidence. In Weston v. State, 60 N.J. 36,51-52 (1972) the New Jersey Supreme Court set forth the requirement that agency factfinding be supported by some measure of competent evidence."* The court also said that *"to sustain an administrative decision, which affects the substantial rights of a party, there must be residuum of legal and competent evidence in the record."*

The Respondent further argues that a tenure hearing, which takes the form of an arbitration, requires such competent evidence as established by the residuum rule.

For the foregoing reasons, Mr. Toland contends that the tenure charges should be dismissed with prejudice, and the Arbitrator should enter an Award granting him back pay, benefits and other emoluments and otherwise make him whole.

DISCUSSION AND OPINION

The Petitioner acknowledges and accepts the mandates set forth in N.J.S.A. 18A:6-17.1(b)(3). Nevertheless, the District believes that based upon their post hearing briefs citing case law, testimony and commentary at the hearings, both Mr. Toland and Superintendent Caldwell can be called as witnesses for the District.

Quite frankly, normally a respondent may be called as a witness by a petitioner unless a fact pattern unique to a specific case exists that would preclude such testimony. The matter at bar is an example of specific circumstances that will prevent the testimony of Mr. Toland.

N.J.S.A. 18A:6-17.1(b)(3), mandates that the "*employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony to the employee or the employee's representative.*" The statute also requires *that the "employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment."*

All of the above enumerated items including a witness list must be presented to the Respondent prior to the start of a hearing. To do otherwise relegates the tenure hearing process to nothing more than trial by ambush, which is anathema to the statute.

Yet there was no witness list or a summary of their testimony presented to the Respondent, and the record is devoid of any such list.

Counsel for the Petitioner stated that it was always her intent to call Mr. Toland as a witness. (see footnote 3) However, that must be done in accordance with the statutory requirement for witnesses.

On a two-prong test for admissibility of Mr. Toland's testimony, because a required witness list was not submitted by the Petitioner, the Respondent cannot be called as a witness. The second prong allows Mr. Toland to be called as a rebuttal witness. For this to occur Mr. Toland would be testifying in rebuttal to the record set forth by the Respondent. However, counsel for Mr. Toland did not call any witnesses and rested. The Arbitrator asked the Respondent's counsel if he was going to call Mr. Toland as a witness. He answered by stating *"that trial strategy discussions with Mr. Toland are attorney client privilege and not subject to this matter."* He is correct, and I have no authority to pierce attorney client privilege.

The Petitioner also strongly argues that Mr. Toland's written statement (See Exhibit 13e) can authenticate that statement. However, there is no competent evidence in the record to establish the foundation for that exhibit. For example, where was it written, who was present when it was drafted, did anyone suggest a modification or revision, did anyone proof the statement. Did Mr. Toland submit the statement of his own volition or was he asked to submit the statement?

Mr. Toland cannot be called as a witness to authenticate the video of the pool incident on January 14, 2019, because N.J.S.A. 18A:6-17.1(b)(3), was not complied with.

The issue of the USB drive, Exhibit H must be addressed. At the March 22, 2021, hearing Jennifer Killough-Herrera, Director of the Office of Controversies and Disputes, of the DOE testified that tenure charges are sent to the Commissioner of Education and are then submitted to her office. She further testified that the USB drive is evidence in this case and that evidence is transmitted to the Arbitrator. In this case due to COVID the USB was not submitted to the Arbitrator and the parties were to send a USB directly the Arbitrator. Additionally, Ms. Killough-Herrera testified that she *"should have indicated that the parties should have provided the Arbitrator with a copy.*[4] On March 23, 2021, I received a letter from Ms. Killough-Herrera with the USB attached.

Superintendent Caldwell could not authenticate the video because he was not a witness to the January 14, 2019, incident at the High School pool. He testified that he received the video from Mr. Atiba Rose, the District's Director of Operations.

Yet there was no proof offered that Mr. Rose was an eyewitness to the January 14, 2019, incident at the High School pool.

The Petitioner argues that Superintendent Caldwell is a non-voting member of the Atlantic City Board of Education and as such is a party to these proceedings, which allows him to testify. Unfortunately, the statue does not reference party or non-voting

member of the Board, it specifically states employer or employee. Superintendent Caldwell is an employee of the Board, he is not the employer. Following that logic simply means that any member of the Atlantic City Board of Education can offer testimony to authenticate the video in question. If that individual was present at the high School pool on January 14, 2019, and observed the incident in question, that person, if listed on a Petitioner witness list, can certainly offer testimony

On July 3, 2020, Superintendent Caldwell signed a Certificate of Determination, against the Respondent. Within the twelve (12) cited points, there is no reference that Superintendent Caldwell was an actual eye witness to the January 14, 2019, pool incident at the high school. Compare that to 18A:6-17.3 section 2 which requires any Superintendent of schools to file inefficiency charges against a teacher who for two (2) consecutive years receives a partially effective or ineffective evaluation. For exceptional circumstances a Superintendent may defer the filing of tenure charges until the next annual summative evaluation.

In the evaluative scenario, a Superintendent does not have to be a witness to any shortcomings in a classroom, and absent any exceptional circumstances, tenure charges must be filled. Here, the Petitioner seeks to have Superintendent Caldwell offer his evaluation or insight into the video.

Had Superintendent Caldwell been listed as a witness for the Petitioner and a summary of his testimony provided to the Respondent, he would have started his testimony subject to any potential objections that may have been raised.

[4] TR 1 – 76:4-17

However, to get to the potential objection phase he had to have been listed as a witness for the Petitioner. Again, that did not happen.

The Petitioner offers New Jersey court decisions to bolster its argument that Superintendent Caldwell was improperly denied the opportunity to offer testimony about the video in question.

Balian (1972) supra was a product liability, civil action in which the "*party offering the film was attempting to implement the testimony of an expert witness by filming an experiment for the purpose of submission of the film to a jury.*" **Contrast that with the Toland matter where there is no expert witness and there is no experiment.** (emphasis supplied)

Wilson (1994) supra, was a criminal case. On March 3, 2020, Mario Formica, Deputy First Assistant Prosecutor, Atlantic County Prosecutor's Office, sent an email to the Petitioner's counsel in which he indicated that *"we reviewed the matter some time ago and determined that no action (or inaction) on the part of the lifeguard or gym teacher rose to criminal conducts under a probable cause standard."* The Toland matter was not pursued by the Atlantic County Prosecutor's Office. Nevertheless, the N.J. Supreme Court in Wilson said that *"because the videotape is relevant only if based on its representation of the positions of the witnesses at the time of the crime, only a witness to the actual crime can properly authenticate that the video accurately represents the scene of the crime."*

Balian, and Wilson were pre-N.J.S.A. 18A:6-17.1(b)(3), which was approved on August 6, 2012. In her closing arguments, counsel for the Petitioner referenced post

N.J.S.A. 18A:6-17.1(b)(3), cases and stated: "In *light of the fact that our Courts merely require a prima facie showing, neither absolute certainty nor conclusive proof is required to authenticate a video. Any person with knowledge of the facts represented in the video may authenticate it, through evidence that it is an accurate depiction of what is purports to represent and (sic) the scene at the time of the incident in question."* The Court decisions referenced do not eliminate the absolute requirement for a witness identification list and a summary of their testimony as specified in the above cited statute.

Under the residuum rule, competent evidence must be presented to sustain the charges against the Respondent. Superintendent Caldwell testified that he received the video from Mr. Abita and that Mr. Rose was at the pool on January 14, 2019, at the time of the incident.[5] In light of that testimony one would expect that Mr. Rose would have been on the Petitioner witness list with a summary of this testimony or was a rebuttal witness. Mr. Rose could not be called as a rebuttal witness because the Respondent never put on its case-in-chief. The record clearly and unequivocally establishes that no proof was offered that Mr. Rose was a witness to the January 14, 2019, pool incident at the high school.

Other than the reasons offered above, the Petitioner did not present any rationale for the lack of non-conformance with N.J.S.A. 18A:6-17.1(b)(3). Any further discussion by me would be highly speculative. Arbitrators are not privy to trial strategy nor should we be. If arbitrators become involved with trial strategy, then that becomes the new

[5] TR 3 – 21:13-18

norm for the definition of the word neutral. For the foregoing reasons, and having duly heard the proofs and allegations of the parties, I Award the following:

AWARD

The Respondent's motion to dismiss the tenure charges filed against John Toland is granted due to the district's failure to follow the requirements of N.J.S.A. 18A:6-17.1(b)(3). John Toland shall be returned to work with full back pay, health benefits, seniority and any other emoluments he lost while serving a 120 days suspension. The District shall reimburse Mr. Toland for any personal and/or family medical expenses he may have incurred while on suspension.

Dated: October13, 2021

Gerard G. Restaino

Gerard G. Restaino, Arbitrator

State of New Jersey)

County of Ocean) ss:

On this 13th day of October, 2021, before me personally came and appeared GERARD G. RESTAINO to me known to be the person who executed the foregoing document and he duly acknowledged to me that he executed the same.

Cheryl Yannacone

Notary Public
State of New Jersey
My commission expires on August 26, 2026

CHERYL YANNACONE
Notary Public, State of New Jersey
My Commission expires
August 26. 2026

260-21

260-21

IN THE MATTER OF TENURE BETWEEN

Harold Booker

- And –

Willingboro Board of Education

Agency DKT. NO. 61-4/21

Arbitrator: Kinard Lang

Hearing Date: September 24, 2021

Hearing Location: Willingboro School District Offices

PARTIES: William C. Morlock, ESQ. – Willingboro Board of Education

James K. Grace, Esq. – Harold Booker

ISSUE: Is the Settlement Agreement facilitated by the Arbitrator on September 24, 2021, and finally ratified by the parties on October 4, 2021, in conformance with the standards established in the matter entitled *In re Cardonick,* State Board decision of April 6, 1983 (1990 *School Law Decisions* (S.L.D.) 842, 846.

Based upon the facts in this case adherence to the following *Cardick Standards* is evaluated:

1. *"Accompaniment by documentation as to the nature of the charges".*
   The record in this matter contains detailed documentation of charges against the Respondent.

2. *"Explication of the circumstances justifying settlement or withdrawal"*
   The following extract from the Board's *"**Agenda Item Details**"* conveys an understanding of the circumstances warranting the Settlement:
   > *"...the Board has fully considered the terms and conditions of the Settlement Agreement and finds them to be acceptable in all aspects and **in the best interests of the school district and the public**..."*

3. *"Consent of both the charged and charging parties"*
   The Settlement Agreement contains the signatures of the Respondent and President of the Willingboro Board of Education, showing their acceptance.

4. *"Indication the charged party entered into the agreement a full understanding of his or her rights"*
   Respondent and Willingboro School Board President, Debra Williams signed the Settlement Agreement, respectively, on September 27, 2021 and October 4, 2021; item 8. of the Settlement Agreement says:
   > *"...The parties further acknowledge that **each party fully understands the Terms of this Agreement,** and that each party is signing this Agreement Freely and voluntarily, without any coercion, duress or pressure from the other party."* (Emphasis added)

5. *"A showing the agreement is in the public interest"*
   See 2. Above.

6. *"If the charged party is a teaching staff member, a showing the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation certificate.*

Respondent did not suffer a *"loss of position"*, as I understand the intent of that language; he was:
"...demoted from Assistant Principal back to his previous position as a physical education teacher..."
I find the parties have conformed to the provisions of the *Cardonick Standards* relevant in this matter, hence, the following Award.

AWARD

The Settlement Agreement in Agency Docket Number 61-4/21 satisfies the *Cardonick Standards.*

Kinard Lang, Arbitrator/ Mediator October 19, 2021

263-21

263-21
OAL Dkt. No. EDU 08418-20
Agency Dkt. No. 171-8/20

New Jersey Commissioner of Education

Final Decision

Sara Sparano,

Petitioner,

v.

Board of Education of the City of Garfield, Bergen County,

Respondent.

The record of this matter, the proposed Settlement Agreement and General Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Paragraph 3 of the Agreement references an action taken by the parties which preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 21, 2021
Date of Mailing: October 21, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 08418-20
AGENCY DKT. NO. 171-8/20

SARA SPARANO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,

Respondent.

Kim E. Sparano, Esq., for petitioner Sara Sparano (Kim E. Sparano, attorneys)

Todd S. McGarvey, Esq., for respondent Board of Education of City of Garfield (Anderson & Shah, attorneys)

Record Closed: August 24, 2021 Decided: August 30, 2021

BEFORE **GAIL M. COOKSON,** ALJ:

On September 4, 2020, the matter was transmitted to the Office of Administrative Law for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement and Stipulation of Dismissal with Prejudice and Without Costs. The Board's resolution is not needed.

Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Gail M. Cookson

August 30, 2021

DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 9-7-21

Date Mailed to Parties: 9-7-21

id

SARA SPARANO, Petitioner, v. BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY, Respondent.	OAL DOCKET NO.: EDU 08418-20 AGENCY REF. NO.: 171-8/20 **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

1. **Releasor and Releasees:** This SETTLEMENT AGREEMENT and GENERAL RELEASE (the "Release" or "Agreement"), is given by the releasor(s). The Releasor(s) is SARA SPARANO, referred to as "I", "Me", or "My". The Releasees, hereinafter referred to as "Releasees" or "You", are the BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY, and all of its respective departments, divisions, agencies, officials, employees and agents, past and present.

2. **Release**: I release and give up any and all claims and rights which I may have against You. This releases all claims, demands, damages, causes of action, or suits which have been or could have been brought related to the events that gave rise to the Petition filed in the above-captioned matter, including claims for attorney's fees and costs; any claims of which I am not aware; and any claims not mentioned in this Release. This Release applies to claims resulting from anything which has happened from the first date of my employment with You up through the present date. This Releases and encompasses all claims resulting from or arising out of:

i. My employment relationship with You; including claims for breach of contract or promise, real or implied; claims for fraud, misrepresentation, physical or personal injury, emotional distress, libel, slander, defamation, tortious interference, and similar or related claims; claims for wrongful termination; claims for discrimination, harassment or retaliation of any kind (including any claim of retaliation for reporting a work-related injury or filing a workers' compensation claim); claims arising under the Fair Labor Standards Act and state wage and hour laws, the Employee Retirement Income Security Act (except for vested ERISA benefits), the Consolidated Omnibus Budget Reconciliation Act, the Age Discrimination in Employment Act, the Older Workers Benefit

Protection Act, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Rehabilitation Act, the Reconstruction Era Civil Rights Acts, including 42 U.S.C. § 1981 and 42 U.S.C. § 1983, the Equal Pay Act and any similar state laws, the Family and Medical Leave Act and any similar state laws, the Fair Credit Reporting Act and any similar state laws, all New Jersey state wage and hour laws, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, and any amendments to any of the above laws; and claims under any constitution, common law or any other federal, state or local law, including those not specifically listed above which were the subject of an action captioned *Sara Sparano v. Board of Education of the City of Garfield, Bergen County*, venued in the State of New Jersey Office of Administrative Law, OAL Docket No. EDU 08418-20, Agency Ref. No. 171-8/20, or which claims could have been raised in that proceeding.

ii. Any and all claims and/or liens, past current and/or future arising out of this litigation or asserted against the proceeds of the settlement and I agree that such claims and/or liens are to be satisfied by Me, including but not limited to any Medicare or Medicaid claims and/or liens, Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens.

iii. I further release all claims which might otherwise have been brought in the future by My Estate or My family members under Mauro v. Raymark Industries, 116 N.J. 126 (1989) and Alfone v. Sarno, 87 N.J. 99 (1981) for past, present, or future losses, damages, or injuries. This includes all possible future claims for wrongful death.

iv. I further agree to return any property owned by Releasees by providing it to my counsel, who shall then return it to Anderson & Shah, LLC, 457 Haddonfield Road, Suite 120, Cherry Hill, NJ 08002.

3. **Terms**: Upon approval of this Agreement by the Board of Education of the City of Garfield, Bergen County, the Terms of this Agreement are as follows:

In consideration of my releasing the claims enumerated in this Release, You have agreed to pay Me, in full satisfaction of all of My claims, including My claims for costs and attorney's fees, a total of $30,000 within 30 days from when You approve this Agreement. I acknowledge that this is consideration to which I am not otherwise

entitled. This sum represents full payment, including all attorney fees, costs, and expenses. I agree that I shall not seek anything further from You. Payment shall not be made unless counsel for Releasees has received this Release signed by Me and notarized, W-9 and 1099 forms, a Charlie Jones search, a Medicare lien search, and a signed Stipulation of Dismissal with Prejudice. A check shall be remitted by the Releasees' insurance carrier and be payable as follows:

i. $30,000 for Sara Sparano issued in a check made payable to Sara Sparano.

4. **Taxes**: I shall be solely responsible for the payment of appropriate taxes on this settlement, if any, and I agree and understand that the Releasees have not made any representation to Me regarding the tax treatment of the sums paid pursuant to this Release. In the event a claim for such taxes, and/or penalties and interest, is assessed by any taxing authority, I agree to, and do hereby hold the Releasees harmless and indemnify Releasees against any and all tax liability, interest and/or penalties due from Me.

5. **Liens**: I shall be solely responsible for the payment of any claims or liens that may be asserted against the proceeds of this settlement. In the event a claim or lien for such payment is asserted by anyone, including Medicare and/or Medicaid, I agree to make those payments and to defend and indemnify Releasees against any such claim or lien, including the payment of any fines, charges, and attorney's fees. Failure to satisfy any such lien shall constitute a breach of this Release and I agree to pay all costs, interest and attorney's fees associated with any such claim or lien.

6. **Attorney's fees**: This Release includes all claims for attorney's fees and costs.

7. **No Admission of Liability/Future Precedent**: Releasees expressly deny the validity of My disputed claims, and nothing contained herein may be used or viewed as an admission of liability by Releasees. Further, nothing contained herein shall be construed as setting any precedent relative to the resolution or compromise of any future claims involving Releasees.

8. **Dismissal of Lawsuit**: I hereby authorize and instruct my legal counsel of record to sign a Stipulation of Dismissal with Prejudice and Without Costs and Attorney Fees as to all claims and all Releasees named in the matter referenced above and to provide same to counsel for Releasees at the time of execution of this Release. The Stipulation of Dismissal shall be filed by counsel for Releasees upon receipt of the settlement check as outlined above by my attorney.

9. **Confidentiality**: I acknowledge that the terms of this Agreement, and the fact of this settlement, are confidential to the extent permitted by law. Accordingly, except as specifically permitted under this Agreement, or required by force of law, I agree not to disclose or cause to be disclosed, either directly or indirectly, to any person or organization (including but not limited to any current, former or future employee of Yours, and on any social media or Internet site) any information regarding the settlement amount or other terms of this Agreement (collectively, "the Confidential Information"), and to respond to any inquiries regarding the disposition of the claims contained in the Complaint by stating, "The case is over" or "It has been resolved," and nothing more.

i. I further agree that:

a. I may disclose the Confidential Information to only My spouse, My family, My Counsel and financial advisors, and shall direct them to keep such information confidential, and shall inform them that I may be held responsible for any disclosure by them, and shall accept full and legal responsibility for any such disclosures;

b. I may disclose the terms of this settlement to the extent necessary to enforce or challenge the terms of this Agreement, or to comply with a legal requirement that the Confidential Information be disclosed;

ii. **ALTHOUGH THE PARTIES MAY HAVE AGREED TO KEEP THE SETTLEMENT AND UNDERLYING FACTS CONFIDENTIAL, SUCH A PROVISION IN AN AGREEMENT IS UNENFORCABLE AGAINST THE EMPLOYER (RESPONDENT) IF THE EMPLOYEE (PETITIONER) PUBLICALLY REVEALS SUFFICIENT DETAILS OF THE CLAIM SO THAT THE EMPLOYER IS REASONABLY IDENTIFIABLE.**

10. **Non-Disparagement**: Except as permitted by Paragraph 9, the Parties agree not to make critical, negative or disparaging remarks about each other to any person or entity, or on any social media or Internet site, including but not limited to comments about their related services, or business, or employment practices. You shall also respond to all employment-related inquiries regarding Me with only a neutral employment reference, consisting exclusively of dates of employment and positions held. The contact person for such an employment reference shall be the Human Resources Department of the Board of Education of the City of Garfield, Bergen County. I must notify the Human Resources Department at the time I refer a third

party to the School for purposes of an employment-related inquiry. If either party breaches this provision, it shall be a material breach of this Agreement and this provision shall no longer apply to the non-breaching party.

11. **Waiver of Future Employment:** In further consideration for the payment provided for in paragraph 3 of this Settlement Agreement and General Release, I agree that I will not seek or make application for any future employment or consultant relationship with the Board of Education of the City of Garfield, Bergen County at any time following My execution of this Agreement and expressly waive any and all right to do so. The execution of this Agreement by Me serves as an acknowledgement that My employment with You has been severed and that future employment will not be offered to Me by You. I also agree that You have no obligation, contractual or otherwise, to re-hire or re-employ Me directly, or hire or employ Me indirectly or to offer Me any employment with the Board of Education of the City of Garfield, Bergen County.

12. **Non-Assignment**: I acknowledge that none of the proceeds given herein have been assigned.

13. **Counterparts:** This Release may be executed in any number of counterparts, each of which when executed and delivered shall constitute a duplicate original, but all counterparts together shall constitute a single Release.

14. **Who is Bound:** I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

15. **Severability:** The provisions of this Release are severable and if any part of it is found to be illegal or unenforceable for any reason, the other provisions shall remain fully valid and enforceable.

16. **Choice of Law:** This Release shall be governed, construed, and enforced in accordance with the laws of the State of New Jersey, without regard to that state's conflict of laws rules and principles.

17. **Obligation to Meet and Confer**: Any disputes arising out of this Settlement Agreement and General Release relating to the enforcement of its terms, including any issues arising after the date execution, shall first be communicated between the parties through counsel to resolve such issues. If issues arise requiring the parties to meet and confer, the parties agree to proceed in good faith and make reasonable efforts to resolve such issues.

18. **Child Support Certification:** I hereby acknowledge and understand My obligation to comply with the legal requirements of N.J.S.A. 2A:17-56.23b, including, but not limited to, the requirement to perform a certified child support judgment lien search and to provide Releasees with said documentation prior to the Releasees' disbursement of the Payment. I agree that I shall direct my attorneys to perform the judgment search required by N.J.S.A. 2A:17-56.23b and deliver a copy of the certification to Releasees' counsel. I further understand and acknowledge that, (a) no settlement funds due to me under this Release shall be released prior to the receipt of the judgment search certification, and (b) any fees incurred, and payments made, by Releasees in connection with N.J.S.A. 2A:17-56.23b shall be deducted from the payment prior to its disbursement to me.

19. **Entire Agreement:** This Release contains the entire agreement between the Releasor and Releasees and supersedes any prior written or oral agreements, understandings or arrangements.

20. **Signatures:** I understand and agree to the terms of this Release, have had sufficient opportunity to review it with counsel of my choice, and sign it knowingly and voluntarily. I have had sufficient opportunity to review this Release, including but not limited to an opportunity to review it with My attorney, seek her guidance, and have her answer My questions. I warrant that I am of legal age and under no legal disability of any kind and I am fully competent to execute this Release. I agree and acknowledge that I have received at least 21 days to consider this Release. I agree and acknowledge that I may revoke this Release within 7 days of signing it. I agree and acknowledge that this Release will not become effective until the 7-day period has elapsed.

Sara Sparano

Sara Sparano
Dated: 7/1/21

Sworn and subscribed to me on this
1st day of July, 2021.

Kim Sparano

Notary Public – State of New Jersey
Print Name: Kim Sparano, attorney at law State of NJ
My Commission Expires: _____

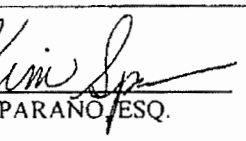
_____
Board of Education of the City of Garfield, Bergen County

By: _____
Dated:

TODD S. MCGARVEY, ESQ. (18072002)
ANDERSON & SHAH, LLC
ATTORNEYS AT LAW
457 Haddonfield Road, Suite 120
Cherry Hill, New Jersey 08002
Telephone: (856) 393-2345
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Attorneys for Respondent Board of Education of the City of Garfield, Bergen County

SARA SPARANO, Petitioner, v. BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY, Respondent.	OAL DOCKET NO.: EDU 08418-20 AGENCY REF. NO.: 171-8/20 **STIPULATION OF DISMISSAL WITH PREJUDICE AND WITHOUT COSTS**

The matter in difference in the above-entitled action having been amicably adjusted, it is hereby STIPULATED and AGREED, by and between Petitioner Sara Sparano and Respondent Board of Education of the City of Garfield, Bergen County, through their undersigned counsel, who are authorized to enter into this Stipulation, that Petitioner's action is hereby DISMISSED in its entirety, with prejudice and without costs or attorneys' fees.

By:  KIM E. SPARANO, ESQ. *Attorney for Petitioner, Sara Sparano* Dated: 7/1/21	By: /s/Todd S. McGarvey TODD S. MCGARVEY, ESQ. *Attorney for Respondent, Board of Education of the City of Garfield, Bergen County* Dated: 8/24/2021

264-21

264-21
OAL Dkt. No. EDU 05064-20
Agency Dkt. No. 88-5/20

New Jersey Commissioner of Education

Final Decision

Jeanne Weisblatt,

Petitioner,

v.

Mercer County Special Services School District, Mercer County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Paragraph 1 and 2 of the Agreement reference actions taken by the parties which preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 21, 2021
Date of Mailing: October 21, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05064-20
AGENCY DKT. NO. 88-5/20

JEANNE WEISBLATT,

Petitioner,

v.

MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT,

Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Walter R. Bliss, Jr., Esq., for respondent

Record Closed: September 9, 2021 Decided: September 14, 2021

BEFORE **JOSEPH A. ASCIONE,** ALJ:

These matters were transmitted to the Office of Administrative Law for determination as a contested case on June 2, 2020 (, pursuant to N.J.S.A. 52:14B 1 to -15 and N.J.S.A. 52:14F 1 to -13.

The parties have settled these matters and have filed a Settlement Agreement and Release indicating the terms thereof, which is attached and fully incorporated herein.

Having reviewed the record Settlement Agreement and Release, which reference both matters, I **FIND** these matters concern the same law, and otherwise meet the standards for

consolidation under N.J.A.C. 1:1-17.3. Accordingly, I **CONCLUDE** that these matters should be consolidated. Additionally, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that the Settlement Agreement and Release meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved.

In view of the foregoing, I approve the settlement and **ORDER** that these matters be consolidated and further **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B 10.

September 14, 2021
DATE

Joseph A. Ascione
JOSEPH A. ASCIONE, ALJ

Date Received at Agency

9-14-21

Date Mailed to Parties:

9-14-21

Attachment
mm

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release is entered into this 9th day of Sept, 2021 between the Mercer County Special Services School District, having its administrative offices at 1020 Old Trenton Road, Hamilton, New Jersey 08690 (hereafter referred to as "MCSSSD") and Jeanne Weisblatt, residing at 26 Fir Drive, Richboro, Pennsylvania 18954 (hereafter "JW"). (JW and MCSSSD are hereafter referred to collectively as "the Parties").

This Settlement Agreement and Release is entered into by the Parties in settlement of (a) JW's Verified Petition entitled Jeanne Weisblatt v. Mercer County Special Services School District, State of New Jersey Department of Education, Agency Docket No. 88-5/20, now pending in the New Jersey Office of Administrative Law, OAL Docket No. EDU 05064 2020S ("Verified Petition"); and (b) the contractual grievance against MCSSSD filed on JW's behalf by the Mercer County Special Services Educational and Therapeutic Association ("MCSSETA") dated April 21, 2020 ("Grievance"), which has been suspended by the Parties and MCSSETA pending the outcome of proceedings on the Verified Petition.

This Settlement Agreement and Release is based upon the following exchange of actions and promises by the Parties:

1. MCSSSD has compensated JW for 12 days of lost pay at her rate of payment in effect in the 2019-2020 school year. The gross amount of the payment is $6,056.16, from which customary payroll deductions have been taken. This payment was made as part of the MCSSSD payroll of 9/15/2021

2. JW has entered into a Corrective Action Plan (CAP), relating to her attendance, in the form attached to this Settlement Agreement and Release and made a part hereof by reference.

3. JW hereby gives up, releases and withdraws all claims, rights and grievances JW may have against MCSSSD in connection with JW's absences from school, related events and loss of pay during March and April 2020. These claims, rights and grievances include but are not limited to the claims set forth in JW's Verified Petition and the Grievance described above. The Parties have entered into Stipulations of Dismissal of the Verified Petition, with prejudice; and JW has directed MCSSETA to dismiss the Grievance and same has been dismissed, with prejudice.

The Parties acknowledge and agree that this Settlement Agreement and Release represents a compromise serving their mutual interests in bringing about an expeditious resolution of the underlying controversy without the expense, delay and disruption of further litigation. By entering into this Settlement Agreement and Release, neither JW nor MCSSSD admit wrongdoing.

The Parties have entered into this Settlement Agreement and Release with the assistance of their respective legal counsel.

By signing and entering into this Settlement Agreement and Release, JW and MCSSSD each represents that they understand and agree to its terms.

JEANNE WEISBLATT — 09/01/2021
Dated

Signature Witnessed by: _____
(name and title) Michael T. Barrett, Esq Counsel

MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT

By: _____ — 9/9/21
James Fazzone
Interim Superintendent
Dated

Signature Attested to by: _____
Deborah Donnelly, Board Secretary

265-21

265-21

New Jersey Commissioner of Education

Final Decision

P.H. and K.G.H., on behalf of minor child, L.H.,

Petitioner,

v.

Board of Education of the City of Northfield, Atlantic County,

Respondent.

Synopsis

In October 2019, petitioners appealed the finding of the respondent Board that their son – who had attended kindergarten at the Northfield Community School from the commencement of the 2018-2019 school year through March 28, 2019 – was not the victim of harassment, intimidation and bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* Petitioners alleged that the HIB investigation conducted by the Board was procedurally and practically defective because it was conducted months after L.H. had been withdrawn from the school district. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; the within matter was not mooted by the withdrawal of L.H. from the district; the Board acknowledged that as of April 29, 2019, it had received adequate information upon which to begin an HIB investigation; such investigation should have commenced at that time pursuant to the statutory mandates set forth in *N.J.S.A.* 18A:3 7-15b; because it was not initiated until June 5, 2019, the Board was in violation of the Act as well as Board policy regarding the initiation of HIB investigations; however, given the limited information provided to the District by petitioners regarding the nature of their complaint, and given that the District was not permitted to interview the victim of the alleged HIB, the Board's determination in this matter was based on a sufficiently complete investigation and was not arbitrary, capricious, or unreasonable. Accordingly, the ALJ dismissed the petitioners' motion for summary decision and granted summary decision in favor of the Board; in so doing, the ALJ directed the Board to institute corrective action to assure that future HIB investigations are commenced in a timely manner pursuant to the schedule established by the Act and Board policy.

Upon a comprehensive review, the Commissioner concurred with the ALJ that the Board's HIB determination was based on a sufficiently complete investigation and was not arbitrary, capricious, or unreasonable. Further, the Commissioner agreed that the Board did not initiate its HIB investigation in a timely manner. Accordingly, the Commissioner granted the Board's motion for summary decision and dismissed the petition. The Board was directed to be more mindful of statutory time requirements when conducting future HIB investigations.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

265-21
OAL Dkt. No. EDU 16082-19
Agency Dkt. No. 275-10/19

New Jersey Commissioner of Education

Final Decision

P.H. and K.G.H., on behalf of minor child, L.H.

Petitioner,

v.

Board of Education of the City of Northfield, Atlantic County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

The Board determined that petitioners' child was not the victim of harassment, intimidation, and bullying (HIB). Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Board's determination was based on a sufficiently complete investigation and was not arbitrary, capricious, or unreasonable, for the reasons detailed in the Initial Decision. The Commissioner further agrees with the ALJ that the Board did not initiate its HIB investigation in a timely manner, but that the delay does not render the Board's determination arbitrary, capricious, or unreasonable; however, the Board is directed to be more mindful of the statutory time requirements when conducting future HIB investigations.

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 21, 2021
Date of Mailing: October 21, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 16082-19
AGENCY DKT. NO. 275-10/19

P.H. and K.G.H., on behalf of minor child, L.H.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF NORTHFIELD, ATLANTIC COUNTY,

Respondent.

Patrick M. Harrington, Esq., for petitioners (Dilworth Paxson, attorneys)

John G. Geppert, Jr., Esq., for respondent (Scarinci & Hollenbeck, LLC, attorneys)

Record Closed: August 9, 2021 Decided: September 22, 2021

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

During the 2018-2019 school year. L.H. was a kindergarten student in the Northfield School District. On March 29, 2019, at a meeting with the District Superintendent, the petitioners advised him that L.H. was expressing depressed behavior at home. This meeting followed a March 20, 2019, meeting between P.H., the principal of

the Northfield Community School and others, including the classroom teacher, Kelli Kern, at which several concerns were discussed. At the March 29, meeting, P.H. advised Superintendent Bretones that L.H. would not be returning to Ms. Kern's classroom and requested that the child be transferred to another classroom. On April 4, 2019, Bretones advised Mr. and Mrs. H. that the District would not agree to transfer L.H. to a different classroom. After March 28, 2019, L.H. never attended school in the District and during the April 4, call, the parents advised Bretones that they were removing their child from the District, effective immediately. L.H. has not attended school in the District since that time.

On April 29, 2019, P.H. attended the Northfield Board Education public meeting and spoke during that session. According to the minutes of that meeting he spoke of his son "enduring emotional distress in Kindergarten," that their experience with the school had been "negative and disappointing." They had requested a classroom change which request was denied and they withdrew their son from the District and were uncertain as to whether they would allow his return for the following year. P.H. also distributed a letter and email to all members of the school board, in which he detailed actions on Ms. Kern's part that "devastated our child and is a completely unacceptable way to treat an enthusiastic, kind child who wants to learn as they begin their school experience."

On May 20, 2019, P.H. again attended a Board meeting. The public minutes note that he again spoke of his son's "situation on campus." He advised that "he has not received any response or information from the school." He was then advised that while the matter concerning a student could not be discussed in a public session, the Superintendent was "working on a written response which will come to him shortly." P.H. asked what the procedure was to "initiate a formal request to transfer a student within a grade" and was told that the school administration would respond.

On May 23, the parents received a letter from Superintendent Bretones. He advised that he had "investigated the allegations about Mrs. Kern" and the investigation "did not support any of the allegations that [P.H.] made."

On June 7, 2019, the Anti-Bullying Coordinator, Maureen Vaccaro, who had been present at the March 20, 2019, meeting, emailed the parents that a Harassment, Intimidation and Bullying (HIB) investigation had been opened on June 5, 2019, and requested to meet with L.H. and his parents. The parents did not respond to this request and did not produce L.H. for any meeting.

On June 21, counsel for the Board advised the parents that a decision on the investigation would be rendered in June. On June 25, they received a letter from Bretones, advising that the investigation "centered on . . . allegations that a pupil committed an act(s) of harassment, intimidation, or bullying" and that Vaccaro had "interviewed L.H." The Board admits that this letter contained incorrect information, as there had been no discussion or any allegation that a pupil had engaged in any such conduct and L.H. had not been interviewed by Vaccaro.

On July 8, 2019, the parents received a revised letter, stating that the "nature of the investigation centered on the allegation that one of your child's teachers committed an act(s) of harassment, intimidation, or bullying to your child." The parents then requested a hearing before the Board. This took place on July 22, 2019. On July 24, the parents received a letter from Superintendent Bretones, advising them that "after due deliberation and consideration following the hearing before the Board on Monday, July 22, 2019, the Board affirmed the finding and determination that the alleged incident involving [L.H.] did not constitute HIB as defined by the State of New Jersey and the District policies."

On October 11, 2019, the parents filed a Petition with the Commissioner of Education, asking that the Commissioner find that "the HIB investigation conducted by the District be [deemed] invalid and deemed inconclusive due the fatal procedural and legal deficiencies and delayed initiation which render the Investigation deficient as a matter of law." The Board filed an Answer and Affirmative Defenses on November 1, 2019. Discovery commenced following transmittal of the contested case to the Office of Administrative Law. The matter was initially assigned to Honorable John S. Kennedy,

ALJ. The parties filed cross-motions for summary decision. Judge Kennedy was appointed to the Superior Court and the matter was re-assigned on July 28 , 2021 to this judge, retired and serving on recall.

The Board's motion for summary decision is based in part on the notion that the matter is moot because L.H. is no longer a student in the Northfield School District and no meaningful relief has been requested. The petitioners' motion is based upon the claim that the Board failed to comply with both State legislation concerning investigations of alleged HIB violations and the District's own policies regarding such investigations. They contend that the HIB investigation begun in June 2019, was commenced far beyond the allowable time frame for the initiation of such investigations and that to the extent an investigation was undertaken, it was flawed because, while faculty members were questioned concerning their son, no students who were actually in L.H.'s classroom with Mrs. Kern were questioned. The Board counters that even if there were "minor" violations of the required time frame for the initiation and conclusion of an HIB investigation, these were of no actual consequence, particularly as the student had been withdrawn from the District and thus even if some HIB violation had been discovered, the student could not have benefited from any relief that might otherwise have been warranted. The parties do not agree as to the date by which any allegation of HIB conduct was first brought to the attention of the district. As such, they disagree as to the date which was applicable in regard to the time frame for the investigation.

Mootness

If a legal matter is moot, there is no basis for any substantive decision to be rendered on the controversy. Here, once L.H. was withdrawn from the District, no relief concerning the child's educational process within the District could be effectuated. It is speculative whether, had there been a determination that Mrs. Kern had acted in a manner regarding L.H. that involved HIB, the parents would have chosen to re-enroll L.H. in the District, either before the end of the 2018-19 term or thereafter. It is also necessary to consider that in their Petition, the parents did not ask that the determination that no HIB

violation(s) had occurred be changed to a finding that such did occur, but instead that the investigation be found to have been procedurally flawed, and therefore in essence set aside and deemed to, in effect, have made no affirmative or negative conclusion, but instead, an inconclusive one. Thus, even in their Petition's request for relief, the parents do not seek a finding that Mrs. Kern committed HIB infractions. In effect, they simply seek to have the Board told that it did not proceed as it should have in investigating an HIB allegation and, as a result, their determination of no HIB conduct having occurred must be set aside and the investigation deemed inconclusive. Given these factors, the Board contends that the matter is moot.

In response to the claim of mootness, the petitioners cite language from decisions that point out that even if a student is disenrolled after an HIB complaint is made, the district is still required to carry out an HIB investigation, D.M. on behalf of minor child K.B. v. Board of Ed. of West Milford, njlaw.rutgers.edu/collections/oal/final/edu.1pdf ("[a]ny allegation of HIB committed against one of its students must be investigated by the school district, regardless of whether the student is disenrolled after the allegation is reported."), and that while the HIB statute does not prescribe specific relief where the child is no longer in the district, the "Board must promptly take all appropriate measures, including the conducting of staff in-service programs, to assure full compliance with the Act", T.R. and T.R. on behalf of E.R. v. Bridgewater-Raritan Regional Board of Education, njlaw.rutgers.edu/collection/oal/html/initial/edu10208-13-2.html, where the ALJ noted a recommendation "that the Commissioner fashion any further relief deemed just and proper." Counsel contends that the Anti-Bullying Bill of Rights has "two areas of focus, the student and the District," pointing to the Commissioner's determination in C.K. and M.K. on behalf of minor child, M.K. V. Board of Ed. of Voorhees, njlaw.rutgers.edu/collections/oal/final/edu20510-15-1.pdf (March 23, 2017), where the Commissioner explicitly determined that the Board had initially failed to investigate and conduct a timely hearing and that when it did investigate, it did not conduct a thorough and complete investigation. Thus, even where the student is no longer enrolled in the district, there is reason to assure that the required HIB investigation is conducted in a timely and complete manner and where the evidence shows that it was not, the

Commissioner has reason to decide that such violations of the requirements of a fully compliant investigation occurred and to fashion such relief as the Commissioner deems proper in such circumstances.

If the withdrawal of a student from a school district automatically resulted in the mootness of any attempt to review how that district carried out an HIB investigation involving alleged HIB actions toward that student, the district would in effect be insulated from any determination that it had failed to properly carry out such a required investigation and to have done so in a legally appropriate manner. If the HIB allegation had substance and the district failed to investigate properly, the district and the person or persons who perpetrated the HIB conduct would then escape any consequence. This may be particularly of concern regarding allegations of staff HIB misconduct. If a district properly investigates and determines that a teacher or other staff member has engaged in such misconduct, the district must then determine how to assure that that person will not continue such improper conduct in the future. Such findings may point to the need for more training, for a nonrenewal of a non-tenured staff member's employment or even to the need to consider tenure charges. While of course not every allegation will be found to be true, nevertheless if the mere fact of the student's withdrawal is enough to moot the Commissioner's review of district action, narrow as that review is (see below), then perhaps withdrawal moots the need for the district to even continue the investigation at district level. Given the fact that the purpose of the legislation is clearly to eliminate HIB conduct in schools, the district has an obligation to complete a proper investigation even if withdrawal occurs. D.M.

I **CONCLUDE** that this matter is not mooted by the student's withdrawal. As the District was required to complete its investigation, so too the Commissioner is permitted to review that action within the limits that case law has established for such a review of a district's actions. The Commissioner and the appellate courts have consistently held that the actions of a local school board acting in regard to a determination made within its regulatory sphere will not be overturned unless demonstrated to have been arbitrary, unreasonable or capricious. Thomas v. Morris Twp. Bd. Of Education, 89 N.J. Super.

327, 332 (App. Div. 1965). Unless the district acted in bad faith or "utter disregard of the circumstances before it," the Commissioner will not interfere. G.H. and E.H. ex rel.K.H v. Bd of Educ. of the Bor. of Franklin Lakes, http://njlaw.rutgers.edu/collections/oal/html.initial/edu13204-13-1.html. That said, withdrawal is not a defense for a district's failure to properly carry out its role in advancing the purposes of Anti-Bullying legislation.

Summary Decision

Summary decision motions are permitted in administrative proceedings by N.J.A.C. 1:1-12.5. The standard for determining such motions is the same as that for summary judgment motions in Superior Court. The New Jersey Supreme Court defined the standard for determining motions for summary decision in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). In this case, the Court elaborated upon the standards first established in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). Under the Brill standard, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The substantive law governing a dispute determines which facts are material. Only disputes regarding "those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Dungee v. Northeast Foods, Inc., 940 F. Supp 682, 685 (D.N.J. 1996), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, (1986)(Anderson).

In Judson, at 75, the Supreme Court stated that the material facts allegedly in dispute upon which the party opposing the motion relies to defeat the motion must be

something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ," (citations omitted). Brill focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill, at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.'" Id. at 536, quoting Anderson, at 477 U.S. 251-52, 106 S. Ct 2505, 2512, 91 L.Ed 2d 214. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed material facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied, and a full evidentiary hearing held.

The Investigation

Timeliness

The petitioners argue that the District failed to comply with the established time frames for conducting an HIB investigation. Of course, before a district can begin such a process, it must first be on notice that an allegation of HIB conduct has been made, either by a complaint or by some other factor which makes, or should make it clear to the district that such conduct may have occurred. In order to consider the parties' positions regarding the timeliness of the investigation, we must first determine when the district was put on notice. This requires an understanding of what constitutes HIB conduct.

N,J.S.A. 18A:37-13.2 is the "Anti Bullying Bill of Rights." HIB Conduct is defined at N.J.S.A. 18A:37-14 as

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> > a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
> > b. has the effect of insulting or demeaning any student or group of students; or
> > c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

As the definition states, to constitute actionable HIB conduct, the alleged actions, words, etc. must be "reasonably perceived as motivated either by [an] actual or perceived characteristic." The law provides a listing of the sort of characteristics that it aims to prevent. While many of these track the obvious categories of invidious discrimination such as race, sex, religion, etc., the list also includes "mental, physical or sensory disability," and adds a seeming catch-all, "other distinguishing characteristic." Thus, if a district receives a complaint that a student(s) or staff person(s) have engaged in "any gesture, any written, verbal or physical act, or electronic communication," that targets a student for such actual or perceived characteristic", the district must begin an HIB investigation which must comply with the timelines set out in N.J.S.A. 18A:37-15b.6. The timelines are also stated in the Board's own HIB policy.

The petitioners claim that the District was notified of such an HIB complaint on March 20, 2019, when P.H. met with staff personnel including Anti-Bullying Coordinator Vaccaro. As background, the petitioners note that in February 2019, they were contacted by Mrs. Kern who told them that their child was "significantly behind his peers academically, and had been for some time." Information as to what topics needed to be addressed was provided and the parents worked on these. Although they claim Kern agreed that progress had occurred, nevertheless, in late February Kern emailed them, suggesting that they consider retaining L.H. to repeat kindergarten, despite "acknowledging his academic progress having 'dramatically improved.'" The petitioners state that they found this confusing and reached out to Kern, who did not respond. They then reached out to Elementary School Principal Maureen Vaccaro, who was also the Anti-Bullying Coordinator, although it appears from the Petition that the contact in late February, or perhaps early March, was not then intended to address any complaint regarding alleged HIB conduct. In early March, Kern recommended that L.H. be referred to the Child Study Team.

According to the Petition, at about this time L.H. "began to come home from school distraught, depressed and crying frequently." In their Petition, the parents state that their five-year-old, "disclosed" to them that "Kern was harassing him in the classroom and creating a hostile, abusive environment which caused L.H. emotional distress and resulted in L.H. being made to feel that he was incompetent, incapable of success, and inferior to his peers, including statements that L.H. was not able to color, was not able to read, and was not able to perform work on the board in front of the class." L.H. told his parents that other students ridiculed him, "based upon Kern's hostile conduct and chastising." According to the petitioners, they brought these "concerns" to Vaccaro's attention at a March 14, meeting. Then at the larger group meeting on March 20, with Kern present as well as Vaccaro, P.H. advised them of the "hostile and intimidating environment in the classroom which caused L.H. emotional distress . . . ." He reports that Kern denied knowing what was causing this emotional distress and made inappropriate

comments about how she had seventeen students in the class and was not "paid more" or "getting paid a bonus" to help L.H.

Since the petitioners contend that they brought their concerns about a "hostile and intimidating environment" and "abuse" of L.H. to the attention of representatives of the District, including its Anti-Bullying Coordinator, on either March 14 and/or March 20, it is necessary to see if what they claim to have reported would have been sufficient to have triggered the District's obligation to initiate an HIB investigation. It seems apparent from the context that L.H. may have been struggling in his kindergarten class and that Mrs. Kern had advised the petitioners of this issue. Given this background, the child's alleged comments about being told that he could not perform certain tasks relating to school work can reasonably be understood as statements that might have been made, in one manner or another, to the student by the teacher. However, the language employed by the petitioners in their Petition seems clearly not to be the language spoken to them by the child as the child told them of certain events occurring in the classroom. Statements about being "harassed," about being "Incompetent, incapable of success" and even the term "inferior," strike as unlikely words to have been voiced by the child, although they are clearly words that have meaning in crafting an HIB complaint.[1] Exactly what the interaction between the teacher and student was and what words were actually spoken cannot be determined from this rendition of statutorily-significant language. That the child was upset seems clear enough, but the question is whether the information that the parents shared with representatives of the District actually conveyed that the child was being singled out due to a "mental or sensory disability" or "other distinguishing characteristic." If a teacher tells a student that his or her work is not adequate, or needs improvement, that in and of itself hardly seems to come within the ambit of the type of comment or the types of characteristics that the HIB statute aims to address. And it becomes especially tricky to understand the situation when dealing with a five-year-old, perhaps struggling in his or her first year of regular school. That said, of course a child of that age and grade certainly can be harassed, intimidated or bullied, but that the child

[1] It is noted that petitioner P.H. is an attorney, however, any parent who reads the HIB statute could well have used such words and phrases to place their child's comments into the statutory framework.

may have suffered emotional distress because his teacher may have told him that he did not form his letters properly or color within the lines does not mean that the teacher did so in a way that comes within the sphere of HIB. I **FIND** that the description of P.H.'s discussion with the District personnel on March 20, 2019, is insufficient to clearly demonstrate that as of that date the District was on notice of an allegation of HIB. However, despite the lack of any HIB allegation, in response to the meeting and the request for a transfer to another classroom, Superintendent Bretones properly did discuss the matter and, in his discretion, determined to deny the request.

P.H. spoke during the Board's public session on April 29, 2019. As recorded in the minutes of that meeting, nothing he said would have alerted anyone that the "negative and disappointing" reaction to the parents' experience with the District or the child's "emotional distress" were the result of HIB conduct. As for the April 29, 2019, letter distributed to Board members, the discussion on page two, paragraph two, of that letter relates the child's upset and refers to "the way Mrs. Kern spoke to our son and treated him in the classroom and in front of his peers" and the "profound negative effects on his self esteem and his attitude towards learning." According to the parents, their child spoke of Mrs. Kern being "mad" at him and "listing things that he didn't do well." While it is in no way to be thought that a teacher getting "mad" at a student is appropriate, and it is recognized that a student at any age, but perhaps particularly a very young student, might well be upset and even "devastated" both by criticism and a tone that conveys a negative attitude toward the child, the paragraph does not really convey anything approaching an allegation of HIB conduct. That said, in its answer to an interrogatory, the Board concedes that "the April 29, 2019 comments and letter were the first time P.H. raised allegations of potential abuse that triggered the investigation."

As the Board acknowledges that as of April 29, 2019, it had received adequate information to require it to begin an HIB investigation, then it was required to proceed to investigate and reach a determination on the alleged conduct in accordance with statutory mandates set forth in N.J.S.A. 18A:3 7-15b.

b. A school district shall have local control over the content of the policy, except that the policy shall contain, at a minimum, the following components:

(1) a statement prohibiting harassment, intimidation or bullying of a student;
(2) a definition of harassment, intimidation or bullying no less inclusive than that set forth in section 2 of P.L.2002, c.83 (C.18A:37-14);
(3) a description of the type of behavior expected from each student;
(4) consequences and appropriate remedial action for a person who commits an act of harassment, intimidation or bullying;
(5) a procedure for reporting an act of harassment, intimidation or bullying, including a provision that permits a person to report an act of harassment, intimidation or bullying anonymously; however, this shall not be construed to permit formal disciplinary action solely on the basis of an anonymous report.
All acts of harassment, intimidation, or bullying shall be reported verbally to the school principal on the same day when the school employee or contracted service provider witnessed or received reliable information regarding any such incident. The principal shall inform the parents or guardians of all students involved in the alleged incident, and may discuss, as appropriate, the availability of counseling and other intervention services. All acts of harassment, intimidation, or bullying shall be reported in writing to the school principal within two school days of when the school employee or contracted service provider witnessed or received reliable information that a student had been subject to harassment, intimidation, or bullying;

(6) a procedure for prompt investigation of reports of violations and complaints, which procedure shall at a minimum provide that:

(a) the investigation shall be initiated by the principal or the principal's designee within one school day of the report of the incident and shall be conducted by a school anti-bullying specialist. The principal may appoint additional personnel who are not school anti-bullying specialists to assist in the investigation. The investigation shall be completed as soon as possible, but not later than 10 school days from the date of the written report of the incident of harassment, intimidation, or bullying. In the event that there is information relative to the investigation that is anticipated but not yet received by the end of the 10-day period, the school anti-bullying specialist may

amend the original report of the results of the investigation to reflect the information;
(b) the results of the investigation shall be reported to the superintendent of schools within two school days of the completion of the investigation, and in accordance with regulations promulgated by the State Board of Education pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), the superintendent may decide to provide intervention services, establish training programs to reduce harassment, intimidation, or bullying and enhance school climate, impose discipline, order counseling as a result of the findings of the investigation, or take or recommend other appropriate action;
(c) the results of each investigation shall be reported to the board of education no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent;
(d) parents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within 5 school days after the results of the investigation are reported to the board. A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request. The board shall meet in executive session for the hearing to protect the confidentiality of the students. At the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents;
(e) at the next board of education meeting following its receipt of the report, the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision. The board's decision may be appealed to the Commissioner of Education, in

> accordance with the procedures set forth in law and regulation, no later than 90 days after the issuance of the board's decision;

Additionally, as required by the Anti-Bullying statute, Northfield Board of Education adopted a policy, 5131.1 "Harassment, Intimidation and Bullying." This policy mirrors the definition of HIB conduct found in the statute. This policy requires that

> all investigations shall be thorough and complete, and documented in writing, and shall include, but not be limited to
>
> 1. Taking statements from victims, witnesses and accused;
> 2. Careful examination of the facts;
> . . .
> 6. The investigation shall be initiated by the principal or the principal's designee within one school day of the report of the incident . . . .

In this matter, the Board recognizes that as it concedes that April 29, 2019, was the date when it was put on notice about a complaint of HIB concerning its staff member, it was obligated by this statute and by its own adopted policy to begin its investigation no later than one school day thereafter. It concedes that it did not do so. In fact, as the Board concedes, I **FIND** that the investigation was not initiated until June 5, 2019. And even if the District did not receive an adequate alert of such a complaint until the May 20, 2019, Board meeting, a claim stated in its motion brief but undercut by its response to the interrogatory as set forth above, where it agrees to April 29 as the date when it was placed on notice, the initiation of the investigation on June 5, was still outside of the permitted one day after the notice when the investigation was mandated to commence. As such, based upon the undisputed facts, I **FIND** that the petitioners are correct in their assertion that the Board violated the statute and Board policy regarding the initiation of the investigation. That said, was the Board lax in respect to reaching a decision on the complaint? The record reflects that for some unknown reason the original response to the parents about the investigation was issued on June 21, which advised that an investigation had been concluded about alleged HIB conduct by a pupil. While there is some vague reference in the petitioners' account of the child's discussion with them in March to some ridicule by other pupils, there never was any actual complaint voiced or

written to the District about student HIB conduct, only at most about such conduct by Mrs. Kern. Thus, the District's purported completion of an "investigation" of pupil HIB by June 21 was meaningless. The record does not indicate how or why this letter was produced. Since the District did not indicate it had completed the investigation of the teacher's alleged HIB conduct, giving the District the benefit of the doubt, that investigation of the teacher's conduct was completed on July 8 and the Board heard from the petitioners and decided the matter on July 24, at its next meeting after the completion of the investigation of Mrs. Kern. While the facts about the investigation's progress and focus after June 5 are hazy, for the purposes of these cross-motions, I **FIND** that the District did complete the investigation and the Board did act on it at the first meeting following that completion.

Alleged Inadequacy of Investigation

The petitioners argue that the findings of the investigation should be set aside because the witnesses who were interviewed by the District did not include pupils who were in Mrs. Kern's class, students who the petitioners reasonably contend were presumably in a position to see the interactions which he had with L.H. They note that the various staff members who were interviewed were not present in the classroom, only seeing L.H. either in their own classes or at times of transition from Kern's classroom, but not as she interacted with L.H. during the time he was with Kern. The Board does not dispute that it chose not to interview L.H.'s kindergarten classmates. It points out that there is no "policy, statute or regulation that requires a district to include interviews with classmates when an HIB investigation is directed at a teaching staff member." While it is true that there is no such explicit command, it is also true that if a district is to properly investigate an allegation of HIB conduct, it must reasonably determine the persons who may have information that tends to either support or refute the allegation. Thus, if pupils in a classroom are reasonably thought to be sources for such information relevant to the investigation, the overall need for a complete, thorough and fair investigation, as demanded by the Board's own policy, may demand that they be interviewed, subject of course to such safeguards as may be needed to protect the students and also to the reasonable discretion of the investigators as to exactly who they speak with. No blanket

rule commands that pupils either be interviewed or excluded from interviews. As such, the parents may well question why no students were asked about what they may have seen of the alleged harassing and intimidating conduct of Kern towards L.H. That said, as the Board notes, when it sought to interview L.H., the purported recipient of the HIB conduct and the one person, besides Mrs. Kern, most likely to be cognizant of what actually occurred, the parents chose not to allow such an interview. Thus, while the petitioners complain that the District did not conduct a fully appropriate and comprehensive investigation, they themselves contributed to the lack of a complete picture by not allowing their child to explain to the investigator exactly what L.H. said happened. The Board's policy, requiring a thorough and complete investigation, notes that the investigation "shall include . . . taking of statement from the victim", as well as other witnesses and the accused.

It must be emphasized that I recognize the difficulty presented in investigating any matter in which potentially significant witnesses are of kindergarten age. And I can readily understand that parents of a child who claims to have suffered HIB conduct might not want the child to have to undergo even the most mild and well-conducted interview about the matter. But if here the Board is to be criticized for the lack of any interviews with pupils, it must be noted that the most important of all student witnesses, whose input the investigator did seek, was withheld from them. As such, all that the investigator had that set forth what the alleged HIB conduct was, was what the parents related in the letters they wrote and discussions they had with District personnel. That information was second-hand, was presented in language indicative of likely adult input, lacked any real detail or any significant context, and was not the sort of first-hand information that would be obtained in a properly conducted investigation from the alleged victim. As such, it must be said that if the District did not conduct the full investigation the petitioners claim they wanted and the Board policy required, they contributed to that incompleteness. Perhaps the choice to do so was what was best for the child, but the petitioners must recognize that their choice added to any deficiency they claim in the investigation and may well have affected the result. Overall, given the information that the District had about the alleged misconduct by Mrs. Kern, I cannot criticize it for not choosing to interview

kindergarten students when the most relevant of those students was not permitted to tell the investigators any details of what is claimed to have been the serious misconduct that HIB legislation is meant to address.

I **CONCLUDE** that given the circumstances presented in this record, there is no material dispute of fact concerning the late institution of an HIB investigation by the Board. This conclusion is made despite any concern as to whether the limited information that was presented by the parents about exactly what their child claims occurred actually was even an effective claim of "HIB" type conduct concerning a "distinguishing characteristic" to which the statute speaks, as the limited information does not allow for any understanding of the context of Mrs. Kern's alleged comments about skills for which the child may have shown deficiencies. As the Board chose to conduct an investigation, a decision I do not mean to suggest was not an appropriate choice of how to proceed, and for the purposes herein it is assumed that they had to do so, they acted in an untimely fashion. That said, I do not see any basis to overturn the results of the investigation that was conducted merely because it was delayed. There is no basis for finding that the delay ultimately deprived the parents of their rights under the statute. An investigation was conducted after they decided, really at the outset of the matter and at a time when the record does not support that they had yet made an effective claim of HIB misconduct, to remove the child from the District. Whatever shortcomings the investigative process may have had, the delay did not seem to have contributed to these, and the petitioners do not suggest such.

Finally, I **CONCLUDE** that, given the information with which the District was provided and given that its representative could not interview the alleged victim of the HIB comments and actions, it conducted a sufficiently complete investigation such that the Board's decision to find no violation of the Anti-Bullying legislation cannot be deemed arbitrary, capricious or unreasonable or in bad faith. I **CONCLUDE** that deeming the investigation "inconclusive" under these circumstances would be a rather meaningless gesture, and may well be unfair to the accused teacher, who had no control over who the Board chose to interview and certainly no control or say regarding the lack of any direct

interview of her accuser. The District must nevertheless institute such corrective action to assure that once it is properly aware of an HIB allegation, that the investigation of such must be commenced in a timely fashion commensurate with the schedule established by the statute and the Board's own policy.

The petitioners' motion for summary decision is **DISMISSED**, with the notation of the direction to the Board concerning the need for timeliness in its response to HIB complaints and the investigative steps necessary to investigate such matters. The Board's motion for summary decision is **GRANTED**, with the same caveat. The Petition of Appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 22, 2021
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: 9/22/2021

Date Mailed to Parties: 9/22/2021

mph

EXHIBITS

For petitioners:

Exhibit A	Minutes of April 29, 2019 Meeting of Northfield Board of Education
Exhibit B	Letter dated April 29, 2019 to Board of Education
Exhibit C	Minutes of May 20, 2019 Meeting of Northfield Board of Education
Exhibit D	Letter dated May 23, 2019 to P.H. And K.G-H.
Exhibit E	Email dated July 2, 2019 from Maureen Vaccaro
Exhibit F	Letter dated June 21, 2019 to P.H.
Exhibit G	Letter from Pedro P. Bretones, undated
Exhibit H	Letter dated July 8, 2019 from Pedro P. Bretones
Exhibit I	Letter dated July 24, 2019 from Pedro P. Bretones
Exhibit J	Certificate of Service, dated October 11, 2019
Exhibit K	Letter dated April 6, 2020 and Interrogatories
Exhibit L	Emails dated April 6, 2020
Exhibit M	Northfield Board of Education Policy 5131.1 "Harassment, Intimidation and Bullying"
Exhibit N	Response to Interrogatories

For respondent:

Exhibit A	Harassment, Intimidation and Bullying (HIB) Investigation forms and statements of witnesses

266-21

266-21

New Jersey Commissioner of Education

Final Decision

A.B.,

Petitioner,

v.

Board of Education of the City of Hackensack, Bergen County,

Respondent.

Synopsis

Petitioner challenged the respondent Board's dissemination of information about her former employment as a teacher in the Hackensack school district, contending that it released employment-related information that was inaccurate and violative of her 2013 settlement agreement with the Board and which subsequently led to the loss of a job offer from the Clifton Board of Education. Petitioner sought, *inter alia*, to compel the Board to rescind and correct its response to Clifton's employment questionnaire, and to obtain an injunction prohibiting Hackensack from reporting, transmitting, or communicating information to any prospective employer of A.B. that is the subject of an inquiry pursuant to *N.J.S.A.* 18A:6-7.7. The Board contended that it was obligated to release the information pursuant to the "Pass the Trash" Statute, *N.J.S.A.* 18A:6-7.6, et seq. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: the Board's disclosure of information in response to Clifton's questionnaire was required under *N.J.S.A.* 18A:6-7.7 because in 2013 – while petitioner was employed as a teacher in Hackensack schools – the Board had been conducting a sexual misconduct investigation regarding petitioner's social media posts which contained content that is prohibited under *N.J.S.A.* 18A:6-7.6's definition of sexual misconduct; the inappropriate and sexually explicit social media posts at issue were shared on a platform where they were viewed and commented on by some of petitioner's students; *N.J.S.A.* 18:6-7.12 did not exempt settlement agreements entered into before June 1, 2018 from the mandatory disclosure provisions of the "Pass the Trash" statute; petitioner consented to the disclosure of the information when she signed a form requesting Hackensack to release information and documents in regard to her former employment in the school district; and, further, the language of the authorization signed by A.B. tracks the requirements set forth in the mandatory disclosure provisions of *N.J.S.A.* 18A:6-7.7. Accordingly, the ALJ granted the Board's motion for summary decision, denied petitioner's opposing motion, and dismissed the petition in its entirety.

Upon a comprehensive review, the Commissioner agreed with the findings and conclusions of the ALJ in this matter. Finding the petitioner's exceptions unpersuasive, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

266-21
OAL Dkt. No. EDU 16958-19
Agency Dkt. No. 300-11/19

New Jersey Commissioner of Education

Decision

A.B.,

Petitioner,

v.

Board of Education of the City of Hackensack, Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the petitioner in accordance with *N.J.A.C.* 1:1-18.4, and the Board's reply thereto.

This matter stems from two sexually explicit posts shared on social media by petitioner in 2013, when she was employed as a teacher by the Board. Despite the fact that several students had access to her social media posts, petitioner posted "Kiss me, I'm Irish. F*** me, I'm Irish" as well as "Women say, men only think with their penis – Ladies, don't be afraid to blow their minds." When the Board became aware of the posts, it considered taking disciplinary action against petitioner. Thereafter, petitioner, her union representatives, and her legal counsel met with the Board and its legal representation, which resulted in a settlement agreement dated April 25, 2013 and petitioner's subsequent resignation. The settlement agreement contained a confidentiality provision with the disclaimer "to the extent provided by law."

In 2019, petitioner sought employment with the Clifton School District (Clifton). Pursuant to the "Pass the Trash" statute, *N.J.S.A.* 18A:6-7.6 through 7.13, which was enacted in 2018, Clifton submitted a questionnaire to the Board inquiring about whether petitioner had been the subject of a child abuse or sexual misconduct investigation. The Board answered "Yes", that petitioner had been the subject of a child abuse or sexual misconduct investigation and that petitioner had resigned while the allegations were pending or under investigation. As a result, Clifton withdrew its offer to hire petitioner.

Petitioner filed a complaint in Superior Court, Chancery Division, seeking to compel the Board to correct its response to the employment questionnaire. The matter was transferred to the Commissioner and transmitted to the OAL. Following cross motions for summary decision, the Administrative Law Judge (ALJ) found that the Board's disclosure of information in its response to Clifton's questionnaire was required by *N.J.S.A.* 18A:6-7.7 because in 2013, while petitioner was a teacher in Hackensack schools, the Board had been conducting a sexual misconduct investigation regarding petitioner's social media posts which contained content proscribed under *N.J.S.A.* 18A:6-7.6's definition of sexual misconduct. The ALJ also concluded that *N.J.S.A.* 18:6-7.12 did not exempt settlement agreements entered into before June 1, 2018 from the mandatory disclosure provisions of the "Pass the Trash" statute. Additionally, the ALJ found that petitioner consented to the disclosure of the information by signing an authorization form.

In her exceptions, petitioner takes exception to many of the ALJ's factual findings and conclusions of law. Petitioner mainly objects to the factual finding that students saw petitioner's social media posts in 2013, as well as the conclusion that a sexual misconduct investigation had taken place thereafter. Petitioner points to the certification of Richard E. Salkin, Esq., the Board attorney who negotiated the settlement with petitioner, which indicated

that to his knowledge, there was no investigation into petitioner for sexual misconduct or child abuse. Petitioner also points to the certification of Lauren E. McGovern, Esq., who certified that she spoke with the Detective who reviewed the social media posts in 2013, and that he met with the prosecutor and agreed that an investigation was not warranted. Petitioner contends that the ALJ misinterpreted the definition of sexual misconduct and that petitioner was not accused of sexual misconduct as it was defined at the time of her resignation.

Petitioner argues that the 2013 settlement agreement is exempt from the statute's reporting requirements because the clear language of *N.J.S.A.* 18A:6-7.12 creates a savings clause. *N.J.S.A.* 18A:6-7.12 states that "On or after the effective date of this act," districts may not enter into contracts or agreements that will suppress or destroy information relating to a child abuse or sexual misconduct investigation; affect the ability of a school district to report such behavior; or require a district to expunge such information (unless found to be false or unsubstantiated). *N.J.S.A.* 18A:6-7.12 also states that "[a]ny provision of an employment contract or agreement for resignation or termination or a severance agreement that is executed, amended, or entered into after the effective date of this act and that is contrary to this section shall be void and unenforceable." Petitioner argues that because the statute specifically refers to contracts entered into after the effective date as being unenforceable, those entered into before that date are still valid. Petitioner also contends that the signing of a consent form so that Clifton could obtain necessary employment records did not waive the confidentiality terms of her 2013 settlement agreement. She further argues that she did not authorize the release of information that is not true, as she was not accused of sexual misconduct. Finally, petitioner argues that her due process rights were violated because she did not have the opportunity to challenge the Board's answer to the employment questionnaire, which had the result of ending her teaching career. As such, the petitioner asks the Commissioner to reverse the Initial Decision.

In reply, the Board argues that the ALJ was correct in his determinations. The Board points out that the certification of principal Jim Montesano demonstrates that a sexual misconduct investigation occurred, and that he had reached out to law enforcement for assistance. Additionally, the Board maintains the certification also demonstrates that Montesano was informed that students had viewed the social media posts and commented on them. The Board points out that the ALJ engaged in an extensive analysis of the definition of sexual misconduct and concluded that the Board appropriately found that petitioner's actions warranted an investigation. The Board contends that the ALJ properly determined that the legislation does not exempt settlement agreements that were entered into prior to the effective date of the Act. According to the Board, petitioner authorized the release of the information and she has not demonstrated that the Board acted in bad faith. As such, the Board urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner agrees with the ALJ that the Board appropriately disclosed information regarding a sexual misconduct investigation into petitioner as a response to Clifton's employment questionnaire. The "Pass the Trash" statute defines sexual misconduct as:

> any verbal, nonverbal, written, or electronic communication, or any other act directed toward or with a student that is designed to establish a sexual relationship with the student, including a sexual invitation, dating or soliciting a date, engaging in sexual dialogue, making sexually suggestive comments, self-disclosure or physical exposure of a sexual or erotic nature, and any other sexual, indecent or erotic contact with a student.
>
> [*N.J.S.A.* 18A:6-7.6.]

The statute requires schools to reach out to the past employers of applicants and inquire whether they were ever the subject of a child abuse or sexual misconduct investigation, unless the allegations were found to be unsubstantiated; whether they were disciplined, discharged,

nonrenewed, asked to resign, or resigned pending an investigation; or whether they had action taken against a professional license or certificate due to the allegations. *N.J.S.A.* 18A:6-7.7b.

In this matter, the Board reported that petitioner had been the subject of a sexual misconduct investigation and that she resigned while the investigation was still pending. The Commissioner finds that the Board accurately answered the questions on the employment questionnaire. The certification of principal Jim Montesano indicates that as a result of petitioner's social media posts, "the school launched an investigation into [petitioner's] potential sexual misconduct." Other certifications in the record do not directly dispute that statement. For example, the certification of Richard E. Salkin, Esq., the Board attorney at the time, states that "[t]o my knowledge, there was no investigation of [petitioner] for sexual misconduct or child abuse by the School Administration, DYFS, the Hackensack Police or the Bergen County Prosecutor's Office." While he may not have been personally aware of an investigation, that statement does not mean that one did not occur. Additionally, while law enforcement may have chosen not to act, it is important to note that the question does not require that the investigation involve the police. The Board was required to answer if petitioner "was the subject of any child abuse or sexual misconduct investigation by any employer, State licensing agency, law enforcement agency, or the Department of Children and Families." *N.J.S.A.* 18A:6-7.7b. As such, even though petitioner was not the subject of a sexual misconduct investigation by law enforcement, the Board answered yes because she had been the subject of an investigation at the school level. Moreover, the fact that the principal reached out to law enforcement further demonstrates that an investigation was underway – even if it was in the early stages – when petitioner reached a settlement agreement with the Board and resigned her teaching position in the wake of the sexual misconduct allegations.

Considering the definition of sexual misconduct, the Commissioner finds that it is reasonable that the Board conducted an investigation into sexual misconduct based on petitioner's actions. Petitioner's social media posts could meet the definition of electronic communications that are directed toward or with a student that are designed to establish a sexual relationship with the student, such as making sexually suggestive comments. The Commissioner notes that the Board did not report that she committed sexual misconduct, but rather that they had launched an investigation into potential sexual misconduct, and that petitioner resigned prior to the completion of the investigation. As such, it is not necessary to conduct a full analysis of whether her actions met the definition of sexual misconduct; it is sufficient that her actions could meet the definition and that the Board therefore opened an investigation.

The Commissioner also agrees with the ALJ that *N.J.S.A.* 18:6-7.12 did not exempt settlement agreements entered into before June 1, 2018 from the mandatory disclosure provisions of the "Pass the Trash" statute. *N.J.S.A.* 18A:6-7.12 states:

> a. On or after the effective date of this act, a school district, charter school, nonpublic school, or contracted service provider may not enter into a collectively bargained or negotiated agreement, an employment contract, an agreement for resignation or termination, a severance agreement, or any other contract or agreement or take any action that:
>
> (1) has the effect of suppressing or destroying information relating to an investigation related to a report of suspected child abuse or sexual misconduct by a current or former employee;
>
> (2) affects the ability of the school district, charter school, nonpublic school, or contracted service provider to report suspected child abuse or sexual misconduct to the appropriate authorities; or
>
> (3) requires the school district, charter school, nonpublic school, or contracted service provider to expunge information about allegations or finding of suspected child abuse or sexual misconduct from any documents maintained by the school district, charter school, nonpublic school, or contracted service provider,

> unless after investigation the allegations are found to be false or the alleged incident of child abuse or sexual misconduct has not been substantiated.
>
> b. Any provision of an employment contract or agreement for resignation or termination or a severance agreement that is executed, amended, or entered into after the effective date of this act and that is contrary to this section shall be void and unenforceable.

Accordingly, the statute provides that "On or after the effective date of this act," school districts cannot enter into agreements or contracts that would hinder the reporting obligations of the statute. That provision places an obligation on school districts moving forward and cannot be interpreted as waiving settlement agreements entered into before that date. Similarly, Part B above automatically voids contracts or agreements that are contrary to the section but fails to exempt prior settlement agreements from the reporting obligations of the Act. The Commissioner also notes that the Act requires the disclosure of information regarding an applicant's past 20 years of work history. It would be contrary to the spirit and purpose of the legislation to permit the shielding of information prior to the Act's effective date. Moreover, while petitioner's settlement agreement is not exempt from the Act's requirements, the Commissioner further notes that petitioner also consented to the disclosure of information by signing an authorization form and that her settlement agreement provided a waiver of its confidentiality provision when required by law.

The Commissioner does not find petitioner's exceptions to be persuasive. The ALJ's finding of fact that students saw petitioner's social media post was supported by the record. The certification of principal Jim Montesano stated: "I requested that Detective Luis Furcal, in conjunction with the Bergen County Prosecutor's office, review AB's social media postings to confirm that students were able to view, access, and comment on AB's social media page. Detective Furcal stated AB's pages were viewed and commented on by AB's

students." Petitioner points to the certifications of Richard E. Salkin, Esq. and Lauren E. McGovern, Esq., but neither of those certifications dispute that students saw the social media posts. Salkin's certification did not discuss the viewing of the posts at all. McGovern's certification indicates that she met with the Detective who recalled seeing the social media posts, and he decided with the prosecutor's office not to pursue an investigation; however, the certification does not address whether he confirmed that students viewed the social media posts. Petitioner also argues that her due process rights were violated. Here, the Board complied with the requirements of the Act, and petitioner has been afforded the opportunity to challenge the Board's action in this forum.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The petition is hereby dismissed.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 21, 2021
Date of Mailing: October 21, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 16958-19
AGENCY REF. NO.:300-11/19

A.B.,

Petitioner,

vs.

CITY OF HACKENSACK BOARD OF EDUCATION,
BERGEN COUNTY,

Respondent.

Alfred Maurice, Esq., for Petitioner, A.B. (Springstead & Maurice, attorneys)

John Geppert, Esq., for Respondent, Hackensack BOE (Scarinci & Hollenbeck, attorneys)

Record Closed: April 7, 2021 Decided: July 22, 2021

BEFORE: **JOHN P. SCOLLO**, ALJ

STATEMENT OF THE CASE

Petitioner, A.B., challenges Respondent, City of Hackensack Board of Education's (hereinafter the "BOE") dissemination of information regarding her employment. Petitioner contends that Hackensack BOE released certain employment-related information, which was inaccurate and violative of their April 25, 2013 Settlement Agreement, causing her to lose her teaching job with a subsequent employer, the Clifton BOE. Hackensack BOE contends that it was obligated to release

the information pursuant to the "Don't Pass the Trash" Statute, N.J.S.A. 18A:6-7.6, et seq.

PROCEDURAL HISTORY

After an exchange of several letters between counsel for a woman herein referred to only as "A.B." and the BOE's counsel, A.B. filed a Verified Complaint in the Superior Court of New Jersey, Chancery Division (Docket Number BER-C-216-19) seeking: to enforce the terms of the parties' April 25, 2013 Settlement Agreement (officially signed by Hackensack BOE's representative on May 6, 2013); to compel the BOE to rescind and correct its response to the Clifton BOE's questionnaire; to procure a permanent injunction prohibiting Hackensack BOE from reporting, transmitting, or otherwise communicating information to any prospective employer of A.B. that is the subject of an inquiry pursuant to N.J.S.A. 18A:6-7.7, and seeking an award of compensatory and punitive money damages from Hackensack BOE arising out of the loss of the teaching job which A.B. had been offered and which she had accepted from the Clifton BOE with an effective start date of September 1, 2019.

On November 19, 2019, James J. DeLuca, J.S.C. of the Chancery Division issued an Order dismissing the Verified Complaint and transferring the dispute to the Commissioner of the New Jersey Department of Education for a substantive determination of the issues raised in the parties' cross-motions for Summary Judgment. Upon receipt of the matter by the Department of Education's Office of Controversies and Disputes, the matter was transmitted to the Office of Administrative Law, where it was filed on November 26, 2019 as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to 13.

On December 20, 2019, the matter was assigned to John P. Scollo, ALJ. After an Initial telephone Conference, a Pre-Hearing Order was issued on December 20, 2019 and the parties embarked on the discovery process. After several telephone conferences, it was decided that the parties would file cross-motions for Summary Decision. The parties filed for Summary Decision on July 8, 2020 followed by Opposition papers and Reply papers, which were received by August 12, 2020. On

March 19, 2021, the Tribunal asked for additional briefing. The parties submitted their additional papers on April 7, 2021 and the record closed.

UNDISPUTED FACTS

From their submissions, the Parties are in agreement regarding the following statements of fact.

(1) In 2013, A.B. posted images and statements on her personal social media account on the Internet.

(2) Some of A.B.'s postings denoted or connoted or contained sexual content.

(3) One of A.B.'s postings contained an image depicting the statements, '"Kiss me, I'm Irish" followed by the statement "Fuck Me, I'm Irish." Another image posted by A.B. referred to male genitalia and the act of fellatio and contained words, which if taken literally, encouraged ladies to engage in fellatio. It read, "Women say, men only think with their penis – Ladies, don't be afraid to blow their minds."

(4) Some of A.B.'s postings contain material which, depending upon the viewer's sensibilities, range from being insensitive, showing poor taste, being crude, coarse, or vulgar, to being perceived as obscene, lewd or lascivious.

(5) Among those who had access to A.B.'s social media posts were some students in the Hackensack School District, where A.B. was employed as a teacher.

(6) The Principal of Hackensack High School, Jim Montesano, stated in his Certification (which has not been shown to be inaccurate) that the aforesaid posts were made on A.B.'s social media account, which was accessible by students. In his Certification, Montesano stated that Detective Luis Furcal, in conjunction with the Bergen County Prosecutor's Office, confirmed to him that students had viewed A.B.'s pages and had commented on them.

(7) A.B. is a school teacher. Like police officers, teachers are among the class of individuals who are under a duty to behave appropriately wherever they may

be, because by the very nature of their professions, they are visible to the public and represent their professions.

(8) In 2013, A.B.'s postings came to the attention of school officials and to the Hackensack Board of Education and the BOE considered taking disciplinary action, which led to discussions between A.B. and her representatives and the BOE and its representatives.

(9) In April, 2013, A.B., her union representatives, and her legal counsel met with the BOE and the BOE's legal counsel regarding the controversy over the postings. The BOE asserted, and A.B. did not deny, that the discussions between the two sides took place between April 22, 2013 and April 25, 2013. The discussions and all related matters concluded when the parties reached an agreement on April 25, 2013 whereupon A.B. signed the Settlement Agreement. After the BOE, at its meeting on May 6, 2013 approved the settlement, it was signed and it became effective as of April 25, 2013.

(10) Both sides to this matter have copies of the April 25, 2013 Settlement Agreement and have forwarded same to the OAL.

(11) The "Don't Pass the Trash" statute is codified at N.J.S.A. 18A:6-7.6 through 7.13 and its effective date was June 1, 2018.

(12) There was no accusation of "child abuse" against A.B.

(13) In answer to Clifton's questionnaire, the Hackensack School District gave "yes" answers to Clifton's questions which asked if A.B. was: (1) the subject of an investigation into child abuse or sexual misconduct by any employer, State licensing agency, law enforcement agency or the Department of Children and Families, and (2) was disciplined, discharged, nonrenewed, asked to resign, resigned or was otherwise separated from employment while child abuse or sexual misconduct allegations were pending or were under investigation, or due to an adjudication or finding of child abuse or sexual misconduct.

DISCUSSION

A.B.'s Position

A.B. maintains that N.J.S.A. 18A:6-7.12 specifically exempts agreements entered before the statute's effective date of June 1, 2018 from the disclosure requirements set forth in N.J.S.A. 18A:6-7.7. Referring to N.J.S.A. 18A:6-7.12 as a "grandfather provision" or "savings clause", A.B. maintains that any agreement entered before June 1, 2018 effective date of the "Don't Pass the Trash" statute, such as the April 25, 2013 Settlement Agreement, is exempt from the purview of the "Don't Pass the Trash" statute, including the reporting requirements set forth in N.J.S.A. 18A:6-7.7.

A.B. maintains that her social media posts can not be construed to meet the definitions of "child abuse" or of "sexual misconduct" as those terms are defined by the "Don't Pass the Trash" statute, N.J.S.A. 18A:6-7.6.

It is A.B.'s position that the subject matter that led to the Settlement Agreement concerned her use of or alleged misuse of social media, not sexual misconduct. Specifically, A.B. stated in her July 7, 2020 Certification that the BOE's accusation was that her use of social media was "unprofessional behavior that included offensive social media posts, some of which were sexual in nature."

It is A.B.'s position that she underwent a "disciplinary review", not an investigation into sexual misconduct. A.B. contends that there was no investigation conducted by the BOE (or by any other agency of government) which was an investigation into child abuse or sexual misconduct *as those terms are defined by N.J.S.A. 18A:6-7.6*. Thus, A.B. maintains that the BOE acted improperly when it stated in answer to the questionnaire from Clifton that A.B. separated from her employment with Hackensack School District while an investigation into child abuse or sexual misconduct was occurring.

A.B. maintains that the Confidentiality provision, Numbered Paragraph 11 of the April 25, 2013 Settlement Agreement, absolutely prohibited the BOE from divulging any information about the circumstances leading to her resignation. In her action against the

BOE, A.B. maintains that the BOE violated the terms of their April 25, 2013 Agreement. A.B. maintains that that the BOE was obligated, under the April 25, 2013 Settlement Agreement, not to release any information beyond her name, position, dates of employment and salary to a prospective employer.

The BOE's Position

It is the position of the BOE that the subject matter that led to the Settlement Agreement concerned A.B.'s use of sexually-suggestive images and words in her postings on her social media account, which was accessible by students in the Hackensack School District. The BOE maintains that it conducted an investigation of whether A.B. used her social media account in 2013 in a manner consistent with sexual misconduct as that term was understood in 2013 and as it was later defined with the enactment of the "Don't Pass the Trash" statute in 2018. It is the BOE's position that it actually did conduct a sexual misconduct investigation of A.B. because it probed into whether she used sexually suggestive images and content on her social media account in 2013 and because it sought and obtained confirmation that students viewed A.B.'s posts.

It is the BOE's position that when it received an inquiry from a school (in this case the Clifton School District or "Clifton") seeking information about an applicant under the "Don't Pass the Trash" statute, it was - from June 1, 2018 forward - required to report any investigation into sexual misconduct (whether the investigation took place in the past or the present) during which a separation from employment took place either while such allegations were pending or while an investigation was still in progress; and to do so regardless of how the term "sexual misconduct" was understood in 2013 and how it was later defined with the enactment of the "Don't Pass the Trash" statute in 2018.

The BOE points out that the April 25, 2013 Settlement Agreement contains, in Numbered Paragraph 11 entitled "Confidentiality", two references to the Settlement Agreement being subject to the prevailing law of the State of New Jersey. The first reference simply states that the terms of the agreement and the matters discussed in

negotiating the terms of the agreement "*are confidential, to the extent permitted by law.*" The BOE's point is that the confidentiality provision of the Settlement is not absolute; it is subject to the requirements of the prevailing law of the State of New Jersey. The BOE maintains that the enactment of the "Don't Pass the Trash" statute modified the scope of things that were previously shielded by the confidentiality provision of the April 25, 2013 Settlement Agreement.

The second reference to the Settlement Agreement being subject to the prevailing law of the State of New Jersey, is a provision obligating the parties not to "divulge, discuss, publicize, disclose or in any way communicate ... circumstances leading to A.B.'s resignation in the District *except as required by law* without the express written authorization by an authorized representative off the other party."

The BOE's position is that as of June 1, 2018, when the "Don't Pass the Trash" statute became effective, the prevailing law of New Jersey changed. The change obligated the BOE to respond to a prospective employer's background check questionnaire regarding A.B.'s employment history, a history which contained a resignation that occurred while a sexual misconduct investigation was ongoing.

Analysis of the Parties' Respective Positions

The definition of "sexual misconduct" set forth in N.J.S.A. 18A:6-7.6 refers to "communications", "acts" and "other contacts" (referring to communicative contacts, not physical contacts). Several questions arise. They are: Did any content of A.B.'s posts include any of the several specific types of proscribed "communications", "acts" or "contacts" with students set forth in the definition of sexual misconduct? For instance, were there any "sexually suggestive comments" in the posts? If so, were any comments "directed toward or with a student that was designed to establish a sexual relationship with a student"? What is meant by "directed toward"? What is meant by "designed"? The answers to these questions will affect the outcome of the matter at bar.

A.B. characterizes her posts as attempts at humor directed toward her adult audience, not toward students. A.B. states that none of her posts could seriously be

construed as an attempt on her part to establish a sexual relationship with a particular student or with students in general. The BOE considers the posts quoted herein to have been sexually suggestive communications and violative of the standard of conduct appropriate to someone who has regular contact with students. Moreover, the BOE points out that A.B.'s posts were directed to her entire audience, which included students, and therefore must be considered as directed toward students, among others.

The BOE maintains that it was required by law (N.J.S.A. 18A:6-7.7) to report whether the applicant resigned, was terminated, etcetera while an investigation into sexual misconduct was in progress. The BOE's position is that as long as a student had access to A.B.'s social media posts, any statements, images, etcetera contained in the posts must be considered as "directed toward students", even if the same posts were also directed toward others. The BOE relies on the confirmation by Detective Luis Furcal, who confirmed that some of A.B.'s students had access to the posts in question and that at least one student commented on one of the posts. The BOE maintains that since A.B. resigned during an ongoing investigation of "sexually suggestive comments" (one of the proscribed forms of conduct listed in the "Don't Pass the Trash" statute's definition of "sexual misconduct"), it was obligated to report this when answering Clifton's questionnaire.

The question of intent is always difficult to analyze and decide. A.B. pointed out that she is a married woman, that she has had no intent to establish a sexual relationship with a student, and that there is absolutely no evidence of any kind proving that such has been her intent. A.B.'s counsel criticized the BOE for attempting to read A.B.'s mind.

The BOE would be forced to concede that, without direct evidence (testimonial or documentary) of an actual communication or action by and between A.B. and a student regarding the establishment of a sexual encounter or relationship, it would have no way of looking into A.B.'s mind to prove what A.B.'s actual intent was when she made her posts on social media. The BOE is left with the task of finding some circumstantial evidence, (relying on an inference to prove its case) or resting its case on a

presumption to prove that her communications were *designed* (not "intended") to establish a sexual relationship with a student.

Here, in its attempt to prove "design" (i.e., the A.B.'s posts were "designed to establish a sexual relationship"), the BOE points to the sexually-charged and provocative nature of the statements (and the specific words used therein) which A.B. consciously and deliberately decided to post on her social media, knowing that some students had access to her site. The BOE points to two (of several) statements (posts) in particular. The first post was: "Kiss me, I'm Irish" followed by "Fuck me, I'm Irish". The BOE's position is that this post, on its face, can be construed as a frank invitation by the person posting it to engage in an act of sexual intercourse. The second post was: "Women say men only think with their penis. Ladies, don't be afraid to blow their minds." The BOE's position is that this post equates a man's penis to his mind and that the person posting it encourages ladies to "blow" (a slang reference to fellatio) the man's mind/penis. The latter posting was accompanied by A.B.'s admission: "This is totally inappropriate for me to post, but it actually made me laugh." In support of its position, the BOE presents A.B.'s admission that her post was "inappropriate" and that she decided to post it anyway despite the fact that students could see it.

The BOE's approach to establishing A.B.'s "design" appears to be as follows. The BOE notes that A.B.'s posts contained sexually-suggestive statements, which were knowingly made to an audience that included students. The BOE notes that the "Don't Pass the Trash" is remedial and seeks to prevent persons who have a history of improper sexual conduct from having regular contact with students. The BOE's position appears to be that, going forward from June 1, 2018, for the purposes of reporting a present or former employee's improper sexual conduct (be it "child abuse" or "sexual misconduct") under 6-7.7, the remedial and preventative intent of the statute is to require the reporting district to report any prior (going back twenty years) or present allegation or investigation into child abuse or sexual misconduct to the inquiring employer (unless the investigation found the allegations to be false or "not substantiated".)

The Tribunal finds it noteworthy that the definition of "sexual misconduct" contains the word "designed" rather that the word "intended". This suggests that the Legislature did not seek to place the burden of proving the actor's or communicator's intent on the reporting district. The use of the word "designed" indicates that the Legislature envisioned situations wherein the actor's or communicator's conduct might be suspected as an attempt to entice a student into a sexual relationship, but without placing the burden on the district of proving the actor's or communicator's actual intent. The wording of the definition of "sexual misconduct" in 6-7.6 is such that it assumes, and perhaps establishes a presumption, that when a teacher communicates, acts or contacts a student with a message that includes "a sexual invitation, dating or soliciting a date, engaging in sexual dialogue, *making sexually suggestive comments*, self-disclosure or physical exposure of a sexual or erotic nature, and *any other sexual, indecent or erotic contact* with a student", that message is inherently suspicious and is to be treated by the BOE as being "designed" (which connotes something approaching being "intended") to establish a sexual relationship.

Analysis of the "grandfather provision" or "savings clause"

N.J.S.A. 18A:6-7.12(b) reads as follows:

> "b. Any provision of an employment contract or agreement for resignation or termination or a severance agreement that is executed, amended, or entered into after the effective date [June 1, 2018] of this act and that is contrary to this section shall be void and unenforceable."

A.B. maintains that when the Legislature enacted the "Don't Pass the Trash" statute , N.J.S.A. 18A:6-7.6 to 6-7.12, it intended that the disclosure requirements of N.J.S.A. 18A:6-7.7 would apply only to inquiries made by prospective employers made after the June 1, 2018 effective date of the statute; and that any such inquiries could only inquire into allegations, investigations, findings or agreements entered after June 1, 2018. A.B. maintains that the literal meaning of N.J.S.A 18A:6-7.12, specifically 6-7.12 (b), should be give full effect.

The lynchpin of A.B.'s argument, indeed of her entire case, is that the Legislature intended that the disclosure provisions of 6-7.7 only apply prospectively from June 1, 2018. A.B.'s position is that 6-7.12's automatic voiding of agreements which seek to shield or suppress information about child abuse or sexual misconduct investigations or findings made *after* the effective date of the statute, June 1, 2018, clearly demonstrates the Legislature's intent to *exempt* these types of provisions in agreements entered *before* June 1, 2018 from being voided. It therefore follows that any agreement, such as the one entered by the Hackensack BOE and A.B. before June 1, 2018 containing provisions which shield information about whether an employee separated from his or her employment over allegations, an investigation, a finding or an agreement related to child abuse or sexual misconduct is not subject to the disclosure provisions of 6-7.7.

Utilizing an English translation of the maxim *Expressio unius est exclusio alterius* (The expression of one [thing] is the exclusion of the other [thing])", A.B. set forth her position as follows: if the Legislature wanted to make settlement agreements which were entered before June 1, 2018 subject to 6-7.7, it would have said so expressly in the statute. A.B. furthermore states that the absence of such a provision means that the Legislature literally intended to keep all prior agreements intact and not subject to 6-7.7 disclosure requirements. A.B. contends that it follows that the April 25, 2013 Settlement Agreement precludes the release of any information about the discussions leading up to the parties' agreement, including the nature of the BOE's disciplinary inquiry into A.B.'s actions, whether or not there was an investigation into child abuse or sexual misconduct, and the reasons for the cessation of A.B.'s employment with the Hackensack BOE. A.B.'s conclusion is that pre-June 1, 2018 agreements containing such confidential information were "grandfathered-in" by 6-7.12.

The BOE maintains that N.J.S.A. 18A:6-7.12 does not exempt Settlement Agreements entered before June 1, 2018 from the statute's reporting requirements. The BOE recognizes that the provisions of 6-7.12(b), specifically prohibit agreements entered after June 1, 2018 which suppress, destroy or otherwise safeguard information that would be disclosable under 6-7.7. However, the BOE argues that the application of "Expressio unius est exclusio alterius" could also be employed to favor the BOE's

position. That is, if the Legislature intended pre-June 1, 2018 agreements to be *exempt* from the reporting requirements of 6-7.7, it would have expressly stated this.

The BOE contends that there is no Legislative intent in the "Don't Pass the Trash" statute to create a "grandfather" provision or "savings clause". The BOE contends that A.B.'s interpretation and use of "Expressio unius est exclusio alterius" would run counter the spirit of the "Don't Pass the Trash" statute and thereby undermine its purpose. The BOE contends that the clear intent of the "Don't Pass the Trash" statute was to identify persons who were either adjudicated to be involved in child abuse or in sexual misconduct or who became separated from their employments while such charges were alleged or were being investigated (thus avoiding adjudication).

The BOE, although not specifically quoting it, relies on the maxim, "Ratio legis est anima legis" ('The reason for [or underlying] the law is the soul [spirit] of the law"). Indeed, the BOE contends that the entire intent behind N.J.S.A. 18A:6-7.6 through 7.13 was to remediate a system that continued to allow people with histories of child abuse or sexual misconduct from having the opportunity to interact with students. The intent of the statute is to specifically require that such histories be revealed pursuant to 6-7.7 in order to protect students by identifying such people and deterring them from applying for positions in which they would have regular contact with students.

Analysis of the Parties' Positions about the Authorization signed by A.B.

The BOE argues that A.B. signed an authorization in 2018 specifically authorizing the release of "... any and all information and the release of documentation within your (the school district's) possession in relation to any investigation in which I was accused of child abuse or sexual is conduct ...." A.B.'s response to the BOE's argument is that she was required by N.J.S.A. 18A:6-7.7 (a)(2) to provide her signed authorization, which she did indeed provide. However, A.B. further responds that the BOE was required to honor the April 25, 2013 Settlement Agreement by only giving A.B.'s name, position, dates of employment, and salary.

Analysis of the Parties' Positions on whether a Sexual Misconduct Investigation Took Place

A.B. contends that she was accused of misue of social media and that there was no investigation into sexual misconduct *as defined by the statute*. Therefore, A.B. contends that the information which the BOE released to Clifton was incorrectly and improperly disclosed and was done with malice. The BOE relies on the Certification of Principal Joe Montesano, in which he stated that A.B.'s posts came to the school officials' attention, that the posts appeared to contain inappropriate content and sexual content. He stated that the BOE looked into the content and confirmed by Detective Furcal that it was viewed and commented upon by students. Based upon this, meetings were held, which resulted in A.B. submitting her resignation as part of the April 25, 2013 Settlement Agreement.

Bottom Line Analysis

The BOE maintains that A.B. authorized the release of the information, and that it is therefore immune from liability. The BOE further says that it had been conducting a sexual misconduct investigation. The BOE believed that A.B. made sexually-suggestive posts, which were viewed and commented upon by students. The BOE maintains that the inquiry ended because parties negotiated the Settlement Agreement. Essentially, the BOE's case is that it followed the law (N.J.S.A. 18A:6-7.7).

Essentially, A.B.'s entire case hangs on her contentions that the BOE did not conduct a sexual misconduct investigation in 2013 (as that term was defined five years afterwards in the "Don't Pass the Trash" statute) and that N.J.S.A 18A:6-7.12 "grandfathered" any agreements sheltering any information about any investigation which the BOE may have conducted into allegations of A.B.'s suspected involvement in sexual misconduct in 2013. A.B. maintains that the BOE breached the April 25, 2013 Settlement Agreement by maliciously releasing confidential information costing her a job with Clifton.

APPLICABLE LAW

The "Don't Pass the Trash Statute" is found at N.J.S.A. 18A:6-7.6 to 7.13. For the matter at bar, the applicable sections of the statute are:

(1) N.J.S.A. 18A:6-7.6 (Definition of "sexual misconduct");

(2) N.J.S.A. 18A:6-7.7 (Requirements for certain school employees);

(3) N.J.S.A. 18A:6-7.9 (Verification, disclosure of information);

(4) N.J.S.A. 18A:6-7.10 (Review, further inquiries); and

(5) N.J.S.A. 18A:6-7.11 (Information not deemed public record; immunity);

(6) N.J.S.A. 18A:6-7.12 (Prohibited actions relative to certain agreements, employment contracts).

The definition of "sexual misconduct" is set forth in N.J.S.A. 18A:6-7.6 as follows:

> "Sexual misconduct" means any verbal, nonverbal, written, or electronic communication, or any other act directed toward or with a student that is designed to establish a sexual relationship with the student, including sexual invitation, dating or soliciting a date, engaging in a sexual dialogue, making sexually suggestive comments, self-disclosure or physical disclosure of a sexual or erotic nature, and any other sexual, indecent or erotic contact with a student."

The "Don't Pass the Trash" statute specifies certain duties and procedures for the employer or former employer to follow and for the applicant/ teacher to follow in regard to providing information to prospective employers about whether the applicant's work history includes information about his or her conduct regarding the subjects of sexual misconduct and child abuse. They are set forth in N.J.S.A. 18A:6-7.7 as follows:

> "A school district, charter school, nonpublic school, or contracted service provider holding a contract with a school district, charter school or nonpublic school shall not employ for pay or contract for the paid services of any person serving in a position which involves regular contact with

students unless the school district, charter school, nonpublic school, or contracted service provider:

a. Requires the applicant to provide:

(1) A list, including name, address, telephone number and other relevant contact information of the applicant's:
(a) Current employer;
(b) all former employers within the last 20 years that were schools; and
(c) all former employers within the last 20 years where the applicant was employed in a position that involved direct contact with children; and

(2) A written authorization that consents to and authorizes disclosure of the information requested under subsection b. of this section and the release of related records by the applicant's employers listed under paragraph (1) of this subsection, and that releases those employers from liability that may arise from the disclosure or release of records;

(3) A written statement as to whether the applicant:

(a) has been the subject of any child abuse or sexual misconduct investigation by any employer, State licensing agency, law enforcement agency, or the Department of Children and Families, unless the investigation resulted in a finding that the allegations were false or the alleged incident of child abuse or sexual misconduct was not substantiated;

(b) has ever been disciplined discharged, nonrenewed, asked to resign from employment, resigned from or otherwise separated from any employment while allegation of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication or finding of child abuse or sexual misconduct; or

(c) has ever had a license, professional license, or certificate suspended, surrendered, or revoked while allegations of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication or finding of child abuse or sexual misconduct; and

b. Conducts a review of the employment history of the applicant by contacting those employers listed by the applicant under the provisions of paragraph (1) of subsection a. of this section and requesting the following information:

(1) The dates of employment of the applicant; and
(2) a statement as to whether the applicant:

> (a) was the subject of any child abuse or sexual misconduct investigation by any employer, State licensing agency, law enforcement agency, or the department of Children and Families, unless the investigation resulted in a finding that the allegations were false or the alleged incident of child abuse or sexual misconduct was not substantiated;
>
> (b) was disciplined, discharged, nonrenewed, asked to resign from employment, resigned from or otherwise separated from any employment while allegations of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication or finding of child abuse or sexual misconduct; or
>
> (c) has ever had a license, professional license, or certificate suspended, surrendered, or revoked while allegations of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication of finding of child abuse or sexual misconduct.

The review of the employment history may be conducted through telephonic, electronic, or written communications. If the review is conducted by telephone, the results of the review shall be documented in writing by the prospective employer."

N.J.S.A. 18A:6-7.9 (a) provides that the applicant's employer or former employer must respond to the prospective employer's request for information submitted under N.J.S.A. 18A:6-7.7 within 20 days after receiving the request.

N.J.S.A. 18A:6-7.9 (b) provides that the prospective employer must make diligent efforts to verify the information requested of out-of-state employers.

N.J.S.A. 18A:6-7.9 (c) provides that the failure of an employer or former employer to provide the information requested by a prospective employer under N.J.S.A. 18A:6-7.7 may be grounds for the automatic disqualification of an applicant from employment. If that is the case, then the prospective employer shall not be liable to the applicant who is not offered employment or whose employment is terminated due to information received or due to the prospective employer's inability to conduct a full review of the applicant's employment history.

The full text of N.J.S.A. 18A:6-7.9 (d) reads as follows:

> "A school district, charter school, nonpublic school or contracted service provider shall have the right to

> immediately terminate an individual's employment or rescind an offer of employment if:
>
> (1) the applicant is offered or commences employment with the school district, charter school, nonpublic school, or contract service provider following the effective date [June 1, 2018] of this act; and
>
> (2) information regarding the applicant's history of sexual misconduct or child abuse is subsequently discovered or obtained by the employer that the employer determines disqualifies the applicant or employee from employment with the school district, charter school, nonpublic school or contracted service provider.

The termination of employment pursuant to this subsection shall not be subject to any grievance or appeals procedures or tenure proceedings pursuant to any collectively bargained or negotiated agreement or any law, rule, or regulation."

N.J.S.A. 18A:6-7.10 (a) provides that if a prospective employer receives information from an applicant's employer or previous employer indicating that there is a history of child abuse or sexual misconduct, then the prospective employer is required to make further inquiries to ascertain additional details regarding the matter(s) disclosed. N.J.S.A. 18A:6-7.10 (b) provides that a prospective employer may employ an applicant on a provisional basis for no more than 90 days as long as:

> (1) the applicant has complied with N.J.S.A. 18A:6-7.7(a), disclosing current and previous employers; and
>
> (2) the applicant has submitted a written statement disclosing whether he or she has ever been the subject of any child abuse or sexual misconduct investigation; has been disciplined, discharged, nonrenewed, asked to resign, resigned, or otherwise been separated from employment while allegations of child abuse or sexual misconduct were pending or under investigation; or has ever had a license, professional license, or certificate suspended, surrendered or revoked while allegations of child abuse or sexual misconduct were pending or under investigation; and
>
> (3) the prospective employer determines that special or emergent circumstances exist that justify the temporary employment of the applicant.

The full text of N.J.S.A. 18A:6-7.11 reads as follows:

> "a. Information received by an employer under this act [C.18A:6-7.6, et seq.] shall not be deemed a public record under P.L. 1963, c.73 (C.47:1A-1 et seq.) or the common law concerning access to public records.
>
> b. An employer, school district, charter school, nonpublic school, school administrator, or contracted service provider that provides information or records about a current or former employee or applicant shall be immune from criminal and civil liability for the disclosure of the information, unless the information or records provided were knowingly false. The immunity shall be in addition to and not in limitation of any other immunity provided by law.

The full text of N.J.S.A. 18A:6-7.12 reads as follows:

> "a. On or after the effective date [June 1, 2018] of this act a school district, charter school, nonpublic school, or contracted service provider may not enter into a collectively bargained or negotiated agreement, an employment contract, an agreement for resignation or termination, a severance agreement, or any other contract or agreement or take any action that:
>
> (1) has the effect of suppressing or destroying information relating to an investigation related to a report of suspected child abuse or sexual misconduct by a current or former employee;
>
> (2) affects the ability of the school district, charter school, nonpublic school, of contracted service provider to report suspected child abuse or sexual misconduct to the appropriate authorities; or
>
> (3) requires he school district, charter school, nonpublic school, or contracted service provider to expunge information about allegations or findings of suspected child abuse or sexual misconduct from any documents maintained by the school district, charter school, nonpublic school, or contracted service provider, unless after investigation the allegations are found to be false or the alleged incident of child abuse or sexual misconduct has not been sustained.

> b. Any provision of an employment contract or agreement for resignation or termination or a severance agreement that is executed, amended, or entered into after the effective date [June 1, 2018] of this act and that is contrary to this section shall be void and unenforceable."

The Law of Decorum for Public Employees

Members of certain professions are held to a high standard of conduct because the nature of their callings demand exemplary behavior. The New Jersey Supreme Court defined unbecoming conduct as conduct "which adversely affects the morale or efficiency of the [department]" or "has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." In re Young, 202 N.J. 50, 66 (2010), (quoting Karins v. Atlantic City, 152 N.J. 532, 554 (1998). See also, In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) and Asbury Park v. Department of Civil Service, 17 N.J. 419, 429 (1955). The Supreme Court also stated in Karins that a finding of unbecoming conduct "need not 'be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.'" Karins v. Atlantic City at 555 (quoting Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992)). In Bound Brook Board of Education v. Glenn Ciripompo, 228 N.J. 4, 14 (2017) the Supreme Court of New Jersey emphasized the interplay of the high standard of conduct borne by teachers and the delicacy of the respect paid by members of the public to the teaching profession when it stated:

> "A charge of unbecoming conduct requires only evidence of inappropriate conduct by teaching professionals. It focuses on the morale, efficiency, and public perception of an entity, and how those concerns are harmed by allowing teachers to behave inappropriately while holding public employment."

Statutory Interpretation

In the case at bar, it is necessary to address the subject of statutory interpretation. When interpreting a statute, the main objective is to discern and further the intent of the Legislature. Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 ((2009)

(citing D'Annunzio v. Prudential Ins. Co. of America , 192 N.J. 110 (2007); Daidone v. Buterrick Bulkheading, 191 N.J. 557, 565 (2007)). To discern the Legislature's intent, courts look first to the plain language of the statute in question. DiProspero v. Penn, 183 N.J. 477, (2005) (citing Lozano v. Frank DeLuca Constr.,178 N.J. 513 (2004)). When reading statutory language, courts will give words their ordinary meaning unless the Legislature directs to the contrary. Serv. Armament Co. v. Hyland, 70 N.J. 550 (1970) (citing Safeway Trails, Inc. v. Furman,41 N.J. 467, 487 (1964)). In Richardson v Bd. of Trs, , Police, Firemens's Ret. Sys., 192 N.J. 189 (2007) (citing DiProspero, supra, 183 N.J. at 492), the Supreme Court stated flatly, "If the plain language leads to a clear and unambiguous result, then [the] interpretive process is over." However, if the plain meaning does not point to a "clear and unambiguous result," the courts will then consider extrinsic evidence from which it may glean the Legislature's intent. Bedford v. Riello, 195 N.J. 210 (2008) (citing DiProspero, supra, 183 N.J. at 492-93). Included within the extrinsic evidence rubric are legislative history and statutory context, which may shed light on the drafters' motives. Aponte-Correa v. Allstate Ins. Co., 162 N.J. 318 (2000) (citing Twp. of Pennsauken v. Schad, 160 N.J. 156 (1999)). Regardless of the materials relied upon and the analytical tools employed, in the final analysis, courts should "seek to effectuate the 'fundamental purpose for which the legislation was enacted.'" Schad, supra, 160 N.J. at 170 (quoting N.J. Builders Ass'n. v. Blair, 60 N.J. 330, 338-39 (1972)).

ISSUES

(1) Does N.J.S.A. 18A:6-7.12 exempt settlements entered before June 1, 2018 from the mandatory disclosure provisions of N.J.S.A. 18A:6-7?

(2) Did the BOE conduct a sexual misconduct investigation of A.B.?

(3) What is meant by the words "directed toward or with a student" as used in the definition of "sexual misconduct"?

(4) Was any content of A.B.'s comments "directed toward or with a student that was 'designed' to establish a sexual relationship with a student"?

(5) Did any content of A.B.'s social media posts include any of the several specific types of proscribed "communications", "acts" or "contacts" with students set forth in the definition of "sexual misconduct" as found in N.J.S.A. 18A:6-7.6?

(6) Did A.B. authorize the Hackensack B.O.E. to disclose information to Clifton B.O.E. about the sexual misconduct investigation in 2013?

(7) Did Hackensack B.O.E. follow the requirements of N.J.S.A. 18A:6-7.6, et seq. (the "Don't Pass the Trash Law")?

(8) If so, is the Hackensack B.O.E. entitled to immunity?

LEGAL ANALYSIS AND CONCLUSIONS

Preliminary Conclusions

From a review of all the evidence in the case, I **CONCLUDE** that there is no evidence of child abuse in the case at bar. The allegations against A.B. were not for "child abuse", but rather were for "sexual misconduct".

There was discussion about a certain photograph of teenagers in a swimming pool, clad in bathing suits and standing next to each other facing the photographer. Both sides agree that the teenagers are appropriately clad, are doing nothing except posing for a photograph, and I **CONCLUDE** that there is nothing sexual depicted in said photograph. Moreover, I **CONCLUDE** that no one has demonstrated that A.B. was in the photograph with the teenagers. I **CONCLUDE** that the photograph adds nothing to the outcome of this matter.

ISSUE # 1: Does N.J.S.A. 18A:6-7.12 exempt agreements entered before June 1, 2018 from the mandatory disclosure provisions of N.J.S.A. 18A:6-7 ?

The parties each presented arguments employing the maxim "Expression unius est exclusio alterius" to their respective advantage. A.B. employed the maxim to support the proposition that by means of 6-7.12 the Legislature sought to regulate only post-June 1, 2018 contracts and agreements and to exempt or leave intact all pre-June 1,

2018 contracts and agreements. The effect of this argument would be the preservation of the confidentiality of certain information protected by the April 25, 2013 Settlement Agreement. The BOE looked to the remedial and protective intent of the "Don't Pass the Trash" statute, reasoning that it would not be consistent for the statute's purposes to exempt pre-June 1, 2018 agreements (like the April 25, 2013 Settlement Agreement) and thus shield the histories of people whom the Legislature sought to deter from taking jobs that allowed regular contact with students. Following the Supreme Court's reasoning in Schad and N.J. Builders Ass'n, supra, I **CONCLUDE** that the BOE's argument is stronger than A.B.'s argument. However, here, the statute itself contains the answer to the question.

N.J.S.A. 18A:6-7.12(b) reads as follows:

> "b. Any provision of an employment contract or agreement for resignation or termination or a severance agreement that is executed, amended, or entered into after the effective date [June 1, 2018] of this act and that is contrary to this section shall be void and unenforceable."

The inclusion of the word "amended" can only refer to contracts or agreements entered before the June 1, 2018 effective date of the "Don't Pass the Trash" statute. This indicates that the Legislature contemplated that after the effective date of the "Don't Pass the Trash" statute, people or entities might attempt to amend their pre-June 1, 2018 contracts or agreements in a way to avoid the disclosure requirements of N.J.S.A. 18A:6-7.7. I **CONCLUDE** that this means that the Legislature intended that pre-June 1, 2018 contracts and agreements are subject to the disclosure requirements of the "Don't Pass the Trash" statute.

ISSUE # 2: Did the BOE conduct a sexual misconduct investigation of A.B. ?

A.B. confined the question to "sexual misconduct' *as defined by N.J.S.A. 18A:6-7.6.* Certainly, the term "sexual misconduct" can be defined different ways in different jurisdictions and at different times. So the real question is whether the BOE conducted any type of sexual misconduct investigation in 2013 that would be reportable when it was called-upon to answer Clifton's background questionnaire in 2019. The Certification

of Hackensack High School Principal Jim Montesano provides his own sworn assertion that an investigation took place and that Detective Furcal reported to him that he examined the postings on A.B.'s social media account and found that students had viewed the postings and even posted comment. I **CONCLUDE** that this proves that what was undertaken in 2013 was a sexual misconduct investigation, which was reportable in 2019 pursuant to be requirements of the "Don't Pass the Trash' statute.

ISSUE # 3: What is meant by the words "directed toward or with a student" as used in the definition of sexual misconduct found in N.J.S.A. 18A:6-7.6 ?

Inasmuch as students were among the people who had access to A.B.'s social media posts, I **CONCLUDE** that there is no doubt that A.B.'s posts were directed toward students.

ISSUE # 4: Was any content of A.B.'s comments "directed towards or with a student that was 'designed' to establish a sexual relationship with a student ?

In New Jersey, remedial legislation, necessary for the protection of its citizens, is liberally construed to effectuate the purposes and intent thereof. The "Don't Pass the Trash" is remedial and seeks to prevent persons who have a history of improper sexual conduct from having regular contact with students.

As noted above in the analysis of the parties' arguments and positions, the definition of "sexual misconduct" uses the word "designed" rather that the word "intended", which suggests that the Legislature did not seek to place the burden of proving the actor's or communicator's intent on the reporting district.

As stated above in my analysis, I **CONCLUDE** that the use of the word "designed" in the definition of "sexual misconduct" indicates that the Legislature envisioned situations wherein the teacher's conduct might be suspected as an attempt to entice a student into a sexual relationship, but did not wish to place the burden of proving the actor's or communicator's actual intent on the district. Here, although there is no direct evidence of A.B.'s actual *intent*, A.B.'s own words are fraught with notions of

improper invitation and provocation and therefore, I **CONCLUDE** that her words were capable of being understood as *designed* to establish a sexual relationship with a member of her audience, including a student.

ISSUE # 5: Did any content of A.B.'s social media posts include any of the several specific types of proscribed "communications", "acts" or "contacts" with students set forth in the definition of "sexual misconduct" found in N.J.S.A. 18A:6-7.6 ?

The definition of "sexual misconduct' proscribes "sexually suggestive comments" and three types of "other contacts" (communicative contacts, not physical contacts) set forth as "sexual contact", "indecent contact" or "erotic contact". One of A.B.'s posts stated "Kiss me, I'm Irish" followed by "Fuck me, I'm Irish". Taken literally, the meaning of each statement, especially the latter statement, is a frank invitation to erotic activity. A.B. claimed to have posted this post as an attempt at humor, but to accept her explanation would require that whenever such a statement is uttered, the person who makes a communication to a student, even a person who is actually seeking an erotic encounter, would avoid any consequences for his or her statement by merely claiming to have spoken in jest. Knowing her status as a teacher, A.B. posted statements, which she knew or should have known could be construed as sexually suggestive or as sexual, indecent or erotic contacts. A.B. may well have made her posts innocently and in jest, but she should have considered how her postings could affect the school environment, the safety of students and her duty to maintain the integrity of the teaching profession in the eyes of the public. While it is legitimate for an adult person to enjoy the casual communication which social media offers, the Supreme Court's decision in Bound Brook, supra, warns us that it is incumbent upon a teacher whose social media site is accessible to students to be mindful of her position, to exercise caution about the content of the communications she makes, and to make a careful assessment of her priorities.

The "Don't Pass the Trash" statute is a remedial and preventative statute that is intended to identify those who pose a threat to the well-being of students. I **CONCLUDE** that its passage changed the law of New Jersey regarding what was beforehand

regarded as confidential and what was henceforth to be regarded as confidential in pre-June 1, 2018 agreements concerning the termination or separation of teachers from their employments, even their former employments. In New Jersey, the provisions of remedial statutes are construed liberally so as to effectuate the purposes and intent thereof to the fullest extent possible. Therefore, I **CONCLUDE** that to effectuate the statute's remedial and protective intent, it must be read as requiring a reporting school district (Hackensack BOE) to report to the inquiring school district (Clifton BOE) any present or prior allegation or investigation into child abuse or sexual misconduct (unless the investigation found the allegations to be false or "not substantiated") regardless of when the investigation took place and regardless of whether the information was previously shielded by an agreement between the parties.

I **CONCLUDE** that A.B.'s posting of "Kiss me, I'm Irish" followed by "Fuck me, I'm Irish" meets the criteria of being "sexually suggestive", as well as being "sexual contact", "indecent contact" and "erotic contact". I **CONCLUDE** that A.B.'s aforesaid posting contained content proscribed by N.J.S.A. 18A:6-7.6's definition of "sexual misconduct".

I **CONCLUDE** that the other post, "Women say men only think with their penis. Ladies, don't be afraid to blow their minds", also meets the criteria of being "sexually suggestive", as well as being "sexual contact", "indecent contact" and "erotic contact". Moreover, in the post itself, A.B. admitted that her statement was inappropriate.

I **CONCLUDE** that this post also contained content proscribed by N.J.S.A. 18A:6-7.6's definition of "sexual misconduct".

ISSUE # 6: Did A.B. authorize the Hackensack BOE to disclose information to Clifton about the sexual misconduct investigation of 2013?

The language of the authorization signed by A.B. tracks the requirements set forth in N.J.S.A. 18A:6-7.7. The authorization signed by A.B. she requested the Hackensack BOE to release information and documents to the Clifton BOE as follows:

> "I consent to and authorize the disclosure of any and all information and the release of documentation within your

possession in relation to any investigation in which I was accused of child abuse or sexual misconduct pursuant to New Jersey Public Law 2018, C.5. I expressly request all investigative materials, if any exist, be disclosed including the following:

- Any investigative reports of child abuse or sexual misconduct investigation conducted by your company, a State licensing agency, law enforcement agency, or the Division of Child Protection and Permanency in the Department of Children and Families unless the Investigation was found to be false or unsubstantiated;

- Any documentation, including, but not limited to, resolutions or agreements in which I was disciplined, discharged, nonrenewed, asked to resign from employment, resigned from or otherwise separated from any employment while allegations of child abuse or sexual misconduct were pending or (under)* investigation, or due to an adjudication or finding of child abuse or sexual misconduct [were pending or under investigation, or finding of child abuse or sexual misconduct]**; and

- Any documentation which shows my license or certificate was suspended, surrendered or revoked while allegations of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication or finding of child abuse or sexual misconduct.

*NOTE: The word "under" in parentheses did not appear on the form signed by A.B., but was inserted by the Tribunal because it conforms with the wording of 6-7.7 (a) (3)(b).

** NOTE: The words "were pending or under investigation, or finding of child abuse or sexual misconduct" in brackets appear in the form signed by A.B., but are superfluous and were mistakenly included on the form.

The consent form, at the top, states that A.B. consents to disclosure and release of all "information", "documentation" and "investigative materials". The language is plain and comprehensive and does not contain any reservations.

In the first bullet point, A.B. consents to the disclosure of investigative reports unless same were found to be false or unsubstantiated. This is not applicable in the present case.

In the second bullet point, A.B. consents to the disclosure of any documents, including resolutions and / or agreements put into effect while allegations were pending against her or while she was under investigation for child abuse or sexual misconduct or due to an adjudication against her of child abuse or sexual misconduct. The inclusion of the word "agreements" certainly put A.B. on notice that her April 25, 2013 Settlement Agreement was included in the items she was consenting to disclose.

In the third bullet point, A.B. consents to the disclosure of any documentation which shows that her license or certificate was suspended, surrendered, or revoked while allegations of child abuse or sexual misconduct were pending against her or under investigation. This is not applicable in the present case.

Returning to the crucial issue of whether N.J.S.A. 18A:6-7.12 exempts the disclosure of the April 25, 2013 Settlement Agreement or includes it in the types of items that must be disclosed, I have already concluded that 6-7.12 does not exempt pre-June 1, 2018 agreements and I have concluded that the enactment of N.J.S.A. 18A:6-7.6 through 7.13 changed the law of New Jersey regarding what would be considered as confidential. I **CONCLUDE** that A.B.'s signing of the authorization consented to the disclosure of information in the April 25, 2013 Settlement Agreement and I **CONCLUDE** that the BOE had the right and the duty under the statute to disclose it.

ISSUE # 7: Did the Hackensack BOE follow the requirements of N.J.S.A. 18A:6-7.6, et seq. ?

I **CONCLUDE** that the BOE's disclosure of the information set forth in its response to Clifton's questionnaire was required by the "Don't Pass the Trash" statute, notably, 6-7.7.

ISSUE # 8: If so, is the Hackensack BOE entitled to Immunity ?

I **CONCLUDE** that the BOE followed the requirements of the "Don't Pass the Trash" statute, notably 6-7.7, and is therefore immune from liability, civil or criminal.

ORDER

It is hereby **ORDERED** that the Hackensack BOE's motion for **SUMMARY DECISION** is **GRANTED**, and it is further **ORDERED** that A.B. 's motion for **SUMMARY DECISION** is **DENIED** and her Petition is **DISMISSED** in its entirety.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

John P. Scollo

July 22, 2021
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: July 22, 2021

Date Mailed to Parties: July 22, 2021

db

267-21

267-21

New Jersey Commissioner of Education

Final Decision

W.H., on behalf of minor child, Z.A.,

Petitioner,

v.

Board of Education of the City of Beverly, Burlington County,

Respondent.

Synopsis

Pro se petitioner appealed the finding of the respondent Board that her son – at the time, a fifth grader at Beverly City School – was not the victim of harassment, intimidation and bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* Petitioner alleged that Z.A. was the victim of HIB when students said mean things to him after his absences from school caused them to lose an attendance contest and miss out on a pizza party. Petitioner also alleged that students made comments about a smell in the cafeteria that Z.A. felt were directed toward him. The Board contended that its actions had complied with the requirements of the Act, and no HIB was found in this case.

The ALJ found, *inter alia*, that: the required investigation into the alleged incidents of HIB was properly carried out by the Superintendent/Principal, who oversees the implementation of the HIB statute for the district, the Anti-Bullying coordinator, and the Anti-Bullying specialist – all of whom have substantial experience in the implementation of the HIB statute; the prompt and thorough investigation was in accordance with *N.J.S.A.* 18A:37-14, and concluded that there was a "back and forth" of unkind words between Z.A. and the other students regarding the effect of his absences on the class' standing in the March attendance contest; the investigation did not, however, reveal any evidence that Z.A. was targeted due to a distinguishing characteristic about him, his race, his gender, his ethnicity, or any element of the HIB statute; instead, the evidence showed that the incident regarding Z.A.'s attendance represented a conflict between students that did not constitute HIB. The ALJ concluded that the petitioner did not meet her burden of demonstrating that the Board's determination of HIB was arbitrary, capricious, or unreasonable. Accordingly, the ALJ denied petitioner's appeal.

Upon a comprehensive review, the Commissioner concurred with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination as the alleged actions were not motivated by a distinguishing characteristic of Z.A. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

267-21
OAL Dkt. No. EDU 08075-19
Agency Dkt. No. 91-5/19

New Jersey Commissioner of Education

Final Decision

W.H., on behalf of minor child, Z.A.,

Petitioner,

v.

Board of Education of the City of Beverly, Burlington County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

In this matter, petitioner alleged that her son was the victim of harassment, intimidation and bullying (HIB) when students said mean things to him after his absences caused them to lose an attendance contest and miss out on a pizza party. Petitioner also alleged that students made comments about a smell in the cafeteria that Z.A. felt were directed toward him. Following an investigation in accordance with the Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 *et seq.*, the Board found the exchange of comments regarding Z.A.'s absences was a conflict between students that was not motivated by a distinguishing characteristic of Z.A. The Board also found the smell comments were unsubstantiated based on surveillance video and interviews with witnesses.

Following a hearing on the merits, the Administrative Law Judge (ALJ) concluded that the petitioner had not met her burden of demonstrating that the Board's

determination regarding the HIB allegations was arbitrary, capricious, or unreasonable. The ALJ also found that the Board conducted a prompt and thorough investigation in accordance with *N.J.S.A.* 18A:37-14.

Upon review, the Commissioner agrees with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination as the alleged actions were not motivated by a distinguishing characteristic of Z.A.[1] Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 21, 2021
Date of Mailing: October 21, 2021

[1] Although the conduct of the students in this matter did not amount to an act of HIB under the Act, the Board should take steps to ensure that its code of conduct policy is enforced; and all students should be encouraged to interact with each other in a more positive manner.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08075-19
AGENCY DKT. NO. 91-5/19

W.H. on behalf of minor child, Z.A.,
Petitioner,
v.
CITY OF BEVERLY BOARD OF EDUCATION, BURLINGTON COUNTY,
Respondent.

W.H. on behalf of minor child, **Z.A.,** petitioner pro se[1]

David B. Rubin, Esq., for respondent (David Rubin, P.C., Attorney at Law, attorneys)

Record Closed: June 21, 2021 Decided: July 30 2021

BEFORE **JACOB S. GERTSMAN,** ALJ t/a:

STATEMENT OF THE CASE

This matter comes before the Office of Administrative Law (OAL) as the result of petitioning parent challenging the conclusion of respondent, City of Beverly Board of Education's (District or Board) investigation that harassment, intimidation, and bullying (HIB) did not occur, pursuant to N.J.S.A. 18A:37-13.2 et seq.

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[1] Petitioner was represented by counsel at the outset of the case. Counsel's motion to withdraw from the matter was granted by order dated March 5, 2020, and petitioner determined to proceed pro se.

PROCEDURAL HISTORY

Petitioner was notified by letter dated April 18, 2019, that the Board of Education upheld the Administration's finding that there was no instance of HIB in this matter on April 17, 2019. Petitioner filed her appeal on May 1, 2019, and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on June 13, 2019, for a hearing as a contested case. N.J.S.A. 52:14B-1 to B-15; N.J.S.A. 52:14F-1 to F-13.

The undersigned conducted multiple telephone prehearing conferences, which resulted in the scheduling of hearing dates for January 6 and 8, 2020. Those hearings were adjourned at the request of the parties. Following additional telephone conferences a hearing was scheduled for November 19, 2020, via Zoom Video Communications, Inc. (Zoom). On that date, petitioner failed to log on for the Zoom hearing and at my request, respondent's counsel was able to get petitioner on the phone. W.H. then informed me that she did not have access to a computer and requested an in-person hearing. The matter was then adjourned. On the January 28, 2021 telephone conference, petitioner stated that she was ready to proceed with a Zoom hearing, which was then held on March 29, 2021.

Respondent's post-hearing brief was submitted on June 15, 2021. The record was closed on June 16, 2021, after petitioner informed the undersigned that she would not be submitting a post-hearing brief.

FACTUAL DISCUSSION AND FINDINGS

Testimony for Petitioner

W.H., the mother of Z.A., testified that her son Z.A. came home on March 28, 2019, and informed her that students in his class were upset with him, and were calling him names. She added that the other students said that they did not like him because his absences from school caused them not to have a pizza party. The incident was reported to the school who found that the incident was not bullying.

There was no cross-examination.

Z.A. testified that he felt like he was being bullied on the day of the incident. The incident happened in the library, so he informed the library teacher, Mrs. Butler, who instructed him to tell his homeroom teacher Ms. Best. There were no problems the rest of the day, but he added that that the other students did not seem to like him.

On cross-examination, he remembered being asked to write a statement describing what happened but did not know if the other students were asked to write a statement. His mother also asked him to write a statement.

Testimony for Respondent

Dr. Elizabeth Giacobbe (Giacobbe), has served as the Superintendent of the District for ten years. The District, which consists of one school of approximately 350 pre-kindergartners through eighth graders, is housed in one building. Giacobbe additionally serves as the principal and oversees the implementation of the HIB statute. Her office is located in the school, and she is very acquainted with the students.

The District has adopted a policy that contains a definition of HIB that is consistent with that statute. At time of incident in March 2019, Giacobbe had over seven years of experience applying the definition of HIB. The school had one anti-bullying specialist, the school psychologist, Chelsea Light (Light), and an anti-bullying coordinator, Kerri Lawler (Lawler), the director of curriculum and instruction. By 2019, both had some experience in interpreting and applying the HIB statute in their respective roles.

On March 28, 2019, when picking Z.A. up from school, W.H. provided the school with a note from Z.A. describing the incident that happened that morning between him and several other students. Giacobbe made a photocopy of the written account.

Jodi Gottlieb (Gottlieb), the fifth-grade teacher and who was on duty supervising the children before homeroom began when the incident occurred, emailed Giacobbe on March 29,

2019, describing the incident. (R-1.) Giacobbe had requested that Gottlieb email her account of the incident. Under the District's HIB procedures, an investigation was initiated as a result of the allegations being brought to Giacobbe's attention.

During the investigation, Light and Lawler

> [i]dentified the students from Z.'s note and interviewed each one of those students and got their written account of the incident. Z. also in his note made a claim that some of the students that were sitting near him that day in the cafeteria at their lunchtime which would have been after the morning -- the morning lineup that's discussed in the email -- somebody was saying a comment about that something smelled bad.
>
> Then Mrs. Light and Ms. Lawler interviewed – went back and reviewed the videotape to see who was sitting near Z. at the time in the lunchroom and interviewed those students as well to get the account of what occurred in the cafeteria during lunchtime."
>
> TT 37: 1-16

By way of background, the school sponsors contests throughout the year to combat chronic absenteeism. In this instance, it was a "March Madness" competition, named for the annual NCAA Basketball Tournament. Each classroom was assigned a college or university team and the classes competed against each other based on their attendance rate, until one class became the overall winner of the tournament.

Z.A. was absent twice that week and some of his classmates questioned him when he returned to school, accusing him of causing the class to lose in the tournament. The investigation determined that the children engaged in a "back and forth" where the other students "did admit that they were sort of, you know, questioning him and upset with him, but that Z. also returned, you know, some -- some of the jabs back at the -- the kids verbally." (TT: 40: 17-20.) However, the investigation did not reveal any evidence that Z.A. was being targeted because of any particular distinguishing characteristic about him, his race, his gender, his ethnicity, or anything the HIB statute focuses on.

While the investigation did substantiate the students questioning Z.A. about his absences, it concluded that "since it didn't fall underneath the qualifying characteristic that it was not a harassment, intimidation and bullying case." (TT1 38: 24-25, 39: 1-2.)

That does not mean that the behavior of the students was acceptable and Giacobbe noted that Gottlieb found the behavior to be unacceptable and put a stop to it. (R-1.)

Regarding Z.A.'s assertion that other students were talking about a bad smell at the table in the cafeteria, meaning him, Giacobbe reviewed videotape surveillance footage[2] of the incident. The footage did not contain any audio. She determined that none of the students that Z.A. claimed to have made the comments were sitting near him. She questioned the students who were sitting at the table with Z.A. and all of them stated that no one made a comment about a smell.

As a part of the investigation, written statements were requested and received from Z.A. (R-6), Student A (R-7), Student B (R-8) and Student C (R-9). The students were also interviewed by Giacobbe, Light and Lawler with W.H. present during the interview with Z.A.

Giacobbe identified other documents related to the investigation including the March 29, 2019, letter to W.H. advising her that the investigation would be commencing and advising her of certain procedural rights (R-2); the April 4, 2019, letter to W.H. letter informing her that the investigation was concluded, and that the District determined that there was no HIB (R-3); the reporting form containing a summary of the allegations and factual findings of the anti-bullying specialist dated April 5, 2019, (R-4);[3] and the April 18, 2019, letter from the District's counsel to W.H. confirming that she appeared for a hearing on April 17, 2019, and described the proceedings. (R-5.) W.H. was advised of her right to a hearing, which she exercised. At the hearing, W.H. and Z.A. were present and W.H. presented her version of events.

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[2] Giacobbe testified that these videos are recorded over every month or so, as is the District's standard practice. She added that this video would have been preserved if she thought there would be litigation.

[3] This form is not usually provided to parents. W.H. has only been provided with this document as a part of her appeal of the District's investigation.

Giacobbe concluded by stating that to the best of her knowledge, the HIB statute and Board policy procedures were followed.

On cross examination, Giacobbe was asked why she took the word of the other children at the lunch table when they could be covering for each other since if one got in trouble, they all could. She responded that Z.A. accused Y. and S. of making comments about a bad smell in the cafeteria, and the investigation found that they were not sitting near Z.A. Additionally, the investigation was not simply taking the word of Y. and S., as al all of the students sitting near Z.A. in the cafeteria were interviewed.

She reiterated that there was no finding of HIB because "[u]nder the New Jersey Anti-Bullying Bill of Rights it does not meet the – their definition of harassment, intimidation and bullying as it was an equal balance of power and there was no distinguishing characteristics called into question." (TT 65:1-5.)

Kerri Lawler is the Director of Curriculum and Instruction, and the Anti-Bullying Coordinator, for the District. In summarizing her involvement with the investigation, she noted that W.H. brought in the hand-written letter detailing Z.A.'s account of the incidents. The students named in the letter were then interviewed by Lawler, Light and Giacobbe, in order to get their version of the events, with their conclusions drawn from a review of all of the students' accounts. She additionally viewed the videotape surveillance footage of the alleged incident in the cafeteria. Light assisted Lawler in drawing the conclusions based on the evidence, which they then shared with Giacobbe.

She concluded that the students did not use a distinguishing characteristic when they were talking with Z.A. and described the conflict as unkind things said back and forth between Z.A. and the other students.

There was no cross-examination on the issues germane to the instant matter.

Chelsea Light is the school psychologist and Anti-Bullying specialist for the District. Her responsibilities include conducting investigations when a bullying claim is made and working with the anti-bullying coordinator and superintendent to review her findings.

She has a familiarity with the statutory and policy definitions of HIB, which are not the same as the dictionary definitions.

During the investigation, Light reviewed the written statements and interviewed Z.A. with W.H. present. She then reviewed all of the statements, written testimony and video, and concluded that the incidents were a conflict between students without an imbalance of power, nor a highlighted distinguishing characteristic. Her determination was that the incidents did not constitute HIB.

There was no cross-examination.

FACTUAL DISCUSSION

Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In Re Estate of Perrone, 5 N.J. 514 (1950). The Court pronounced:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.
>
> [Ibid. at 522.]

See also, Spagnuolo v. Bonnet, 16 N.J. 546, (1954), State v. Taylor, 38 N.J. Super. 6 (App. Div. 1955).

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, a trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or

because it is overborne by other testimony. Congleton v. Pura- Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

I deem the testimony of Giacobbe to be credible. Her testimony was calm, clear, and direct. Further, her professionalism and thorough understanding of both the HIB statute and the District's policy implementing the statute were apparent. I further deem the testimony of Lawler and Light to be credible. Their testimony, which corroborated Giacobbe, was professional and both witnesses demonstrated their substantial knowledge of both the HIB statute and the District's policy implementing the statute.

I additionally deem the testimony relevant to the instant matter of both W.H. and Z.A., to be credible. W.H.'s relevant testimony was limited to Z.A. informing her of the incident, her reporting of the incident to the school, and the ultimate finding of the investigation. Z.A.'s testimony focused on the fact that he felt bullied during the incident. It should be noted that W.H. did testify that she disagreed with the conclusion of the District's investigation. As she is a pro se litigant, and did not submit a post-hearing brief, that argument will be addressed in the legal analysis.

After consideration of the testimony and the credibility of the witnesses, I **FIND** as the following **FACTS.** The District has adopted a policy that contains a definition of HIB that is consistent with that statute. On March 28, 2019, W.H. provided the school with a statement from Z.A. detailing an incident between him and other students. (R-6.) That statement alleged that the other students were angry at him since his absences caused the class to lose in the school sponsored March Madness Tournament, which was instituted to combat excessive absences in the District. Z.A. also alleged that in the cafeteria during lunch, other students complained of a smell, which Z.A. took to mean him. (Ibid.)

On March 29, 2019, Gottlieb, the teacher supervising the students at the time of the incident, emailed Giacobbe, at her request, providing her account of the incident. (R-1) Gottlieb also noted that she found the behavior to be unacceptable and put a stop to it. (Ibid.) An investigation was then initiated in accordance with the districts HIB procedures. W.H. was notified of the investigation and advised of her procedural rights by letter dated March 29, 2019. (R-2.)

The investigation was conducted by Giacobbe, the superintendent and principal who oversees the implementation of the HIB statute, Lawlor, the Anti-Bullying coordinator, and Light, the Anti-Bullying specialist. All three have substantial experience in the implementation of the HIB statute.

The investigation included the review of written statements from Z.A. (R-6), Student A (R-7), Student B (R-8), and Student C (R-9). These students were all interviewed by Giacobbe, Lawlor, and Light. Z.A. was interviewed with his mother W.H. present. The video surveillance footage of the alleged incident in the cafeteria was also reviewed by the three investigators.

Light and Lawler drew their conclusions based on the evidence which was then shared with Giacobbe. The investigation did conclude that there was a "back and forth" of unkind words between Z.A. and the other students regarding the effect of his absences on the class' standing in the "March Madness" tournament. However, the investigation did not reveal any evidence that Z.A. was targeted due to a distinguishing characteristic about him, his race, his gender, his ethnicity, or any element of the HIB statute.

The investigation further found that there was no substantiation of Z.A.'s claim that students at his table in the cafeteria were talking about a bad smell, that he took to mean him. The videotape surveillance showed that the students accused by Z.A. were not sitting with him at the time of the incident. Those students, as well as the students who were seated with Z.A., all denied making or hearing these statements.

Accordingly, the conclusion of the investigation was that the incident regarding Z.A.'s attendance represented a conflict between students that did not constitute HIB. Notwithstanding this finding, the District did not find the behavior acceptable and Gottlieb, the teacher supervising the students at the time of the incident, put a stop to it. (R-1.)

On April 4, 2019, W.H. was advised by letter that the investigation had concluded, and that the District determined that there was no HIB. (R-3.) W.H. was advised of her right to a hearing, which she exercised. The hearing took place on April 17, 2019, where W.H. and Z.A. were present, and W.H. presented her version of events and contested the findings of the

investigation. The April 18, 2019, letter to W.H. from the District's counsel described the April 17, 2019, proceedings, notified her that the Board had upheld the findings of the investigation that there was no HIB, and advised her of her right to appeal. (R-5.)

LEGAL ANALYSIS AND CONCLUSIONS

The Anti-Bullying Act is designed "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises." N.J.S.A. 18A:37-13.1(f). Under the act, HIB is defined as:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (c.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14.]

Each school district must adopt a policy that prohibits HIB and provides for a prompt response to any alleged HIB incident. N.J.S.A. 18A:37-15. Once an alleged HIB incident is

reported to the school principal, the principal must initiate an investigation within one school day of the report. N.J.S.A. 18A:37-15(b)(6). The investigation shall be conducted by a school anti-bullying specialist and shall take no longer than ten school days to be completed. Ibid.

The results of the investigation shall then be quickly reported to the superintendent of schools, who may take certain remedial action. Ibid. The results shall also be reported to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." Ibid.

The parents of the students involved in any alleged HIB incident are entitled to receive information about the nature of the investigation and the results of the investigation. Ibid. The parents may request a hearing before the board, and the hearing must be held within ten days of the request. Ibid. Any hearing shall be held in executive session to protect the identity of any students involved. Ibid. The board may hear from the anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents. Ibid.

The board must issue a decision at the first meeting after its receipt of the investigation report. Ibid. The board may affirm, reject, or modify the superintendent's decision. Ibid. The board's decision may be appealed to the Commissioner of Education. Ibid.

An action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Thus, in order to prevail, those challenging a HIB decision made by a board of education "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of the Bor. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014) (citation omitted), adopted, Comm'r (April 10, 2014) <http://njlaw.rutgers.edu/collections/oal/>. Also, a board's decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., EDU 10826-12, Initial Decision (March 11, 2013) [citing Campbell v. Dep't

of Civil Serv., 39 N.J. 556, 562 (1963)], adopted, Comm'r (April 25, 2013) <http://njlaw.rutgers.edu/collections/oal/>. Finally, the Commissioner of Education will not disturb the local school board decision unless it was arbitrary, capricious, or unreasonable. Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960); Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966).

Here, petitioner challenges the District's investigation into the incident between Z.A. and the other students which concluded that there was no HIB. The District has adopted a policy that contains a definition of HIB that is consistent with that statute. Consistent with that policy, an investigation was initiated on March 29, 2019, one day after W.H. provided Z.A.'s written statement containing his allegations. The investigation, conducted by Giacobbe, the superintendent and principal who oversees the implementation of the HIB statute, Lawler, the Anti-Bullying coordinator, and Light, the Anti-Bullying specialist, concluded on April 4, 2019, with a finding of no HIB. W.H. was advised of her right to a hearing to contest the determination, which she exercised on April 17, 2019. W.H. presented her version of events and argued in opposition to the findings of the investigation. The Board upheld the findings and notified W.H. of her right to appeal. Accordingly, I **CONCLUDE** that the District's prompt and thorough investigation of Z.A.'s allegation satisfies the requirements set forth in N.J.S.A. 18A:37-15(b)(6).

Turning now to petitioner's challenge to the conclusions of the investigation. Giacobbe, Lawler and Light reviewed the written statements of, and conducted interviews with, the students involved in the incident, and concluded that Z.A. was not targeted based on his membership in one of the legally protected categories or some other "distinguishing characteristic" as set forth in N.J.S.A. 18A:37-14.

Here, the record is devoid of any testimony or documentary evidence to demonstrate that the students engaged in the "back and forth" targeting Z.A. based on a distinguishing characteristic. In fact, petitioner does not make this argument. W.H. testified "[w]hen I reported it to the school they told me he wasn't being bullied. They — they told me that there's certain – you have to be – it's like a list of things that you have to do in order to be considered bullying and I feel like it's – it shouldn't be that way. (TT 15: 25, 16: 1-3.)

W.H., like any parent, is seeking to protect her child from what she believes is bullying. However, not all disputes between students are subject to the HIB statute. M.S. and N.S. o/b/o J.S. v. Board of Education of the Township of Hainesport, OAL Dkt. No. EDU 8878-16, Agency Dkt. No. 151-5/16 (Initial Decision, March 28, 2019), adopted (Comm'r, June 18, 2019). ("It is important here to note that not all disputes between students, not all actions that may involve harassment, intimidation and bullying, necessarily come within the reach of the Act. The motivating element of the matter must be a 'distinguishing characteristic, actual or perceived, such as identified in the Act.") It should be noted that notwithstanding the findings of the investigation, the District does not dispute that the conduct was inappropriate, and the teacher dealt with it promptly. (District Brief at 8.)

With regard to the "smell comment" alleged by Z.A., the record demonstrates that the petitioner has failed to present any testimony or documentary evidence to contravene the findings of the investigation. Giacobbe, Lawler and Light reviewed the videotape surveillance and determined that the students accused by Z.A. were not seated near him at the time of the incident. Those students, as well as the students who actually were seated near Z.A., were subsequently interviewed and all denied making or hearing these statements. W.H. raised the issue of the students covering for each other to avoid getting in trouble for the incident. However, as Giacobbe testified, the investigation did not simply take the word of the students accused by Z.A. All students seated near him were interviewed and the surveillance video demonstrated that there was no opportunity for this incident to have occurred as alleged by Z.A.

Based on the forgoing, I **CONCLUDE** that petitioner has not met her burden to demonstrate that the conclusions of the investigation were made in bad faith. I **FURTHER CONCLUDE** that petitioner has not met her burden to show that the Board's determination, that the incident between Z.A. and the other students on March 28, 2019, was not HIB, was arbitrary, capricious, or unreasonable.

ORDER

It is **ORDERED** that petitioner's appeal of the conclusion of the District's investigation is **DENIED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 30, 2021
DATE

JACOB S. GERTSMAN, ALJ t/a

Date Received at Agency: 7/30/2021 emailed

Date Mailed to Parties: 7/30/2021 emailed

JSG/nd

APPENDIX

WITNESSES

For Petitioner:

W.H.

Z.A.

For Respondent:

Dr. Elizabeth Giacobbe

Kerri Lawler

Chelsea Light

EXHIBITS

For Petitioner:

None.

For Respondent:

R-1 Email from J. Gottlieb to E. Giacobbe, dated March 29, 2019

R-2 Letter from E. Giacobbe to W.H., dated March 29, 2019

R-3 Letter from E. Giacobbe to W.H., dated March 18, 2019

R-4 HIB Reporting Form, dated April 5, 2019

R-5 Letter from D. Rubin, Esq., to W.H., dated April 18, 2019

R-6 Statement of Z.A., dated March 28, 2019

R-7 Statement of Student A, dated March 29, 2019

R-8 Statement of Student B, dated March 29, 2019

R-9 Statement of Student C, dated March 29, 2019

272-21

272-21SEC
SEC Dkt. No. T17-21
Agency Dkt. No. 181-9/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Judy Khan,
Englewood on the Palisades Charter School,
Bergen County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent completed training after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 28, 2021
Date of Mailing: October 28, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T17-21
Amended Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Judy Khan,
Englewood on the Palisades Charter School, Bergen County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of *N.J.S.A.*18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Englewood on the Palisades Charter School, located in Bergen County. Pursuant to *N.J.S.A.* 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 3 training program by June 30, 2021.

On July 1, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2021 and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement on July 29, 2021, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2021.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on September 21, 2021,[3] the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, as well as *N.J.A.C.* 6A:28-4.1 and *N.J.A.C.* 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the

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[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

[3] At its special meeting on August 30, 2021, the Commission adopted a decision recommending removal; however, the Commission was later advised that Respondent completed training after the OTSC was issued, but before the Commission's special meeting.

reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[4] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: September 21, 2021

[4] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Amended Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T17-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Judy Khan (Respondent) is a charter school trustee of the Englewood on the Palisades Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her Governance 3 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2021; and

Whereas, at its meeting on September 21, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

Whereas, at its meeting on September 21, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its meeting on September 21, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its meeting on September 21, 2021.

Salma T. Chand

Salma T. Chand, Executive Director

273-21
State Board of Examiners Docket No. 1718-170
Agency Dkt. No. 5-4/21A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Revocation
of the Certificates of Lesley Etheridge
by the State Board of Examiners.

Order of Revocation by the State Board of Examiners, April 1, 2021

For the Respondent-Appellant, Lesley Etheridge, *pro se*

For the Petitioner-Respondent State Board of Examiners, Colin G. Klika, Deputy Attorney General (Andrew J. Bruck, Acting Attorney General of New Jersey)

Appellant challenges the determination of the New Jersey State Board of Examiners (Board) that her actions warranted the revocation of her Teacher of Electronic Technology Certificate of Eligibility and Teacher of Electronic Technology Standard Certificate.

In this matter, appellant was a teacher in the Passaic County Vocational School District (PCVS). PCVS certified tenure charges against appellant for inefficiency and unbecoming conduct, alleging that appellant falsified students' grades and engaged in inappropriate grading practices, failed to appear at several co-teaching assignments or hall duty, left campus without authorization, engaged in unprofessional conduct with parents and administration, and disregarded her corrective action plan (CAP) requirements. Following an arbitration, the Arbitrator found that appellant was "notably uncooperative" with PCVS' efforts to improve her teaching; further, her failure to comply with instructions and recommendations

"reflects an inability and/or unwillingness to perform as befits a tenured teacher." (Arbitrator's Opinion and Award at 14). The Arbitrator also considered appellant's "'outrageously inappropriate behavior,' combined with lack of 'remorse or contrition' and a likelihood of repeating the behavior." *Id.* at 15. Accordingly, the Arbitrator found just cause to terminate appellant.

Following issuance of an Order to Show Cause as to why appellant's certificates should not be revoked, the Board transmitted the matter to the Office of Administrative Law (OAL) for a hearing. The Administrative Law Judge (ALJ) found that collateral estoppel precludes relitigation of the facts proven during the tenure hearing, which demonstrate that appellant engaged in conduct unbecoming a teacher. However, appellant was granted a hearing as to whether the penalty of revocation was appropriate. At the hearing, appellant challenged the accuracy of the grade falsification charge and had her husband – who was also an employee of PCVS – attempt to take the blame. The ALJ agreed with the Arbitrator that appellant's conduct was "outrageously inappropriate" and found that appellant's "pattern of unbecoming conduct and insubordination, coupled with her complete lack of remorse and failure to take any responsibility for her woefully inappropriate actions and poor judgment" constitutes just cause for the revocation of her certificates. (Initial Decision at 7). Thereafter, the Board adopted the Initial Decision of the ALJ and ordered the revocation of appellant's certificates.

On appeal, appellant argues that her husband created the final exam at issue and admitted that he had falsified students' grades. According to appellant, PCVS filed tenure charges against her in retaliation for a whistleblower complaint. Appellant lists a number of interactions with political figures, dating back 40 years to when appellant was a teenager, that she contends contributed to PCVS' actions in this matter. Appellant takes issue with portions of

the Arbitrator's decision, claiming that it includes false statements, and with the Arbitrator's alleged failure to admit appellant's exhibits into evidence and to allow appellant to review PCVS' evidence. Appellant also alleges that Board member Melissa Pearce is formerly the executive superintendent at PCVS, creating a conflict of interest that required her recusal from the Board's vote, thereby preventing a quorum and making the Board's vote invalid.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute her judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a).

After a comprehensive review of the record, the Commissioner finds that the record adequately supports the Board's determination that appellant engaged in unbecoming conduct and that revocation of her teaching certificates is the appropriate penalty. Appellant's arguments reiterate those that she made during the tenure proceedings and at the OAL and fail to demonstrate that the Board's decision was arbitrary, capricious, or unreasonable. The majority of appellant's arguments on appeal take issue with the decision of the Arbitrator regarding the tenure charges. However, as the ALJ correctly concluded, the doctrine of collateral estoppel precludes appellant from relitigating the issue of unbecoming conduct, as appellant had a full and fair opportunity to contest those charges during the tenure proceeding.

The only issue regarding the Board's decision raised by appellant is based on the appointment of the former executive superintendent at PCVS to the Board. The Commissioner does not find this argument persuasive. The conduct of appellant at issue in this case occurred in 2013-2015, with tenure charges filed in 2015 and the arbitrator's decision issued in 2016.

Ms. Pearce, according to appellant, became the executive superintendent at PCVS in 2018, well after those events, and would have had no involvement in the filing or litigation of the tenure charges. Furthermore, PCVS is not a party to the current action. Accordingly, the Commissioner finds that Ms. Pearce was not required to recuse herself from the Board's vote.

Additionally, there is nothing in the record to suggest that the Board's decision to revoke appellant's certificates – based on the nature of the unbecoming conduct proven during the hearing at the OAL – was arbitrary, capricious or unreasonable. Accordingly, the decision of the State Board of Examiners is affirmed. Appellant's Teacher of Electronic Technology Certificate of Eligibility and Teacher of Electronic Technology Standard Certificate are hereby revoked.[1]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 28, 2021
Date of Mailing: October 28, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
LESLEY A. ETHERIDGE	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 1718-170

At its meeting of January 19, 2018, the State Board of Examiners (Board) reviewed information it received regarding Lesley A. Etheridge. The Passaic County Vocational School District (Passaic) certified tenure charges against Etheridge for inefficiency and unbecoming conduct. Pursuant to *N.J.S.A.* 18A:6-16, the Arbitrator assigned by the Department of Education to hear the case, referred to the State Board of Examiners (Board) the tenure matter captioned *In the Matter of the Arbitration Between Lesley Etheridge and Passaic County Vocational School District,* Dkt. No. 120-6/15 (Arbitrator's Decision, June 27, 2016).

Passaic alleged that during the 2014-15 school year, Etheridge refused to acknowledge or cooperate with administration directives about submitting reports and received several reprimands for missing important deadlines and completing required tasks. Etheridge also repeatedly failed to acknowledge observation reports of her classroom performance. Passaic also contended that Etheridge falsified student grades by giving one student an A+ on a final exam even though the student never took the exam and giving all other students in her class an A+ on their final after encouraging them not to complete the exam. Etheridge also refused to remove unjustified participation/discipline grades entered into her grade book. Passaic also alleged that at various times during the 2014-15 school year Etheridge either left her class unattended, failed to report to her co-teaching assignment, left campus without permission or failed to report to her hall duty. In addition, the district charged Etheridge with sending emails to the administration during instructional time on 14 separate occasions and cited her for sending emails with an improper tone and demeanor. Passaic also contended that Etheridge engaged in unprofessional conduct during

an affirmative action meeting and several parent-teacher meetings. She also allegedly coerced students to write statements to the administration and showed an unauthorized film to students.

In her Decision (which is incorporated herein by reference), the Arbitrator noted that Etheridge "was notably uncooperative" with Passaic's effort to improve her teaching performance during the 2014-15 school year. She further found that Etheridge's "failure to comply with explicit instructions and recommendations from the school administration, and, in some instances, even to acknowledge them, reflects an inability and/or unwillingness to perform as befits a tenured teacher." The Arbitrator also stated that Etheridge produced no compelling evidence to explain her lack of cooperation with the administration's reasonable demands or substantiate her accusation that the district was trying to ruin her professional reputation.

The Arbitrator determined that "outrageously inappropriate behavior" combined with lack of "remorse or contrition" and "a likelihood of repeating the behavior" were all factors present in this matter. Having reviewed the entire record, the Arbitrator sustained all the tenure charges and concluded that Etheridge's conduct warranted the loss of tenure and dismissal from the school district. Etheridge was dismissed from her tenured employment with Passaic as a result of the charges proven in the tenure proceeding.

Etheridge currently holds a Teacher of Electronic Technology Certificate of Eligibility and Teacher of Electronic Technology Standard Certificate. After reviewing the above information, at its March 1, 2018 meeting, the Board voted to issue an Order to Show Cause (OSC) to Etheridge as to why her certificates should not be revoked.

The Board sent Etheridge the OSC by regular and certified mail. The OSC provided that Etheridge must file an Answer within 30 days. Etheridge responded by filing an Answer. In her Answer, Etheridge denied the allegations in the Order and indicated that the charges were falsely

affirmed. Etheridge alleged that the Statement of Evidence contained fictitious statements and documents. She also argued that there were "major irregularities" in the date of the filing of the tenure charges. Etheridge further alleged that there was an error in that the Arbitrator was not in possession of the "Charge Book" for several weeks after the filing of the Tenure Charges.

Although the Arbitrator's decision found Etheridge engaged in conduct unbecoming, considering Etheridge's allegations regarding the matter, the Board believed there were materials facts in dispute specifically as it related to mitigation of the penalty. Accordingly, on January 16, 2019, the Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. On September 16, 2019, the OAL entered an Order Granting Motion for Partial Initial Decision finding that Etheridge engaged in conduct unbecoming a teacher, as demonstrated by the facts proven before the Arbitrator. The September 16, 2019 Order also required that the matter proceed to a hearing limited to determining the appropriate penalty. At this hearing, Etheridge would have an opportunity to present mitigative evidence to support her position that revocation of her teaching certificates was unwarranted[1].

On April 14, 2020, Administrative Law Judge (ALJ) Susana E. Guerrero issued an Initial Decision. *In the Matter of the Certificates of Lesley A. Etheridge*, Dkt. No. EDE 01145-19 (Initial Decision, April 14, 2020).

After a day of hearing, ALJ Guerrero found that, Etheridge's conduct constituted unbecoming conduct. (Initial Decision, slip op. at p. 6). The ALJ agreed with the Arbitrator that Etheridge's behavior was not just unbecoming, but "outrageously inappropriate." *Id.* at p. 7. ALJ Guerrero indicated that at the March 6, 2020 hearing, Etheridge "expressed no remorse or even an

[1] Due to the Board's meeting schedule, it was unable to consider and/or act on the Order Granting Partial Initial Decision prior to the expiration of same on December 16, 2019. Absent Etheridge's consent to an extension, the OAL notified the Board that it was unable to grant the Board an extension. Pursuant to N.J.A.C. 1:1-18.6(e), the Partial Initial Decision was deemed adopted as a matter of law.

explanation for her actions." *Id.* Etheridge blamed the District and had her husband try to take responsibility for the grade falsification charges, which were the charges that ALJ Guerrero found to be the most egregious in this case. *Id.* ALJ Guerrero gave little weight to the testimony of Etheridge's husband, mother, and friend. *Id.* None of the testimony gave the ALJ cause to impose a penalty less than revocation. *Id.*

Considering Etheridge's pattern of unbecoming conduct and insubordination, along with "complete lack of remorse and failure to take any responsibility for her woefully inappropriate actions and poor judgment," ALJ Guerrero concluded that there is just cause for the revocation of her teaching certificates. *Id.* Consequently, ALJ Guerrero ordered the revocation of Etheridge's certificates. *Id.* Etheridge filed Exceptions and the Deputy Attorney General (DAG or Deputy) representing the Board filed Reply Exceptions.

In her Exceptions, Etheridge alleged that on March 6, 2020, Rodney Etheridge, an electronics instructor, admitted that he secretly composed the final exam that Etheridge is accused of falsifying and that his conduct caused tension in their marriage. Etheridge Exceptions at p. 2. The remainder of Etheridge's exceptions repeat the arguments she made in prior submissions. She indicates that the Arbitrator did not admit, label, or number any exhibits into the record which prevented Etheridge from obtaining a fair hearing. *Id.* Additionally, she indicates that there was retaliation against her for making formal complaint regarding discriminatory student admission and retention grade falsification. *Id.* at p. 3 and p 9-10. Moreover, Etheridge argues that the ALJ and the DAG did not cite any cases whereupon a motion for summary judgment was granted in a NJ Teach Act case.

In her Reply Exceptions, the DAG argued that Etheridge's exceptions are deficient and should be disregarded. Reply Exceptions at p. 3. She argues that Etheridge refiled her September

27, 2019 Exceptions to the Partial Initial Decision. *Id.* Specifically, Etheridge goes through the facts that were litigated in her tenure proceeding and attaches irrelevant materials. *Id.* The DAG also argues that the ALJ's decision should be adopted because her conduct warrants revocation. *Id.* at p. 5. She states that there is already a finding of unbecoming conduct from the Partial Initial Decision and that nothing was presented at the penalty hearing that would mitigate the penalty. *Id.* at p. 6.

The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of May 14, 2020[2], the Board reviewed the Initial Decision, Exceptions and Reply Exceptions. After full and fair consideration of the Decision and submissions, the Board voted to adopt the Initial Decision. Prior to the June 26, 2020 meeting, wherein the Board was scheduled to vote upon this written form of order, Etheridge contacted the Board office and requested to appear in person. Although there was no legal requirement that the Board permit Etheridge to appear, rather than create a procedural issue, Etheridge was advised she may appear via Skype during the Board's virtual meeting on June 26, 2020. Etheridge indicated she did not wish to appear virtually but preferred to appear in person. Due to the unprecedented public health emergency, the Board did not believe it would be operating virtually for an entire year and it decided to hold the matter until an in-person meeting could be conducted as a courtesy to Etheridge. In the interim, the Board continued to request extensions of time from the OAL for considering the Initial Decision in this matter. The Board no longer has consent to continue extensions in this matter and has placed this written decision for consideration on the April 1, 2021 meeting agenda and offered Etheridge the opportunity to appear virtually.

[2] Due to the public health emergency, the May 14, 2020 meeting was the Board's first virtual meeting.

On April 1, 2021, Etheridge appeared before the Board virtually and made a 5-minute statement regarding this matter.

"Teachers ... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. As noted above, after reviewing the record, ALJ Guerrero concluded that summary decision was appropriate in this case due to the application of collateral estoppel resulting from the factual findings in the Arbitration Decision. Having found unbecoming conduct, combined with Guerrero's credibility findings regarding the witnesses presented by Etheridge in the penalty hearing and the fact that Etheridge showed no remorse for her actions and attempted to blame those around her for her conduct, the Board finds no reason to disturb the ALJ's initial decision. Accordingly, after reviewing the entire record, the Board agrees with the ALJ's assessment regarding Etheridge's conduct and the appropriate resultant penalty.

The record unequivocally established that Etheridge falsified student's grades and engaged in inappropriate grading practices, failed to appear at several co-teaching assignments, hall duty, left campus without authorization, engaged in unprofessional conduct with parents and faculty, and failed to comply with aspects of her corrective action plan. These events, coupled with Etheridge's lack of remorse or acceptance of responsibility for her actions, provide ample justification for the revocation of her certificates. The Board agrees with the ALJ that the mitigation she presented does not compel a different result. The Board therefore believes that the only appropriate penalty in this matter is the revocation of her certificates.

Accordingly, on May 14, 2020, the Board voted to adopt the Initial Decision and ordered the revocation of Etheridge's certificates. On this 1st day of April, 2021, the Board formally

adopted its written decision to adopt the Initial Decision in this matter and it is therefore ORDERED that Lesley A. Etheridge's certificates are hereby revoked, effective immediately. It is further ordered that Etheridge return her certificates to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Rani Singh, Secretary
State Board of Examiners

RS/KAG/rg

Date of Mailing: April 6, 2021
via certified and regular mail

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.

274-21

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

October 28, 2021

VIA EMAIL ONLY
Marc H. Zitomer, Esq.
Schenck Price Smith & King, LLP
220 Park Avenue, P.O. Box 991
Florham Park, NJ 07932

Richard A. Friedman, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
150 West State Street, Suite 1402
Newark, NJ 07102

Re: *Monika Vakulchik v. Board of Education of the Borough of Dunellen, Middlesex County*, Agency Dkt. No. 159-7/20, Commissioner Decision No. 194-21.

Dear Parties:

I have reviewed the materials filed in connection with respondent Dunellen Board of Education's Motion to Stay the September 16, 2021 decision reinstating petitioner Monika Vakulckik to her teaching position, pending appeal.

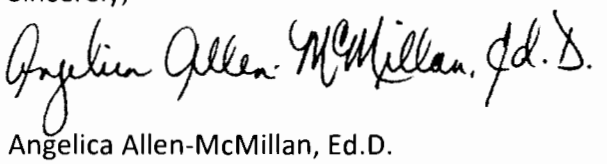
Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that the movant has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

Upon review of the parties' submissions, I find that the Board has failed to meet the standard required for a stay of the September 16, 2021 decision. Most notably, the Board has failed to establish a likelihood of success on the merits. Regarding this prong, the Board argues that it substantially complied with the statutory notice requirements. The petitioner had actual notice of her non-renewal and was able to exercise her right to a statement of reasons and a *Donaldson* hearing to dispute the non-renewal decision.

In the September 16, 2021 decision, the Commissioner determined that the Board had not substantially complied with the statute, because it had not provided a reasonable explanation for its noncompliance or demonstrated that it took steps to comply with the statute. In its motion papers, the Board generally reiterated the arguments previously made before the Commissioner, which were fully considered before the September 16, 2021 decision was issued. The Board further contends that it did take steps to comply with the statute by providing petitioner with a statement of reasons for her non-renewal and a *Donaldson* hearing. However, those steps took place after the failure to provide written notice from the superintendent and demonstrate compliance with other provisions of the statutory framework, not the notice provision. The Board also argues that petitioner had actual notice of her non-renewal, but the Commissioner determined in the September 16, 2021 decision that petitioner's knowledge does not excuse the Board from complying with its statutory notice obligations. As a result, the Board has failed to demonstrate a likelihood of success on the merits.

In light of the fact that all of the *Crowe* prongs must be met in order for a stay to be granted, it is not necessary to analyze the three remaining factors. Accordingly, respondent's request for a stay of the September 16, 2021 decision is hereby DENIED.[1]

Sincerely,



Angelica Allen-McMillan, Ed.D.
Acting Commissioner

c: State Law Library

274-21L

[1] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

275-21

275-21

New Jersey Commissioner of Education

Decision

Lovena Batts,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Synopsis

This matter stems from tenure charges certified and filed by the respondent Board on April 9, 2019, against petitioner – a tenured teacher – charging her with incapacity, excessive absenteeism and other just cause, and seeking her dismissal. Petitioner began working in the Board's district in September 2010, earning tenure in September 2013. During the 2015-2016, 2016-2017, and 2017-2018 school years, petitioner was absent from work an excessive number of days each year. Petitioner has not worked in the school district since September 2017 and has been off the payroll since that time. In January 2020, petitioner filed the within appeal, seeking immediate reinstatement to the Board's payroll and reimbursement for all compensation withheld since October 2019, pursuant to *N.J.S.A.* 18A:6-14. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; *N.J.S.A.* 18A:6-14 does not entitle petitioner to be paid her salary as of October 2019 and during the pendency of the tenure proceedings; *N.J.S.A.* 18A:6-14 only applies when a tenured employee is taken off payroll – or suspended without pay – due to suspension following tenure charges; petitioner in this matter was not suspended upon certification of the tenure charges, but rather had been removed from the Board's payroll in 2017, long before tenure charges were filed in April 2019; and the doctors' letters petitioner submitted clearing her for work in September 2019 do not impact whether she is entitled to payment under *N.J.S.A.* 18A:6-14. Accordingly, the ALJ granted the Board's motion for summary decision, denied petitioner's opposing motion, and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion, and adopted the Initial Decision as the final decision is this matter for the reasons expressed therein. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

275-21

OAL Dkt. No. EDU 01936-20
Agency Dkt. No. 8-1/20

New Jersey Commissioner of Education

Decision

Lovena Batts,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the petitioner, in accordance with *N.J.A.C.* 1:1-18.4, and the Board's reply thereto.

This matter stems from tenure charges certified and filed by the Board on April 9, 2019, against petitioner – a tenured teacher – charging petitioner with incapacity, excessive absenteeism and other just cause, and seeking her dismissal. Petitioner had been absent approximately 46-56 days in the 2015-2016 school year, 30.5 days in the 2016-2017 school year, and 168.5 days in the 2017-2018 school year. Petitioner has been absent from work since on or about September 13, 2017 and has been off the Board's payroll since 2017. Following the filing of tenure charges, petitioner submitted letters from two doctors, dated September 12 and 16, 2019, clearing her to return to work in September 2019. Petitioner subsequently filed the within petition of appeal seeking to be reinstated to the payroll during the pendency of the tenure hearing as of October 6, 2019, based on *N.J.S.A.* 18A:6-14.

Following motions for summary decision, the Administrative Law Judge (ALJ) found that *N.J.S.A.* 18A:6-14 does not entitle petitioner to be paid her salary as of October 6, 2019 and during the pendency of the tenure proceedings. *N.J.S.A.* 18A:6-14 provides:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the arbitrator is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. . .

The ALJ concluded that, considering the principles of statutory construction, *N.J.S.A.* 18A:6-14 only applies when a tenured employee is taken off payroll – or suspended without pay – due to suspension following tenure charges. Here, the ALJ found that petitioner was not suspended upon certification of the tenure charges, but rather had been removed from the Board's payroll in 2017, long before tenure charges were filed in April 2019. Further, the ALJ noted that the letters petitioner submitted clearing her for work in September 2019 do not impact whether she is entitled to payment under *N.J.S.A.* 18A:6-14.

In her exceptions, petitioner argues that the ALJ incorrectly determined that she was not suspended upon certification of the tenure charges and that therefore *N.J.S.A.* 18A:6-14 did not apply. Petitioner attached a copy of a "Resolution Certifying Charges and Suspension without Pay," (Resolution) in which she contends the Board approved the filing of tenure charges against her and suspended her without pay, effective March 25, 2019. According to petitioner, because she was suspended without pay upon the certification of tenure charges, *N.J.S.A.* 18A:6-14 applies to her case, and she is entitled to be reinstated to the payroll with back pay. As such, petitioner urges the Commissioner to reject the Initial Decision. Alternatively, petitioner argues that whether she was suspended is a disputed material fact that warrants a hearing.

In reply, the Board argues that petitioner failed to make that argument before the ALJ; regardless, the argument is without merit. The Board contends that the Resolution did not take petitioner off payroll as she was removed from payroll in 2017, so the sentence suspending petitioner in the Resolution is irrelevant. As such, the Board argues that the Initial Decision should be adopted.

Upon review, the Commissioner agrees with the ALJ that *N.J.S.A.* 18A:6-14 does not entitle petitioner to be paid her salary during the pendency of the tenure proceedings. Petitioner was not removed from the payroll due to the filing of tenure charges; rather, she had not been to work nor been on the payroll for two years prior to the filing of the charges. *N.J.S.A.* 18A:6-14 is intended "to alleviate 'the economic hardship endured by teachers . . . suspended without pay pending the outcome of charges filed against them and certified for [a] hearing. . . .'" *Pugliese v. State Operated School District of the City of Newark,* 454 *N.J. Super.* 495, 505 (App. Div. 2018) (quoting *In re Grossman*, 127 *N.J. Super.* 13, 35-36 (App. Div. 1974)). In this circumstance, it is not the statute's intent to give petitioner a windfall by having her placed on the payroll solely because tenure charges were filed when she had not appeared for work nor been paid in two years. Although the petitioner's argument regarding the Resolution was not presented before the ALJ, the Commissioner notes that this Resolution appears to consist of standard language that did not have the actual effect of suspending petitioner as she was already not working or getting paid.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed herein. The petition is hereby dismissed.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 28, 2021
Date of Mailing: October 28, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 01936-20
AGENCY DKT. NO. 8-1/20

LOVENA BATTS,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,
Respondent.

Nicholas Poberezhsky, Esq., for petitioner (Caruso, Smith, Picini, attorneys)

Stephen J. Edelstein, Esq., for respondent (Weiner Law Group, attorneys)

Record Closed: July 26, 2021 Decided: August 4, 2021

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE

Petitioner Lovena Batts (petitioner or Batts) seeks reinstatement to the payroll pursuant to N.J.S.A. 18A:6-14 during the pendency of tenure proceedings by respondent Roselle Borough Board of Education (the Board).

PROCEDURAL HISTORY

On January 9, 2020, petitioner filed a Certified Petition with the Commissioner of Education (the Commissioner) seeking an order requiring the Board "to immediately reinstate her to the payroll and benefits plan, and to reimburse her for all compensation withheld from her since October 6, 2019." Petitioner's claim is predicated on N.J.S.A. 18A:6-14. On January 29, 2020, the Board filed an Answer and Affirmative Defenses, and the Department of Education transmitted the matter to the Office of Administrative Law for determination as a contested case. Telephone conferences were held on March 2 and April 15, 2020, after which I entered an order on April 29, 2020, at petitioner's request, placing the matter on the inactive list until July 15, 2020. During a telephone conference on July 7, 2020, a schedule was established for the submission of cross-motions for summary decision.[1] Petitioner filed a brief (with exhibits attached) in support of her motion, along with a certification by petitioner (Batts Cert.). The Board submitted a brief in support of its motion; a brief in opposition to petitioner's motion; a Sworn Statement of Evidence by the Interim Superintendent of Schools (Dr. James Baker); and certifications by counsel (Edelstein Cert.). The parties also filed a Joint Stipulation of Facts. Oral argument on the cross-motions was entertained on July 26, 2021.

FINDINGS OF FACT

Based upon a review of the documentary evidence presented, including the Joint Stipulation of Facts (Stip.) and the certifications submitted, I **FIND** the following pertinent **FACTS**:

The Board operates the Roselle Public School District, which is duly organized under the laws of the State of New Jersey and tasked with educating students Grades Pre-K-12. (Stip. at ¶ 1.) Batts has been employed by the Board as a certificated elementary teacher since on or about September 2010. (See Stip. at ¶¶ 2, 7.) She

[1] The Board had previously filed a motion for summary decision with its answer, after which petitioner filed a cross-motion for summary decision. These motions were withdrawn and replaced by the later submissions.

became tenured in or about September 2013. (Stip. at ¶ 2.) Batts was assigned to teach basic skills at Dr. Charles C. Polk Elementary School. (Stip. at ¶ 3.)

During the 2015–2016 school year, Batts was absent approximately forty-six to fifty-six days, including five family illness days, ten sick days, three personal days, thirty-one Family Medical Leave Act (FMLA) days, and seven unpaid days. (See Edelstein Cert. at Exhibit A (Tenure Charges); Sworn Statement of Evidence at Exhibit 4.)[2]

For the 2016–2017 school year, Batts was absent a total of thirty and one-half days, including twelve sick days, three personal days, one other, and fourteen and one-half unpaid days. (See Edelstein Cert. at Exhibit A (Tenure Charges); Sworn Statement of Evidence at Exhibit 9.)

For the 2017–2018 school year, Batts was absent a total of one hundred sixty-eight and one-half days, including twelve sick days, one and one-half personal days, and 155 unpaid days. (See Edelstein Cert. at Exhibit A (Tenure Charges); Sworn Statement of Evidence at Exhibit 10.) Batts has been absent from work since on or about September 13, 2017. (Stip. at ¶ 10.)

On or about April 9, 2019, the Board certified and filed tenure charges with the Commissioner charging Batts with incapacity, excessive absenteeism and other just cause and seeking her dismissal. (Stip. at ¶ 11; see Edelstein Cert. at Exhibit A.) After being granted an extension of time to respond, Batts, through her then-counsel, filed her answer to the tenure charges on May 2, 2019. (Stip. at ¶ 12.) On or about May 11, 2019, the Commissioner appointed Dr. McKissick to serve as the arbitrator. (Stip. at ¶ 13.) To date, the tenure charges have not been adjudicated. (Edelstein Cert. at ¶ 2.)

Batts has been off the Board's payroll since 2017, and her payroll status did not change because of the filing of the tenure charges in April 2019. (See Edelstein Cert., Exhibit B at ¶¶ 3 and 12.) Batts admits that "while out on medical leave since October

[2] Although the Sworn Tenure Charges state that Batts was absent a total of forty-six days, the listed days equal fifty-six days.

2017, [she] exhausted her accumulated sick days and was consequently removed from the payroll prior to April 2019." (Batts' brief at 3.)

More than five months after the tenure charges were filed, Batts' attorney provided letters from two doctors, dated September 12 and September 16, 2019, to the Board's attorney. (Batts Cert. at ¶ 4 and Exhibit 3.)[3] The letters state that the two doctors have cleared Batts to return to work in September 2019. (Id. at Exhibit 3.)

LEGAL DISCUSSION AND CONCLUSIONS

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary-judgment rule embodied in the New Jersey Court Rules. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in deciding the motion:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2.
>
> [Citations omitted.]

[3] According to Batts' brief, the letters were issued to the Board's attorney in September 2019. (Batts' brief at 4.)

In evaluating the merits of the motion, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Judson, 17 N.J. at 75. However, "[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). The New Jersey Supreme Court has cautioned that, "if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla, . . . '[f]anciful, frivolous, gauzy or merely suspicious' . . ., he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact." Judson, 17 N.J. at 75 (citation omitted). Stated differently, "[b]are conclusions . . . without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." U.S. Pipe & Foundry Co. v. Am. Arbitration Ass'n, 67 N.J. Super. 384, 399-400 (App. Div. 1961). Further, the "non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill, 142 N.J. at 529. Disputed issues of fact that are immaterial or of an insubstantial nature will not suffice. Ibid. Rather, "[c]ompetent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments,'" Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014), certif. denied, 220 N.J. 269 (2015) (citation omitted), and the party opposing the motion "'must do more than simply show that there is some metaphysical doubt as to the material facts.'" Alfano v. Schaud, 429 N.J. Super. 469, 474 (App. Div. 2013), certif. denied, 214 N.J. 119 (2013) (citation omitted).

Judged against these standards, I **CONCLUDE**, and the parties agree, that there is no genuine issue as to any material fact and that the matter is ripe for summary decision.

N.J.S.A. 18A:6-14, entitled "[s]uspension upon certification of charge; compensation; reinstatement," directs in pertinent part:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is

> made, with or without pay, but, if the determination of the charge by the arbitrator is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made . . . . (Emphasis added.)

The Legislature's intent in enacting the statute was "to alleviate 'the economic hardship endured by teachers . . . suspended without pay pending the outcome of charges filed against them and certified for [a] hearing. . . .'" Pugliese v. State-Operated Sch. Dist. of City of Newark, 454 N.J. Super. 495, 505 (App. Div. 2018) (quoting In re Grossman, 127 N.J. Super. 13, 35-36 (App. Div. 1974)).

Batts argues that the Board certified the tenure charges on April 9, 2019; the 121st calendar day following certification was August 7, 2019; Batts was granted a sixty-day adjournment of the tenure arbitration to afford her time to seek new counsel; and, if the 120-day unpaid suspension period is tolled by sixty days, the Board was required to reinstate Batts' salary by October 6, 2019 pursuant to N.J.S.A. 18A:6-14.[4]

The principles governing statutory construction are well settled. The "overriding objective in determining the meaning of a statute is to 'effectuate the legislative intent in light of the language used and the objects sought to be achieved.'" McCann v. Clerk of Jersey City, 167 N.J. 311, 320 (2001) (citation omitted). The general rule of statutory construction requires an examination of the language of a statute to determine whether the language is clear or ambiguous and susceptible to more than one interpretation. The

[4] On February 27, 2020, Arbitrator McKissick issued an "Order Pursuant to N.J.S.A. 18A:6-14" ordering that Batts "be reinstated with pay, beginning on the one hundred twenty-first day until a determination is made regarding . . . [the tenure] charges." (Batts Cert. at Exhibit 2.) Batts "acknowledge[s] that Dr. McKissick's February 27, 2020, Arbitration Award and Order is not binding on this tribunal[.]" (Batts' brief at 7.) In May 2020, the Board filed a Verified Complaint in the Superior Court of New Jersey, Chancery Division, seeking to "Vacat[e] the Arbitration Award of February 27, 2020." (Edelstein Cert. at ¶ 3 and Exhibit B.) In response, Batts filed a Counterclaim seeking to "Confirm[ ] . . . [the] February 27, 2020, Arbitration Award and Order," along with reinstatement to the payroll and reimbursement of salary withheld. (Edelstein Supplemental Cert. at Exhibit D.) On June 19, 2020, the Honorable Robert J. Mega, P.J.Ch., issued Orders dismissing the Board's Verified Complaint and Batts' Counterclaim. (Id. at Exhibit E.) According to the parties' submissions, the court determined that the parties failed to exhaust their administrative remedies and that the Commissioner had jurisdiction to hear the matter. (See Batts' brief at 3; Board's reply brief at 2, fn. 1.)

Supreme Court explained in Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592 (2012) (citations omitted):

> The objective of all statutory interpretation is to discern and effectuate the intent of the Legislature. To achieve that objective, we begin by looking at the statute's plain language, ascribing to the words used "their ordinary meaning and significance." We do not view the statutory words in isolation but "in context with related provisions so as to give sense to the legislation as a whole." If the Legislature's intent is clear on the face of the statute, then we must apply the law as written. It is not our function to rewrite a plainly written statute or to presume that the Legislature meant something other than what it conveyed in its clearly expressed language.

Pursuant to the plain and unambiguous language of N.J.S.A. 18A-6-14, the 120-day rule only applies to situations where a tenured teacher is taken off the payroll because of a suspension following the certification of tenure charges. See N.J.S.A. 18A:6-14 ("Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made . . . without pay, but, if the determination of the charge by the arbitrator is not made within 120 calendar days after certification of the charges . . . then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.") (emphasis added.) Indeed, the title of the statute itself (i.e., "[s]uspension upon certification of charge") makes clear that the intended purpose of the statute is to address the permitted length of a suspension during the pendency of tenure proceedings.

Succinctly stated, N.J.S.A. 18A:6-14 is not applicable to Batts' situation. Batts was not suspended upon certification of the tenure charges. Rather, Batts had been removed from the Board's payroll long before the April 2019 tenure charges were filed. Batts has been off the Board's payroll since 2017, and her payroll status did not change as a result of the filing of the tenure charges in April 2019. In other words, Batts' pay was not stopped because of the certification of tenure charges against her, which is the circumstance contemplated by and addressed in N.J.S.A. 18A:6-14. Rather, her pay was stopped because she had exhausted all paid leave and had not returned to work as of the filing of the tenure charges. That Batts provided letters from two doctors more than five months

after the tenure charges had been filed, indicating that she was medically cleared to return to work in September 2019, has no bearing on the issue of whether Batts is entitled to pay pursuant to N.J.S.A. 18A:6-14. And Batts' Petition does not assert any claim relating to alleged action that the Board should have taken after receiving the doctors' letters. Equally unpersuasive is petitioner's "fairness and equity" argument based on the Board's alleged delay in the tenure proceedings.[5] Equity is not an issue here. Whereas here, "the Legislature's intent is clear on the face of the statute," this forum "must apply the law as written" and it is not the function of this forum to "rewrite a plainly written statute." Murray, 210 N.J. at 592.

Based upon the foregoing, I **CONCLUDE** that N.J.S.A. 18A:6-14 does not entitle petitioner to be paid her salary as of October 6, 2019, and during the pendency of the tenure proceedings.

ORDER

I **ORDER** that respondent's motion for summary decision be and hereby is **GRANTED** and petitioner's motion for summary decision be and hereby is **DENIED**. I further Order that petitioner's Certified Petition be and hereby is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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[5] According to petitioner, the "tenure arbitration is inactive pending the conclusion of the Board's ongoing appeal before the Appellate Division" relating to the Board's action to vacate a prehearing discovery ruling by the arbitrator and to have the arbitrator removed. The Board disputes petitioner's assertion. The Board contends that on October 16, 2019, Judge Dupuis entered an Order in Roselle Borough Board of Education v. Lovena Batts, et al., Docket No. UNN-C-143-19, providing that "[t]he Arbitration of the tenure matter scheduled for October 17, 2019, is temporarily enjoined and restrained pending the further Order of this Court" (Edelstein Supplemental Cert. at Exhibit A); that "further Order of this Court" came on February 12, 2020, when Judge Dupuis entered a Final Order dismissing the Verified Complaint and, with it, the restraints (Id. at Exhibit B); because of this Order, and the Board's decision to appeal, Board counsel wrote to the arbitrator on February 18, 2020, advising of the Board's intention to appeal and stating, "[i]n the meantime, we are requesting that you stay the Arbitration in this case until the Appellate Division has ruled on the merits" (Id. at Exhibit C); and the arbitrator did not respond to or grant the request for a stay.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 4, 2021
DATE

MARGARET M. MONACO, ALJ

Date Received at Agency: 8-4-21

Date Mailed to Parties: 8-4-21

jb

276-21

276-21

New Jersey Commissioner of Education

Final Decision

A.T., on behalf of minor children, K.T. and P.T.,

Petitioner,

v.

Board of Education of the Township of Sparta, Sussex County,

Respondent.

Synopsis

Petitioner appealed the determination of the respondent Board that her minor children were not entitled to a free public education in the Sparta School District (the District) and may not continue to attend its schools. In August 2018, petitioner had purchased a home in Sparta that needed significant renovation to make it habitable. In September 2019, petitioner was granted permission for her children to attend school in the District pursuant to a Board policy that allows non-residents who have entered into a contract to buy, build, or rent a home in Sparta to attend its schools for up to 120 days without payment of tuition. In November 2020, the Board conducted a residency investigation and determined that the family was not living at the Sparta home, leading to the within appeal. The Board filed a motion to dismiss the petition, and a counterclaim for tuition in the amount of $35,363.44 for K.T. and P.T.'s period of ineligible attendance.

The ALJ found, *inter alia*, that: petitioner's testimony during the hearing in this matter was not credible; evidence presented failed to prove that petitioner and her family had actually lived in the Sparta home; petitioner failed to satisfy her burden of establishing that she was domiciled in Sparta; further, petitioner and her family were not homeless, as the three-year period of construction on the house in which they had never lived was not the type of emergency that is contemplated by the laws regarding homelessness. Accordingly, the ALJ dismissed the petition and granted the Board's request for tuition reimbursement in the amount of $35,363.44.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. The petitioner was ordered to reimburse the Board for tuition in the amount of $35,363.44 for K.T. and P.T.'s period of ineligible attendance. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

276-21
OAL Dkt. No. EDU 00306-21
Agency Dkt. No. 2-1/21

New Jersey Commissioner of Education

Final Decision

A.T., on behalf of minor children,
K.T. and P.T,

Petitioner,

v.

Board of Education of the Township of
Sparta, Sussex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto, have been reviewed and considered.[1]

Petitioner purchased a home in Sparta in August 2018. In September 2019, she was granted permission for her children to attend school in Sparta while renovations were being completed, provided that the family moved into the home by January 2020. In November 2020, the Board conducted a residency investigation and determined that the family was not living at the Sparta home. Petitioner filed a petition of appeal and application for emergent relief in January 2021, and the Commissioner affirmed the Administrative Law Judge's (ALJ) emergent order permitting the children to remain enrolled in the district, with tuition charges accruing during the pendency of the hearing on the merits. In March 2021, petitioner claimed that she and

[1] Following the filing of the Board's reply, petitioner – on her own, not through her attorney – emailed information to the Commissioner. Petitioner's counsel also submitted a letter in furtherance of petitioner's exceptions, to which the Board objected. As *N.J.A.C.* 1:1-14.8 does not provide for sur-replies to exceptions, these submissions were not considered.

her children were homeless; the Board determined that they were not homeless. Following a hearing, the ALJ found that petitioner's testimony was not credible and that she and her family had never lived in the Sparta home. The ALJ concluded that petitioner had failed to satisfy her burden of establishing that she was domiciled in Sparta. The ALJ further concluded that petitioner was not homeless, as the three-year period of construction on a home in which she had never lived was not the type of emergency that is contemplated by the laws regarding homelessness. Accordingly, the ALJ dismissed the petition and granted the Board's request for tuition reimbursement in the amount of $35,363.44.

In her exceptions, petitioner argues that her testimony was credible, the home was habitable, she and her family did live there, and they only left to accommodate the needs of their autistic child. According to the petitioner, the ALJ ignored the provisions of the McKinney-Vento Act that demonstrate that petitioner was homeless. Petitioner asks the Commissioner to remand the case to the OAL to consider evidence regarding temperatures throughout the state of New Jersey, the effectiveness of attic fans, a recognition that petitioner's September 2019 email to the Superintendent set forth the required elements for a determination of homelessness, and the importance of the fact that petitioner was hired by the Board for a position within walking distance of the Sparta home.

In reply, the Board argues that the ALJ properly held that the Sparta home was uninhabitable based on the evidence, including petitioner's own testimony about numerous material defects. The Board contends that the Commissioner is required to defer to the ALJ's findings of fact based on credibility determinations because they are supported by the record and are not arbitrary, capricious, or unreasonable. According to the Board, petitioner's reliance on an email that she wrote to the superintendent about living in the Sparta home is self-serving, does not negate the ALJ's credibility determinations, and is contradicted by other statements made by petitioner. The Board acknowledges that the ALJ did not specifically reference the McKinney-Vento Act, but argues that

the ALJ did address the issue in finding that the family is not homeless. Finally, the Board contends that petitioner's request for remand is inappropriate because all of the issues or arguments she seeks to raise were considered by the ALJ.

Upon review, the Commissioner concurs with the ALJ's conclusion that petitioner failed to sustain her burden of establishing that she was a domiciliary of Sparta from January 3, 2020 to the present, or that she and her family were homeless during that period. The Commissioner further concurs with the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in Sparta's schools during that time.

Regarding the brief period during the summer of 2019 in which petitioner claims to have lived in the Sparta home, the Commissioner concurs with the ALJ's finding that the evidence demonstrates only a short visit insufficient to establish domicile. The ALJ had the opportunity to assess the credibility of the witnesses who appeared before her and make findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.
>
> [*N.J.S.A.* 52:14B-10(c)].

The Commissioner finds no basis in the record to disturb the ALJ's credibility assessments. While petitioner's exceptions focus on the ALJ's reliance on the lack of air conditioning in the home, the ALJ's conclusion that petitioner was not credible was based on multiple factors, including the lack of the usual documentary evidence demonstrating residence and occupancy. The record makes clear that the family's true, fixed, and permanent home – where they ate, slept, and returned each day after school and work – was, and still is, in Garfield.

In the absence of the family's actual residence in the Sparta home, the only remaining piece of evidence in support of petitioner's claim is her intention to move into the home once repairs and renovations were completed. However, the Commissioner has previously rejected such arguments, and does so again here. *See K.L. and K.L. o/b/o minor child M.L. v. Bd. of Educ. of the Borough of Kinnelon, Morris Cty.*, Commissioner Decision No. 315-08 (July 22, 2008), *aff'd, K.L. v. Bd. of Educ.*, 2010 *N.J. Super. Unpub.* LEXIS 11 (App. Div. 2010); *S.H. and C.H., o/b/o minor children, C.H., S.H., and S.H. v. Bd. of Educ. of the Twp. of Alloway, Salem Cty.*, Commissioner Decision No. 79-19 (March 26, 2019).

The Commissioner further concurs with the ALJ's conclusion that petitioner and her children were not homeless during the time period in question. Under the McKinney-Vento Act, homeless children are defined as "individuals who lack a fixed, regular and adequate nighttime residence," which includes "children sharing housing with other persons due to loss of their own housing, economic hardship, or a similar reason." 42 *U.S.C.A.* § 11434a. Similarly, under state law, homeless children are defined as "child[ren] or youth who lack[] a fixed, regular and adequate residence pursuant to *N.J.S.A.* 18A:7B-12 and *N.J.A.C.* 6A:17-2.2," which includes children living in the "residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own." *N.J.A.C.* 6A:17-1.2 and 2.2 (emphasis added).

The Commissioner has previously addressed the fact-specific nature of a homelessness inquiry. In *M. O'K. v. Bd. of Educ. of the Borough of Cresskill, et al*, Commissioner Decision No. 325-14 (August 12, 2014), *aff'd*, A-0828-14T4 (App. Div. Sept. 8, 2016), following the foreclosure of their home in Cresskill, the O'K family occupied the bottom floor of their relatives' house in Little Ferry, which consisted of one small bedroom and a

common area, without a bathroom or kitchen. The parents and two of the children shared the bedroom, while their third child slept in the common area. At the time of the litigation, neither parent was employed, and the family's sole income consisted of Social Security Disability benefits. During the pendency of the litigation, the O'K family represented that they were actively searching for a house in Cresskill. The Commissioner found, and the Appellate Division affirmed, that the O'K family became homeless due to the foreclosure of their home in Cresskill, and although they had been deemed domiciled in Little Ferry as a result of their residence in the district for over one year, they continued to remain homeless due to their shared living conditions and the parents' economic hardship.

In contrast, in *Bd. of Educ. of the Borough of Hawthorne, Passaic Cty. v. Bd. of Educ. of the Borough of Prospect Park, Passaic Cty., and N.J. Dep't of Educ.*, Commissioner Decision No. 196-14 (May 12, 2014), the Commissioner concluded that the petitioner's family was not homeless when they voluntarily abandoned their fixed, regular, and adequate residence to live with the petitioner's mother as part of fulfilling a plan to move out of state. The Commissioner found that in determining whether a child is residing with a family member "out of necessity," an "examination of the conditions that precipitated the family's relocation is critical." *Ibid.*

Homelessness is best viewed as a continuum, and petitioner's family more closely fits the facts of *Hawthorne* than those of *M.O'K.* Here, as the ALJ noted, there is no evidence that petitioner's family was a victim of an abrupt change of circumstances. During the relevant time period, petitioner lived primarily at her mother's home in Garfield.[2] While living with

[2] From the fall of 2020 until April 2021, when petitioner's brother also lived in the Garfield home, the family relocated to the home of a friend in Oak Ridge. There is limited evidence in the record about the adequacy of the Garfield home while petitioner's brother resided there, other than that it was crowded, and there is no evidence in the record about the adequacy of the Oak Ridge home. Accordingly, the Commissioner is unable to make a

petitioner's mother, petitioner and her spouse chose to purchase a home in Sparta that required major repairs and renovations to make it habitable – so much so that, three years later, at the time of the hearing, the family still did not reside in the home. There is no evidence that the Garfield home was inadequate, and, in fact, the record demonstrates that it has a "mother-daughter" layout that includes a separate kitchen. The family has lived in the Garfield home since 2017, well before the purchase of the Sparta home in August 2018, and the children attended preschool there through June 2019. There is no evidence that the family moved into the Garfield home out of necessity. These circumstances are not the kind of emergency typically experienced by families who are found to be homeless. Petitioner may consider her current residence in Garfield temporary, and her intention may be to move to Sparta in the future. However, the totality of the facts and circumstances in this case, as thoroughly detailed in the Initial Decision, demonstrate that the family is not homeless.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor children were ineligible to attend school in the district. The record reflects that there were 113 school days during the period from January 3, 2020 through June 19, 2020, and the cost of tuition for each child during that period was $94.29 per day, making the total tuition for that period $21,309.54. Furthermore, the record reflects K.T. attended school for 74 days from September 8, 2020 through January 11, 2021, at a tuition rate of $101.84 per day, for a total of $7,536.16. P.T. attended school for 69 days from September 8, 2020 through January 4, 2021, at a tuition rate of $94.46 per day, for a total of $6,517.74.

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determination regarding whether the relocation from Garfield to Oak Ridge was done out of necessity and may have justified a finding of homelessness for that time period. However, even assuming *arguendo* that petitioner and her family were homeless during that period, it appears that their district of origin would have been Garfield, not Sparta, as the family resided in Garfield prior to relocating to Oak Ridge, and they had never established a domicile in Sparta.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the total amount of $35,363.44 for tuition costs incurred during the time period in which K.T. and P.T. were ineligible to attend school in Sparta. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 28, 2021
Date of Mailing: October 28, 2021

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00306-21
AGENCY DKT. NO. 2-1/21

A.T. ON BEHALF OF K.T. AND P.T.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA, SUSSEX COUNTY,
Respondent.

George T. Daggett, Esq., for petitioner A.T. o/b/o K.T. and P.T. (Law Offices of George T. Daggett, attorneys)

Marc H. Zitomer, Esq., for respondent Board of Education of the Township of Sparta (Schenck, Price Smith & King, attorneys)

Record Closed: July 23, 2021 Decided: August 5, 2021

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

Petitioner A.T. filed and perfected a Petition of Appeal with the Department of Education on or about January 6, 2021, from the determination of the Board of Education

("District" or "Board") of the Township of Sparta ("Sparta") dated November 20, 2020, that she and her family are not domiciled in the Sparta and that her children cannot continue to attend its schools. The Board answered the petition and filed a counterclaim demanding tuition repayment for the period since January 3, 2020. On or about January 11, 2021, petitioner filed a Request for Emergent Relief.

PROCEDURAL HISTORY

The Department of Education Office of Controversies and Disputes transmitted the Petition and a Request for Emergent Relief to the Office of Administrative Law (OAL) on or about January 12, 2021. The matter was assigned to the undersigned for oral argument on the emergency request, which was held through Zoom technology, consistent with the OAL Covid-19 Emergency provisions, on January 15, 2021. A determination on the emergent application was filed on January 19, 2021, wherein I concluded that the emergent relief must be granted but subject to the potential continued accrual of tuition reimbursement.

The plenary hearing was held through Zoom technology, consistent with the OAL Covid-19 Emergency provisions, on June 25, 2021. Post-hearing submissions were permitted and the record closed on July 23, 2021, with their receipt.

JOINT STIPULATION OF FACTS

The parties submitted a Joint Stipulation of Facts setting forth:

1. The Sparta Township Board of Education ("Board" or "District") is a pre-K to 12 school district located in Sussex County, New Jersey.

2. A.T. ("petitioner") is the parent of two children who are pertinent to this matter, K.T. and P.T. (collectively, "children").

3. K.T. is in the first grade and is a child entitled to special education as diagnosed on the autism spectrum.

4. P.T. is in preschool. He has a heart condition, but he has not been designated as a child in need of special education.[1]

5. From 2017 until June of 2019, petitioner, her spouse, and her children lived at [xx] Main Street in Garfield, New Jersey. E.K. is the owner of the home and is petitioner's mother.

6. On or about June 28, 2018, Paul Lanaris of N.J. Best HOME INSPECTIONS conducted an inspection of the residence at [xxx] West Mountain Road in Sparta Township, New Jersey ("Sparta Home") for petitioner's spouse, K.T. ("spouse"). Inspector Lanaris noted material defects in the home. See Exhibit A for a copy of the inspection report.

7. On or about August 27, 2018, petitioner's spouse purchased the Sparta Home. See Exhibit B, August 27, 2018 Deed of Sale.

8. On September 18, 2019, petitioner e-mailed the District's Superintendent of Schools at the time, Dr. Michael Rossi, to inquire as to whether her children could attend the District's schools free of charge until construction was completed at the Sparta Home. Petitioner stated that, "construction [would] be done by January and [petitioner's family would] no longer be staying [with their] family but in [their] home by then." See Exhibit C, September 18, 2019 e-mail.

9. On September 19, 2019, Dr. Rossi transmitted two nearly identical letters to petitioner in response to her correspondence, wherein he notified her that the children were granted permission to attend the District's schools free of charge, but that if the family did not move into Sparta Township by January 3, 2020, tuition would be charged, per Board policy. Dr. Rossi's letters stated the following, in pertinent parts:

> I am pleased to inform you that permission is granted with the understanding that you will provide transportation until you actually move into Sparta. [...]

[1] This stipulation is herein revised to correct the identification of the proper student, as addressed at the hearing.

> In the event you are not able to move by January 3, 2020, tuition will be charged. According to our current Board Policy, children are eligible to attend Sparta Schools if there is a signed contract to buy, build, or rent a residence within our district for a period not to exceed 120 days previous to the anticipated date of residency without tuition charges. If the Sparta residence is not established by the end of the period of free attendance, tuition shall be required for the remainder of the time until residency is established. Since your son will start school while not residing in Sparta on September 3, 2019, tuition would commence on January 3, 2020 and continue until the time you move.
>
> [See Exhibit D, September 19, 2019 letters.]

10. The Board Policy that Dr. Rossi referred to was Policy 5111, "Eligibility of Resident/Nonresident Students (M)", which states, in pertinent part:

> A nonresident student otherwise eligible for attendance whose parent or guardian anticipates school district residency and has entered a contract to buy, build, or rent a residence in this school district may be enrolled 120 days without payment of tuition for a period of time not greater than 120 days prior to the anticipated date of residency. If any such student does not become a resident of the school district within 120 days after admission to school, tuition will be charged for attendance commencing the beginning of the 121st day and until such time as the student becomes a resident or withdraws from school.
>
> [See Exhibit E, Board Policy 5111.]

11. From July of 2019 to October of 2020, petitioner, her spouse, and her children lived at [xx] Main Street in Garfield, New Jersey.

12. On November 3, 2020, the District Acting Superintendent of Schools at the time, Patrick McQueeney, wrote to petitioner and her spouse to inquire as to where they were domiciled at that time. He stated as follows:

> As you know, Superintendent Rossi granted your children permission to continue attending school in the Sparta School District on a tuition-free basis until January 3, 2020 conditioned on you moving into the home at [xxx] West Mountain Road, Sparta, New Jersey. It has come to my attention that you are still not domiciled at that address. Upon

> receipt of this letter, please provide proof of your family's current domicile status. I await your timely response.
>
> [See Exhibit F, November 3, 2020 letter.]

13. Petitioner did not respond to Mr. McQueeney's November 3, 2020 letter.

14. The District's Director of District Operations, Michael Gregory, conducted a residency investigation to investigate whether the family was living at the Sparta Home. Mr. Gregory determined that no one was living at the Sparta Home. He concluded as follows in his November 13, 2020 investigation report, which included various photographs of the home:

> I went to the residence on Friday, November 13, 2020 and found no one at the residence. The front door was boarded up, the in-ground pool appeared to not have been utilized this past season, and construction materials limiting access to the back porch. Photos of this visit are attached.
>
> [See Exhibit G, November 13, 2020 Investigation Report with attached photographs.]

15. On or about November 13, 2020, Board Counsel transmitted a letter to petitioner and her spouse to notify them that the Board would be holding a residency hearing to determine her children's enrollment status on November 19, 2020, and that she was permitted to present a statement or other evidence. See Exhibit H, November 13, 2020 letter.

16. Petitioner elected not to attend, but rather, chose to submit a position statement through her Counsel on or about November 16, 2020. See Exhibit I, Position Statement.

17. At the November 19, 2020 Board residency hearing, the Board found that the children were not domiciled within the District during the 2019-2020 and 2020-2021 school years and assessed them tuition for the period of January 3, 2020 to the present. Board Counsel transmitted a letter to petitioner and her spouse the following day, November 20, 2020, to inform them of the Board's decision. See Exhibit J, November 20, 2020 correspondence with tuition spreadsheet and Resolution for the residence

hearing.

18. On January 3, 2021, petitioner e-mailed District Attendance Secretary Jennifer Sullivan to withdraw P.T. from the District for the remainder of the school year. Petitioner stated that P.T. would be receiving home instruction, and she attached an executed student withdrawal form to her e-mail. See Exhibit K, January 3, 2021 e-mail and attached student withdrawal form.

19. Petitioner filed a Petition of Appeal with the Office of Controversies and Disputes on January 6, 2021, and perfected same on January 8, 2021, appealing the Board's decision.

20. Petitioner filed an Application for Emergent Relief on January 11, 2021.

21. On January 19, 2021, the Honorable Gail M. Cookson, ALJ, granted petitioner's request for emergent relief, but with conditions. Judge Cookson concluded the Emergent Relief Order by stating "that petitioner's application for emergent relief must be granted, but conditioned upon the continued accrual of non-residential per diem charges pending the hearing on the merits." See Exhibit L, January 19, 2021 Emergent Relief Order.

22. In or around March of 2021, petitioner claimed, for the first time, that she and her children were homeless.

23. On or about March 22, 2021, the District's Homeless Liaison, Laura Trent, met with petitioner to discuss petitioner's homelessness claim.

24. On or about March 23, 2021, Ms. Trent made her determination that petitioner and her children were not homeless. She advised petitioner that she was permitted to enroll her children in the District, but per Judge Cookson's Emergent Relief Order, petitioner would be responsible for back-tuition should the Court find that she was not domiciled in Sparta Township. In a letter to petitioner, Ms. Trent stated as follows, in pertinent part:

> It is our position that you are not homeless in Sparta, N.J. As you stated, you have chosen to live with friends and family in

> Oak Ridge while the renovations are being completed on your Sparta home. This does not render you homeless. Importantly, the Administrative Law Judge concluded in your application for emergent relief application that you are not currently domiciled in Sparta and, by the admission of your attorney during oral argument, you have never occupied the Sparta home. Notwithstanding, you may enroll them in the Sparta School District, per the Judge's Order, but you will be responsible for back-tuition should the Judge conclude that you are not domiciled in Sparta.
>
> [See Exhibit M, Laura Trent's March 23, 2021 letter.]

25. Upon learning of petitioner's disagreement with her determination, Ms. Trent wrote to the Sussex County Executive County Superintendent of Schools, Gayle Carrick, Ed.D., on or about April 1, 2021, to notify Dr. Carrick of the issue. Counsel for both the Board and for petitioner sent follow-up letters to Dr. Carrick regarding same on or about April 5, 2021. See Exhibit N, Ms. Trent's April 1, 2021 letter (without attached exhibits).

26. On or about April 20, 2021, Dr. Carrick acknowledged receipt of the issue and directed the parties to Judge Cookson's Emergent Relief Order, via a letter that she transmitted to Board Counsel with a copy to petitioner's Counsel:

> I am acknowledging receipt of your correspondence dated April 5, 2021 regarding the T[.]/Sparta dispute and a determination of homeless. I direct you to the Order of Emergent Relief issued by ALJ Gail M. Cookson in this matter. Have a good day.
>
> [See Exhibit O, April 20, 2021 letter.

27. From April of 2021 until present, petitioner, her spouse, and her children have been living at [xx] Main Street in Garfield, New Jersey.

28. The children are not currently enrolled in the District.

It is also undisputed that prior to their residency application in Sparta but during the period both before and after purchase of the house in Sparta, the children attended

preschool in Garfield, with the older son attending there during both the 2017-2018 and 2018-2019 school years. [Exhibit R-1, ¶¶ 118-119.]

FACTUAL DISCUSSION

Based upon the testimony of the witnesses and the documentary evidence presented, and with the opportunity to assess the credibility of the witnesses, I **FIND** the following:

A.T. testified that she and her family lived with her parents in Garfield prior to the purchase of the Sparta home. Her parents had a single-family house but it had a mother-daughter layout such that there was a separate kitchen etc. Petitioner stated that they moved into the Sparta home from June 22, 2019, through July 13, 2019, and intended to stay thereafter. She notified the Superintendent that she wanted to register the children in the Sparta schools. The office of the Superintendent forwarded the District's residency policy and explained that the family would be allowed to obtain a free public education in Sparta for the children for 120 days as the maximum allowed for a period of renovation. Petitioner questioned why the family was not entitled to regular residency attendance if they were living with family during just kitchen renovations. [P-1.] Her spouse was going to do the repairs himself for which they had obtained a permit. At that time, petitioner found the municipal offices to be very friendly and was actually able to procure a part-time job for herself in the building department.

Petitioner described the setting inside the house and the utilities they relied upon, such as hot spots rather than internet service. They all stayed in one bedroom to be able to comfort and supervise over the young children. P.T., who is autistic, has trouble sleeping and wanders, as well as places objects in his mouth. Petitioner became concerned with the potential hazards to him in the kitchen. In addition, it was determined that there was a rat infestation in the insulation, with other renovation issues much worse than they anticipated. As a result of these factors, they felt they had to leave the house while more extensive work was undertaken.

The family returned to petitioner's parents' home in Garfield but by then, her brother, who paid the real estate taxes for their parents, had moved into the self-contained apartment. Petitioner explained at the hearing that that meant that she, her spouse and the children shared just a regular bedroom. Because the house was crowded and her parents were getting too old to handle all of them living there, petitioner moved her family to a friend's home in Oak Ridge sometime in the fall of 2020 until April 2021, when they moved back to Garfield.

By January 2021, petitioner had dis-enrolled the children from Sparta because of the potential tuition claim. It appears that P.T. was in a private home-based ABA program for children on the autism spectrum. It was then that she was advised to consult the homeless liaison for Sparta.

Petitioner was questioned on cross-examination as to the discrepancy in the dates of their occupancy of the Sparta home in various documents. [R-4.] She also described more fully the furniture they moved in to include a bed, couches, boxes placed in the basement. They did not move in a dining room table but used a table left by the sellers. The District queried her extensively on the Inspection Report they procured prior to the closing (R-2), with emphasis on the numerous safety concerns that seemed to have been highlighted therein. Petitioner said her husband, who is an electrician for a public utility company, made some changes and also considered the panel old but functional.

Petitioner admitted that there was no functioning air conditioning when they were there for those weeks in late June and early July. Notwithstanding that her younger son has a congenital heart condition, she insisted that this was not a problem because they spent time outside and in the pool. She did confirm that there were roof and gutter leaks and no railings on the stairs, although the walls provided support. Petitioner asserted that they anticipate being able to move back into the home this summer, with an architect meeting with them the week following this hearing. On these stipulated facts and the petitioner's own testimony, following the purchase of the house, it was not made habitable, and I so **FIND**.

Patrick McQueeney testified for the Board. He is the Assistant Superintendent and explained briefly how the tuition calculations were made. [R-5.]

With the exception of the controverted three weeks in July 2019, it has been stipulated that petitioner's family lived in Garfield from 2017 through October 2020, and from April 2021 to the present. There is no dispute that they were living in neither Sparta nor Garfield between October 2020 and April 2021. Accordingly, the only possible period of physical occupation in the Sparta home is the summer of 2019. It is also not disputed that petitioner's family did not seek to enroll their young children into Sparta schools until a year after the purchase of the house, which interval was simply because of their ages. Further, during the period both before and after purchase of the house in Sparta, the children attended preschool in Garfield, with the older son attending there during both the 2017-2018 and 2018-2019 school years. [Exhibit R-1, ¶¶ 118-119.]

With respect to the three weeks referenced herein,[2] I must make credibility determinations with regard to these potentially material facts. A credibility determination requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Daiichi Pharm. Co. v. Apotex, Inc., 441 F. Supp. 2d 672 (D.N.J. 2006). After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I am convinced that petitioner's testimony was not credible.

Petitioner's testimony did not hang together or make sense in light of many factors, not the least of which were her son's heart condition, the lack of any air conditioning, the minimal amount of the utility bills during and after the alleged period of occupation, and the absence of supporting testimony from other members of her family. To the extent that there are undated photos of the family purportedly at the house only demonstrates some short visit, and I so **FIND**. In addition, I noted on the emergent application that the pleadings did not assert that petitioner had ever lived in her Sparta house and counsel conceded as

[2] These three weeks were alternately referred to as simply "July" or more specifically as between June 22 and July 13, 2019. I do not find that distinction to be material to the issues herein.

much during that oral argument. To the extent that the family slept in the house for some unknown but likely only a few nights, I **FIND** that it was a contrived and manipulated setting in an attempt to buttress the residency application they were then engaged in making to the District.

As set forth above, there was testimony that the family lived in Garfield with petitioner's parents from 2017 through at least June 2019 in the lower-level apartment. That is to say, they lived there both before and after purchasing the Sparta house in August 2018, and the children attended preschool in that district. There was no testimony that they moved there out of necessity, nor is there any evidence in the record as to where they lived prior thereto. Based upon all these facts, I further **FIND** that the Sparta house cannot be a factual predicate for having to live with petitioner's parents.

These findings are further supported by the lack of the usual documentary indicia of residence and occupancy, such as utility bills, pay stubs, insurance, construction invoices. I concur with the District that the lack of production of this common evidence by the petitioner generates, at the very least, a rebuttable presumption that their production would not have helped her case.[3] Petitioner carries the burden of proving her domicile in Sparta for eligibility for free public education there and her lack of documentary or buttressing testimonial proof weighs against her case. See State by Comm'r of Transp. v. Council in Div. of Res. Dev., etc., 60 N.J. 199, 202 (1972)(litigant's failure to produce may be inferred to have been prompted by a conscious appreciation that the evidence would or might be hurtful to his position), citing Interchemical Corp. v. Uncas Printing & Fishing Co., 39 N.J. Super. 318, 328 (App. Div. 1956).

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

The District claims that petitioner cannot establish domicile in Sparta because the family has never lived in the still-uninhabitable house, had not established it as their

[3] Insofar as there has been no demonstration of bad faith or destruction, nor is this a jury trial, a formal sanction of an "adverse inference" is not appropriate, nor has it been sought. See, e.g., Bozic v. City of Wash., 912 F. Supp. 2d 257 (W.D. Pa. 2012).

residence or domicile prior to registration of her children, and certainly was not living there as of January 3, 2020, when the 120-day grace period expired. It further argues that granting petitioner residency on this record would turn residency regulations on their head, to the effect that such a ruling would mean that anyone could purchase an uninhabitable home in a school district and thereafter assert residency and/or homelessness without ever having truly living in the district. The District also contested any claim of homelessness herein.

Petitioner argues that she and the family established their domicile in Sparta prior to registering the children in the District and that they intend to return to the home once renovations are completed. As such, and because they had to move from that residence, petitioner argues that they are currently homeless and that Sparta is the district of origin that must provide a free public education to their children under the homelessness regulations.[4]

The right to a thorough and free education in the district of one's New Jersey domicile is well settled. A.M.S. ex rel. A.D.S. v. Bd. of Educ. of City of Margate, 409 N.J. Super. 149, 160-61 (App. Div. 2009). Therein, the court stated:

> N.J.A.C. 6A:22-2.1(b) requires school districts to adopt written policies and procedures related to student residency and to incorporate Department of Education (DOE) regulations pertaining to student residency into each district's policies and procedures. Moreover, in doing so, "a district board of education shall construe the provisions" of DOE regulations governing student residency "liberally so as to effectuate the right of students to a free public education." Ibid.

The Legislature has provided that local boards of education are responsible for the education of school-age children who are domiciled within their respective district. N.J.S.A. 18A:38-1. Narrow exceptions to the domicile rule are also provided when, among other things, the parent or guardian is a temporary resident of a district, N.J.S.A.

[4] Initially, petitioner was pro se when she appealed to the Department. After counsel entered his appearance and after the emergency hearing, he asserted the claim of homelessness; although petitioner also testified that she received that advice from a private party as well. In light of my determination herein, I need not reach the issue of whether this was timely asserted.

18A-38-1(d), or a parent moves between districts as a result of homelessness. N.J.S.A. 18A-38-1(f). In any event, a child's district of residence is generally determined based upon the district of residence of the child's parent or guardian. See, e.g., N.J.S.A. 18A:7B-12; N.J.S.A. 18A-38-1.

Generally, eligibility under the education laws and regulations is framed as, in relevant part:

> A student is eligible to attend a school district if he or she is domiciled within the school district. . . A student is domiciled in the school district when his or her parent or guardian resides within the school district on an all-year-round basis for one year or more, notwithstanding the existence of a domicile elsewhere.
>
> [N.J.A.C. 6A:22-3.1(a)(4) (as amended 2013)(emphasis added).]

It should be noted that the regulations had provided at the time of earlier decisions, e.g., K.L. v. Bd. of Educ., No. A-5671-07T1, 2010 N.J. Super. Unpub. LEXIS 11, at *9 (Super. Ct. App. Div. Jan. 4, 2010):

> A student is domiciled in the school district when he or she is living with a parent . . . whose permanent home is located within the school district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.
>
> [N.J.A.C. 6A:22-3.1(a)(1).]

Petitioner has asserted that she and her family intend to return to this home and had no intent to move from it but did so out of necessity. Yet, as we see, this regulation as amended no longer encompasses the concept of "intent." 45 N.J.R. 1209(a) (May 20, 2013). Moreover, the concept of "returning" to a home one never truly lived in, as supported by the findings of fact above, I **CONCLUDE** negates petitioner's assertion of intent.

According to N.J.S.A. 18A:7B-12(c), "[t]he district of residence for children whose parent . . . temporarily moves from one school district to another as the result of being homeless shall be the district in which the parent . . . last resided prior to becoming homeless." The district of residence shall be responsible for the education of a homeless child for as long as the parent remains homeless. N.J.A.C. 6A:17-2.4(a) and (c). In addition, "[e]nrollment in the school district of [residence] . . . shall continue for the duration of homelessness, including . . . for the remainder of the academic year if the homeless child becomes permanently housed during the academic year." N.J.A.C. 6A:17-2.6(h).

Before we can even reach the issue of whether Sparta is the district of domicile of the children, sometimes referred to as the "district of origin,"[5] we must examine whether the facts even support a finding of "homelessness."

> (a) A district board of education shall determine that a child is homeless for purposes of this subchapter when he or she resides in any of the following:
>
> * * *
>
> 3. The residence of relatives or friends with whom the homeless child is temporarily residing out of necessity because the family lacks a regular or permanent residence of its own; or
>
> [N.J.A.C. 6A:17-2.3 (emphasis added).]

It is clear that the determination of "necessity" here is fact sensitive, on which issue petitioner has the burden of proof. Hawthorne BOE v. Prospect Park BOE and Dept. of Educ., OAL DKT. NO. EDU 16270-13, Final Agency Decision (May 12, 2014) http://njlaw.rutgers.edu/collections/oal/>. In Hawthorne, the Department held:

> Upon full consideration, the Commissioner concurs with the ALJ's determination that the A. family was not homeless within the meaning of N.J.S.A. 18A:7B-12c and N.J.A.C. 6A:17-2.3. The Commissioner explicitly rejects respondents' assertion that the impetus for the A. family's departure from the Hawthorne apartment is immaterial. To the contrary, the

[5] "District of residence" is also referred to as "district of origin." See N.J.A.C. 6A:17-2.2.

> Commissioner finds that an inquiry into the circumstances surrounding the A. family's move is essential to the homelessness determination.
>
> A "homeless child" is one who lacks a fixed, regular and adequate residence. N.J.A.C. 6A:17-2.2. Not every child residing temporarily with a relative is "homeless." Rather, pursuant to N.J.A.C. 6A:17-2.3(a)3, such a child is homeless when he or she resides in "[t]he residence of relatives or friends with whom the homeless child is temporarily residing out of necessity because the family lacks a regular or permanent residence of its own." An examination of the conditions that precipitated the family's relocation is critical to ascertaining whether the living arrangement arose "out of necessity," and whether the family is without access to a "regular or permanent residence of its own."
>
> In the instant matter, the ALJ specifically found that the A. family was not forced out of their Hawthorne apartment, that N.A. was up to date on her rent, and that there was no evidence that she was unable to pay rent going forward. The ALJ further found that N.A. voluntarily abandoned her Hawthorne home and temporarily relocated the A. family to her parent's home in Prospect Park as part of fulfilling her plan to move to Florida.

As was true in Hawthorne, there is no evidence that petitioner's family was a victim of an abrupt change of circumstances. They chose to purchase a home in need of major repairs and renovations while they were already living in Garfield with her parents. Further, they did not move into the home after purchasing it. There was no crisis of immediacy. This situation is not that of a homeless family. See, e.g., J.G. and D.G. v. Bd. of Educ. of Point Pleasant, EDU 4688-10, Initial Decision (September 23, 2010), adopted, Comm'r (December 27, 2010), http://njlaw.rutgers.edu/collections/oal/>. The family's circumstances here are clearly distinguishable from cases where a family becomes transient due to an emergency. See, e.g., S.J. o/b/o V.J. v. Bd. of Educ. of S. Orange-Maplewood, EDU 5656-07, Initial Decision (January 22, 2008), adopted, Comm'r (March 3, 2008), http://njlaw.rutgers.edu/collections/oal/> (family evicted from apartment and then drifted around while living in a beauty salon, with a friend, and with child's grandmother in an attic); A.B. v. W. Orange Bd. of Educ., EDU13330-09, Initial Decision (January 25, 2010), adopted, Comm'r (April 13, 2010),

http://njlaw.rutgers.edu/collections/oal/> (single mother evicted after losing full-time job and thereafter alternated between apartments of several friends).

In combination with my factual findings on the uninhabitability of the Sparta house, I **CONCLUDE** that their purchase of said house during the period of domicile in Garfield cannot be used to bootstrap either a temporary relocation away from Sparta or homelessness. The home construction has apparently continued, on but mostly off, without completion, for the three years since it was purchased by petitioner and her husband. In fact, only after the hearing was petitioner meeting with an architect to draw up the needed structural renovations. This is not the case of temporary relocation away from one's abode due to fire, storms or other natural disasters; rather, petitioner and her spouse purchased an unsafe and largely uninhabitable house, as evidenced by the fact that they did not live in after the closing in August 2018 and until they were trying to register their children in school.

Except for some unknown and unverifiable number of days in the summer of 2019, and a few months with a friend in Oak Ridge, petitioner, spouse and children have clearly been domiciled in Garfield from 2017 to the present. On the basis of the above-referenced facts and legal authority, I **CONCLUDE** that petitioner has never been domiciled in Sparta and is not now homeless, from Sparta or, for that matter, anywhere else. When and if petitioner establishes that the family is genuinely living in the Sparta house, with a Certificate of Occupancy, they shall then and only then be entitled to register their children in the Sparta school district.

ORDER

Accordingly, it is **ORDERED** that petitioner's appeal from the Sparta Township Board of Education residency determination is and the same is hereby **DENIED** and the determination of the Sparta Township Board of Education on residency and homelessness is **UPHELD**.

It is further **ORDERED** that the counterclaim of the Sparta Township Board of Education for tuition reimbursement in the amount of $35,363.44 is **GRANTED** to the extent of only the days when the children attended its schools after January 3, 2020, or the period of ineligibility.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Gail M. Cookson

August 5, 2021
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency 8/5/21

Date Mailed to Parties: 8/5/21

id

APPENDIX

LIST OF WITNESSES

For Petitioner:

A.T.

For Respondent:

Patrick McQueeney

LIST OF EXHIBITS IN EVIDENCE

Joint Exhibits

J-1 Joint Stipulation of Facts

Petitioner's Exhibits

P-1 E-Mail exchange between Petitioner and District, dated September 19, 2019
P-2 Photo of Inground Pool
P-3 Photo of Children Eating Pizza
P-4 Photo of Child Playing Pool
P-5 Photo of Inground Pool (2)
P-6 Photo of Laundry Room
P-7 Photo of Bathroom
P-8 Photo of Bedroom Shared By Entire Family
P-9 Photo of Kitchen Pre-Renovation

Respondent's Exhibits

R-1 Petitioner's Answers to Board's Interrogatories and Demand for Production of Documents
R-2 Petitioner's Documents Provided in Response to Board's Interrogatories and Demand for Production of Documents

R-3 Petitioner's Supplemental Answers to Board's Interrogatories and Demand for Production of Documents, dated June 16, 2021

R-4 Student Residency Form, dated March 21, 2021

R-5 Tuition Cost Spreadsheet

279-21

279-21R

OAL Dkt. No. EDU 03608-20
(EDU 02929-18 On Remand)
Agency Dkt. No. 30-1/18

New Jersey Commissioner of Education

Final Decision

C.H. and S.H., on behalf of minor children, C.H., S.H., and S.H.

Petitioners,

v.

Board of Education of the Township of Alloway, Salem County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge that the Board conducted a thorough email search and has provided petitioners with all student records that were the subject of the petition of appeal.

Accordingly, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 4, 2021
Date of Mailing: November 4, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03608-20
AGENCY DKT. NO. 30-1/18
(ON REMAND FROM EDU 02929-18)

C.H. AND S.H. ON BEHALF OF C.H., S.H. AND S.H.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF ALLOWAY, SALEM COUNTY,
Respondent.

C.H. and S.H., petitioners, pro se

William C. Morlok, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: September 17, 2021 Decided: September 29, 2021

BEFORE **JEFFREY R. WILSON**, ALJ:

STATEMENT OF THE CASE

Petitioners allege that the respondent denied access to the student records of their three children. Petitioners request that the records be released to them at no cost.

PROCEDURAL HISTORY

The petitioners filed an appeal of the denial of access to the student records of their three children and requested a hearing before the Office of Administrative Law (OAL). The matter was transmitted to the OAL, where it was filed on February 26, 2018, as a contested case, under Docket No. EDU 02929-18. N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13. The petitioners filed a motion for summary decision on June 10, 2018. The respondent filed its cross-motion for summary decision and response on June 21, 2018. The petitioners filed a reply brief on July 2, 2018. On October 1, 2018, the petitioners filed a motion to supplement the record. On October 8, 2018, the respondent filed it's brief in opposition to the motion to supplement the record. Those cross-motions for summary decision were denied by order, dated June 12, 2019.

By order, dated September 24, 2019, petitioners' attorney was relieved as counsel. Since that date, the petitioners continued self-represented. On October 21, 2019, a telephone status conference was held and this matter was scheduled to be heard on February 18 and February 19, 2020.

At the request of the parties, an in-person settlement conference was held on December 26, 2019. At that time, the parties reached a settlement agreement that was placed on the record. During voire dire, the pro se petitioners, C.H. and S.H., affirmed they understood the terms of the agreement and entered into the agreement freely, voluntarily and without coercion or duress. Counsel for the respondent was directed to reduce the agreement to a writing and provide it to the petitioners to execute.

By letter, dated January 14, 2020, counsel for the respondent informed this Administrative Law Judge that the petitioners returned the signed agreement with additions and deletions unilaterally made by them. Counsel for the respondent did not agree with the petitioners' amendments.

On January 16, 2020, this Administrative Law Judge sent a letter to the parties and acknowledged that clearly there was no meeting of the minds and that there was no settlement of the case. In said letter, the parties were directed to participate in a

telephone conference on January 23, 2020, to address outstanding issues. During the January 23, 2020, telephone conference, the parties still could not reach an agreement as to the petitioners' amendments and the petitioners were directed to provide respondent's counsel with a draft of their understanding of the agreement on or before January 27, 2020. The petitioners complied however; respondent's counsel was not in agreement with their submission.

On January 28, 2020, counsel for the respondent filed a motion to enforce the December 26, 2019, settlement agreement. The petitioners acknowledged receipt of the motion on January 30, 2020. By letter order, dated January 30, 2020, the respondent's motion was denied, and it was ordered that the matter would proceed to a fair hearing, as scheduled, on February 18 and February 19, 2020. It was further ordered that a mandatory telephone conference would be held on February 3, 2020, at 4:00 p.m. to address prehearing issues. It was noted that if any party failed to participate in this telephone conference, the file would be returned to the transmitting agency for the appropriate action which may include imposition of the proposed penalty or granting the relief requested by the opposing party. The petitioners failed to participate in the February 3, 2020, telephone conference. On February 5, 2020, an initial decision/dismissal was filed for the petitioners' failure to appear without an explanation for their nonappearance.

By its final decision No. 89-20, issued March 20, 2020, the New Jersey Commissioner of Education remanded this matter to the OAL, under Docket No. EDU 03608-20, for further disposition based upon the petitioners' "timely written explanation stating that they did not appear at the February 3, 2020, conference because they did not receive adequate notice of the call." Upon remand, this matter was scheduled for a peremptory hearing on October 7, 2020.

On September 17, 2020, the respondent informed this Administrative Law Judge that all records requested (R-1 at R0001-R0936) had been turned over to the petitioners with a request that the petitioners formally withdraw their petition. On October 4, 2020, the petitioners filed a motion to compel discovery and to adjourn the October 7, 2020, peremptory hearing. Accordingly, that hearing date was converted to oral argument on the petitioners' motion. By letter order, dated October 7, 2020, the petitioners' motion

was denied, and the matter was scheduled for a peremptory hearing on December 17, 2020, pursuant to the amended prehearing order.

On December 4, 2020, the petitioners filed a "certification in support of motion to compel discovery (reconsideration)." With this, the petitioners requested that this Administrative Law Judge review and reconsider the previously denied motion to compel discovery and seek the same relief as in their prior application. By letter order, dated December 11, 2020, the petitioners' application for reconsideration of the motion that was previously denied was denied as untimely, pursuant to the amended prehearing order. The matter was ordered to proceed to a peremptory hearing on December 17, 2020, at 10:00 a.m., utilizing the ZOOM platform.

At 9:39 a.m., on December 17, 2020, the petitioners requested to adjourn the hearing that was to commence at 10:00 a.m. The respondent submitted their objection at 9:45 a.m. and the parties were directed to appear, via ZOOM, at 10:00 a.m. At that time, the petitioners formally requested an adjournment of the hearing to allow them time to submit their request for interlocutory review of their recently denied motion to compel discovery. The motion was granted, over the respondent's objection as the petitioner was still in time to request interlocutory review, pursuant to N..J.A.C. 1:1-14.10.

On January 4, 2021, the Acting Commissioner of the New Jersey Department of Education denied the petitioners' request for interlocutory review and the matter was ultimately heard virtually on February 9, 2021. The record remained open for the receipt of closing submission and the record closed.

FACTUAL DISCUSSION AND FINDINGS

C.H. testified on behalf of the petitioners. C.H. and S.H. are the parents of the minor children, S.H., S.H. and C.H. The petitioners allege that the respondent denied access to the student records of their three children. Specifically, the petitioners requested:

> All email correspondence between myself, teachers, administrators and staff pertaining to or including reference to any of my children, SH, SH, CH, September 2009 through present [November 21, 2017]

Petitioners request that the records be released at no cost to them.

Through her testimony, C.H. conceded receiving the over nine hundred pages of emails provided by the District in September 2020. (R-1 at R0001-R0936.) These documents were provided to the petitioners at no cost.

Shannon N. DuBois-Brody (DuBois-Brody), testified on behalf of the respondent. She has been employed by the District for eighteen and one-half years and presently serves as the District's Business Administrator and Secretary to the Board of Education. The District is a small rural district (Pre-Kindergarten through eighth grade) consisting of approximately three hundred students. None of the petitioners' children are presently in the district.

DuBois-Brody has been the District's Records Custodian since 2018 and was responsible for overseeing the fulfillment of the petitioners' records request. She assigned the email search task to Christopher Pierce through the District's shared service agreement with Salem Community College's IT Department.

DuBois-Brody reviewed the search parameters utilized (R-2) and all of the emails produced through the search. (R-1 at R0001-R0936.) Based upon this review, she determined that the emails produced were fully responsive to the petitioners' request. Copies of all of the emails were provided to the petitioners at no cost. (R-1 at R0001-R0011.)

Christopher Pierce (Pierce) testified on behalf of the respondent. He has ten years of IT experience and provides services to the District through a shared services agreement. In the present matter, Piece conducted the search utilizing the District's old serve as well as their newer cloud based server. He conducted the email search utilizing

the parameter dates of September 1, 2009, through November 21, 2017. Every mailbox on the servers was searched. None were excluded. The parameters are fully detailed in R-2. All emails responsive to the search are included in R-1 at R0001-R0936 and all of those emails were provided to the petitioners in .pst and .pdf formats.

Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In-re Estate of Perrone, 5 N.J. 514 (1950). The Court pronounced:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.
> [5 N.J. at 522.]

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, a trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Having considered the testimonial and documentary evidence presented, I accept the testimony offered by DuBois-Brody and Pierce to be very credible and highly persuasive. Their testimony was free of any histrionics and they exhibited no ulterior motive. They clearly described their respective roles in the search in question. All of their testimony was corroborated by the documentary evidence. Neither of them had anything to gain from testifying. Accordingly, I **FIND** the testimony of both Dubois-Brody and Pierce as **FACT**.

LEGAL ANALYSIS AND CONCLUSION

The petitioners bring this action seeking "All email correspondence between myself, teachers, administrators and staff pertaining to or including reference to any of

my children, SH, SH, CH, September 2009 through present [November 21, 2017]". Now they argue that the documents provided did not include all emails between counsel and the District relative to her three children. These were not included in their original request.

I **CONCLUDE** that based upon petitioner's original request, the District established appropriate, detailed search parameters. I **CONCLUDE** that the District conducted a fulsome, responsive email search and that the complete fruits of that search were provided to the petitioners at no cost and that the petitioners acknowledge receipt of the same. Accordingly, I **CONCLUDE** that the petitioners failed to show that the District withheld any document that were originally requested.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that this matter is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



September 29, 2021
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency:

Date Mailed to Parties:

JRW/tat

APPENDIX

WITNESSES

For Petitioner:

C.H.

For Respondent:

Shannon DuBois-Brody
Christopher Pierce

EXHIBITS

For Petitioners:

None

For Respondent:

R-1 Emails provided to petitioners (R0001 – R0936)
R-2 Search parameters for email search (R0397 – R0938)
R-3 Not in Evidence
R-4 Not in Evidence
R-5 Not in Evidence
R-6 Not in Evidence
R-7 Not in Evidence
R-8 Prehearing Order, dated September 24, 2020, (R0947 – R0952)
R-9 Shannon DuBois-Brody - Curriculum Vitae (R0953 – R0954)
R-10 Christopher Pierce – Curriculum Vitae (R0955- - R0956)

280-21

280-21

New Jersey Commissioner of Education

Final Decision

T.H., on behalf of minor child,

Petitioner,

v.

Board of Education of the Township of Sparta, Sussex County,

Respondent.

Synopsis

Pro se petitioner filed the within appeal in September 2020, contending that school officials at Sparta High School wrongfully searched his daughter, a minor at the time, during a sporting event on October 20, 2017. Petitioner claimed that a resulting harassment, intimidation and bullying (HIB) complaint he filed with the school district was improperly closed without a proper investigation, and his internal appeal of the HIB claim was rejected by the respondent Board in September 2019. Petitioner's daughter graduated from Sparta High School in June 2019. The Board filed a motion for summary decision contending that petitioner's appeal must be dismissed as untimely; alternatively, the Board asserted that petitioner lacks standing and failed to state a claim upon which relief can be granted.

The ALJ found, *inter alia*, that: pursuant to *N.J.A.C.* 6A:3-1.3(i), petitioners must file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual Party, or agency, which is the subject of the requested contested case hearing; petitioner's appeal was filed as a result of an alleged search of petitioner's daughter, which was conducted in October 2017 by the District's Athletic Director; petitioner waited eight months, until June 2018, to file an HIB complaint, and did not file the within appeal until more than two years later; petitioner has offered no valid reason for the significant delay in filing; further, petitioner lacks standing to pursue a claim on behalf of his child, who is no longer a minor. The ALJ concluded that the petitioner failed to meet his burden and, accordingly, ordered the petition of appeal dismissed.

Upon a comprehensive review, the Commissioner concurred with the ALJ's findings regarding timeliness and lack of standing to bring this case on behalf of his child, who has graduated and is now an adult. Accordingly, the Board's motion for summary decision was granted and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

280-21

OAL Dkt. No. EDU 09769-20
Agency Dkt. No. 192-9/20

New Jersey Commissioner of Education

Final Decision

T.H., on behalf of minor child,

Petitioner,

v.

Board of Education of the Township of Sparta, Sussex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge that the petition was untimely pursuant to *N.J.A.C.* 6A:3-1.3, and that petitioner lacks standing to pursue a claim on behalf of his child, who is no longer a minor. Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 4, 2021
Date of Mailing: November 4, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09769-20
AGENCY DKT. NO. 192-09/20

T.H. ON BEHALF OF MINOR CHILD,
Petitioner,
v.
TOWNSHIP OF SPARTA, SUSSEX COUNTY
Respondent.

Thomas Hand, pro se, for petitioner

Marc H. Zitomer, Esq. for respondent (Schenck, Price, Smith & King, LLP, attorneys)

BEFORE **ANDREW M. BARON**, ALJ:

Petitioner T.H. on behalf of minor child, contends that officials of Sparta High School performed an illegal search on his minor daughter at the time on October 20, 2017. As a result, petitioner filed a H.I.B. complaint which he says was improperly closed without a proper investigation. His internal appeal was rejected by the District in September 2019.

Petitioner filed a Petition of Appeal on September 9, 2020. Respondent filed an Answer to Petition of Appeal September 29, 2020. The matter was transmitted by the

Department of Education (Department) to the Office of Administrative Law (OAL), where it was filed on October 20, 2020 as a contested case.

Among other things, the District contends the appeal was untimely filed, and is moot regardless as T.H.'s daughter has long since graduated, as well as petitioner lacking standing to prosecute the matter on her behalf as she is an adult and was not joined as a party to the case. Respondent seeks a disposition of the matter through summary disposition.

Respondent brings this motion seeking disposition through summary proceedings due to untimeliness of the appeal, lack of standing, and failure to state a claim upon which relief can be granted. Petitioner's daughter graduated from respondent Sparta High School in June 2019.

Petitioner alleges that almost two years prior to graduation, in October 2017, his daughter, a student at the high school was wrongfully searched by school officials at a sporting event. Eight months after the incident, petitioner filed a H.I.B. Complaint against the District and school officials. The matter was closed without what petitioner believed to be a proper investigation, and fifteen months later, in September 2019, petitioner filed the within appeal. Among other things, the driving force behind the appeal is petitioner's allegation that the details of the search were leaked throughout the community thereby besmirching his daughter's good name.

The legal basis for filing an action against a school district is found at N.J.A.C. 6A:3-1.3 which states in part:

A petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual Party, or agency, which is the subject of the requested contested case hearing.

Authority to establish a time limitation for the filing of such actions is vested with the New Jersey Commissioner of Education. See: Kaprow v. Board of Education of Berkeley Township,131 N.J.572 (1993), which stands for the principle that:

The limitation period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. The limitations also gives school districts the security of knowing that the administrative decisions regarding the operation of the school cannot be challenged after 90 days. Only when a petitioner can demonstrate exceptional circumstances or compelling reasons would the Commissioner consider expanding the time to file beyond the 90 days. See also: Brunetti v. Borough of New Milford, 68 N.J. 576 (1975).

Petitioner's complaint was filed as a result of an alleged search conducted by the District's Athletic Director of petitioner's daughter on or about October 21, 2017. Petitioner waited eight months to file an H.I.B. until June 2018.

The Due Process petition was not filed until September 2020. No valid reason for the significant delay in filing has been put forward by petitioner.

As to petitioner's concerns about "leaks" about the incident within the community, there does not appear to be a basis for a cause of action in an administrative proceeding.

The Commissioner of Education only has jurisdiction over disputes that "primarily and directly" arise under school laws. See Ciambrone v. Witty Bd. of Educ of Bloomingdale,C'mmr. Dkt. No. 143-01 (May 7, 2001) quoting Hamilton Bd. of Educ. v.. Fraleigh, 93 N.J.A.R. 2d. (EDU) 538 (Cmm'r 1993).

See also: Fair Lawn Bd. of Educ. v. Mayor of Fair Lawn,143 N.J. Super 259, (Law Div. 1976) aff'd 153 N.J. Super 480 (App. Div. 1977), which speaks to the issue of what the Commissioner of Education has jurisdiction over, and what he or she does not.

Accordingly, while petitioner may have had valid concerns in October 2017 as to what allegedly occurred, and similar concerns about discussions within the community that may have been made public, there simply does not appear to be a legal basis within the confines of Administrative Law for jurisdiction over this area of concern.

Having dealt with the issues of timeliness and lack of jurisdiction over the underlying complaint, I am also compelled here to point out that petitioner does not have standing to have the complaint heard, even if the motion was denied, and a full hearing went forward. The child in whose name petitioner brought the complaint is now and adult in her own right. She was not joined as a party, and petitioner admitted during argument that she was not informed of the proceeding.

Petitioner, no doubt is a loving father who still cares for the welfare of his daughter, and wanted to see a perceived wrong corrected. But for all of the aforementioned reasons stated herein, there is no legal basis for the matter to proceed any further.

Accordingly, I **CONCLUDE** that petitioner has failed to meet their burden and the petition of appeal should be **DISMISSED**. I further **CONCLUDE** that the Clerk should return this matter to the Department of Education.

It is **ORDERED** that this matter is **DISMISSED** and that the Clerk return this matter to the Department of Education for appropriate disposition.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10. Within thirteen days from the date

on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 7, 2021

DATE

ANDREW M. BARON, ALJ

Date Received at Agency: October 7, 2021

Date Mailed to Parties: October 7, 2021

281-21

281-21

New Jersey Commissioner of Education

Final Decision

Robert C. Yaiser,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

Synopsis

Petitioner appealed the denial of his application for a School Administrator Certificate of Eligibility (CE) on the basis that he lacked completion of both an approved School Administrator Program and a 150-hour internship in educational leadership. The New Jersey State Board of Examiners (Board) filed a motion to dismiss in lieu of an answer to the petition.

The ALJ found, *inter alia*, that: the Board's motion to dismiss was converted to a motion for summary decision pursuant to *N.J.A.C.* 1:1-12.5(a); there are no issues of material fact in this case and the matter is ripe for summary decision; the petitioner applied for a School Administrator CE in February 2019; to meet the requirements for this certificate, petitioner was required to complete all of five requirements delineated in N.J.A.C. 6A:9B-12.4; the Board determined that the petitioner's application met and satisfied three of the above criteria, but that two of the criteria had not been met: he had not completed an approved School Administrator program pursuant to *N.J.A.C.* 6A:9B-12.4(a)(1); and he had not completed a 150-hour internship in educational leadership pursuant to *N.J.A.C.* 6A:9B-12.4(a)(3), nor had he demonstrated that he had met the equivalent with his teaching experience; petitioner acknowledged in his filings that he did not complete the required 150-hour internship in educational leadership until December 2019, a date well after his application had been filed with the Board and after the Board had met to consider petitioner's appeal. The ALJ concluded that the Board had appropriately denied petitioner's application for certification. Accordingly, summary decision was granted in favor of the Board, and the petition was dismissed.

The Commissioner concurred with the findings and determination of the ALJ in this matter. Accordingly, summary decision was granted in favor of the Board and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

281-21

OAL Dkt. No. EDU 06932-20
Agency Dkt. No. 40-2/20

New Jersey Commissioner of Education

Final Decision

Robert C. Yaiser,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge that the Board appropriately denied petitioner's application for certification.

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 4, 2021
Date of Mailing: November 4, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 06932-2020
AGENCY DKT. 40-2/20

ROBERT C. YAISER,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
OFFICE OF CERTIFICATION AND INDUCTION,
Respondent.

George T. Daggett, Esq., appearing for petitioner (Law Offices of George T. Daggett, attorneys)

Jaclyn M. Frey, Deputy Attorney General, appearing for respondent (Andrew J. Bruck, Acting Attorney General of New Jersey, attorney)

Record closed: September 9, 2021 Decided: October 1, 2021

BEFORE **SUSAN M. SCAROLA**, ALJ (Ret., on recall):

STATEMENT OF THE CASE

Petitioner, Robert C. Yaiser, appeals the denial of his application for a School Administrator Certificate of Eligibility (CE) by the respondent, New Jersey Department of

Education (Department), Office of Certification and Induction, Board of Examiners (Board), on the basis that he lacked completion of both an approved School Administrator Program and a 150-hour internship in educational leadership.

PROCEDURAL HISTORY

On December 13, 2019, the Board issued a determination denying the petitioner's application for a School Administrator CE. Petitioner filed a timely notice of appeal. In lieu of an answer, the Board filed a motion to dismiss with certification.

On July 30, 2020, the Department transmitted the appeal to the Office of Administrative Law, where it was filed on that date as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On May 28, 2021, the petitioner filed a brief in opposition to the motion to dismiss with certification. On August 4, 2021, the Board filed a reply brief in support of its motion to dismiss the petition of appeal.[1] On September 9, 2021, the petitioner submitted additional documents referenced in his certification, but which had not been attached.

FACTUAL DISCUSSION

The following facts are not in dispute, and, accordingly, I **FIND**:

1. On February 21, 2019, the petitioner filed an application (with documents) to the Board for a School Administrator CE.

2. On June 15, 2019, the petitioner took the Praxis test and successfully passed.

3. On July 24, 2019, the petitioner forwarded the Verification of Program Completion (VOPC) from Seton Hall's certification officer, associate dean

[1] The Board requested that the motion to dismiss be converted to a motion for summary decision, as "no material facts are in dispute." The petitioner has not objected.

Dr. Joseph Martinelli, to the Department confirming that on December 19, 2018, he had completed Seton Hall's State-approved educator-preparation program for a P–12 school administrator.

4. The VOPC also indicated that the petitioner "needs to complete admin [sic] internship," referring to the required 150-hour School Administrator internship, the completion of which would have apparently resulted in completion of an approved School Administrator program at Seton Hall University.

5. At some point, the petitioner was advised that his application was deficient, and his application for a School Administrator CE would be denied. He thereafter filed an appeal pursuant to N.J.A.C. 6A:9B-4.12.

6. In his appeal to the Board, the petitioner requested that it consider his adjunct teaching experience from Fairleigh Dickenson University, Pennsylvania State University, Seton Hall University, Ocean County College, and Montclair State University as demonstrating alternative education and/or experience equivalent to the required program in School Administration and the related 150-hour educational-leadership internship he admittedly had not completed.

7. On or about November 1, 2019, the State Board of Examiners considered the petitioner's appeal for issuance of a School Administrator CE pursuant to the requirements of N.J.A.C. 6A:9B-12.4.[2]

8. After reviewing the petitioner's request for consideration of his alternate education and experience as the equivalent of completion of an approved program in School Administration or the equivalent of a 150-hour School Administrator (Superintendent) internship, the Board concluded that the petitioner's alternate education and accumulated teaching experience as adjunct faculty were not equivalent to what was required by the governing regulation.

[2] The petitioner certified that the hearing was on December 11, 2019, not November 1, 2019. The Board lists the hearing as having occurred on November 1, 2019.

9. The Board denied the application for the CE because the petitioner had not completed two requirements: first, he did not complete an approved School Administrator program pursuant to N.J.A.C. 6A:9B-12.4(a)(1); and second, he did not complete a 150-hour internship in educational leadership pursuant to N.J.A.C. 6A:9B-12.4(a)(3).

10. The petitioner later submitted a transcript from Caldwell University indicating that he was enrolled in the internship for school administrators during the fall of the 2019–2020 academic year and that he completed the course with a 4.0 grade-point average.

LEGAL ANALYSIS AND CONCLUSION

The issue presented is whether the Board properly denied the petitioner's application for a School Administrator CE on the basis that he failed to demonstrate that he had completed both an approved program in School Administration and the required 150-hour internship in educational leadership, or that he had presented proof of equivalent training or experience.

This matter commenced as a motion to dismiss in lieu of an answer pursuant to N.J.A.C. 6A:3-1.5(g), but has been converted to a motion for summary decision pursuant to N.J.A.C. 1:1-12.5(a).

I. Standards for Summary Decision

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Such motion "shall be served with briefs and with or without supporting affidavits" and "[t]he decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). When the motion "is made and supported, an adverse party in order to prevail must by responding affidavit set forth

specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

II. Standards for a School Administrator Certificate of Eligibility

N.J.A.C. 6A:9B-5.3 provides for the issuance of educational certificates:

> (a) The Board of Examiners shall issue three categories of educational certificates: Instructional, Administrative, and Educational Services.
>
> (b) The Board of Examiners shall issue the appropriate certificate upon the candidate's completion of all certification requirements in effect at the time the Office receives the application. Requirements include, but are not limited to, coursework, degree, tests, fees, GPA, and all certificate rules pursuant to N.J.A.C. 6A:9B-8 through 13. An application shall be deemed filed with the Office when it and all required supporting documentation has been received.
>
> 1. The certificate holder shall maintain possession of the original certificate.
>
> (c) If the candidate is not eligible for the certificate sought, the Office shall issue a written evaluation that identifies the deficiency(ies) for certification.

Here, the petitioner applied for a School Administrator CE in February 2019.

N.J.A.C. 6A:9B-12.4 provides the standards for the Board to use in considering an application for a School Administrator CE:

> (a) To be eligible for the school administrator CE, the candidate shall:
>
> 1. Complete one of the following:
>
> i. Hold a master's or higher degree in educational leadership, curriculum and instruction, or one of the recognized fields of leadership or management from a regionally accredited college or university;

ii. Hold a master's degree from a regionally accredited college or university and complete a post-master's program resulting in a CEAS in educational administration and supervision;

iii. Hold a master's degree from a regionally accredited college or university and complete a post-master's program in a coherent sequence of 30 semester-hour credits as they appear on the institution's transcript. The study must be completed at one institution in fields outlined in (a)1i above;

iv. Hold a master's degree from a regionally accredited college or university and complete a Commissioner-approved certification program in educational leadership offered by a Commissioner-approved provider pursuant to N.J.A.C. 6A:9B-12.5(k)2 and (l)2; or

v. Hold a master's degree in educational leadership from a nationally accredited program at an out-of-State college or university;

2. Complete a minimum of 30 graduate credits, either within the master's program or in addition to it, in the following quality components of preparation to promote student learning as set forth in the Professional Standards for School Leaders in N.J.A.C. 6A:9-3.4;[3]

3. Complete a 150-hour internship in educational leadership aligned to the Professional Standards for School Leaders in N.J.A.C. 6A:9-3.4 and in accordance with the roles and responsibilities as a school administrator, independent of other course requirements. This internship either must appear on a transcript from a four-year regionally accredited college or university or must be certified by a Commissioner-approved program for preparing school administrators;

4. Pass a State-approved examination of knowledge acquired through study of the topics listed in (a)2 above, aligned with the Professional Standards for School Leaders, and most directly related to the functions of superintendents as defined in N.J.A.C. 6A:9B-12.3(a); and

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[3] N.J.A.C. 6A:9-3.4 provides: "[s]chool leader preparation, district induction, and professional development programs shall align their learning opportunities with the Professional Standards for Educational Leaders 2015, developed by the National Policy Board for Educational Administration (NPBEA), incorporated herein by reference, available at http://www.npbea.org/wp/wp-content/uploads/2014/11/ProfessionalStandardsforEducationalLeaders2015forNPBEAFINAL-2.pdf."

> 5. Complete five years of successful educational experience in a school district, nonpublic school, or a regionally accredited college or university.

This section applies to all candidates who matriculated and enrolled in a Commissioner-approved educational-leadership preparation program on or after September 1, 2008. The petitioner was required to complete all five of the above requirements to be considered eligible for the School Administrator CE.

Here, the Board determined that the petitioner's application met and satisfied three of the above criteria, but that two of the criteria had not been met: he had not completed an approved School Administrator program pursuant to N.J.A.C. 6A:9B-12.4(a)(1); and he had not completed a 150-hour internship in educational leadership pursuant to N.J.A.C. 6A:9B-12.4(a)(3), nor had he demonstrated that he had met the equivalent with his teaching experience. The petitioner appealed pursuant to N.J.A.C. 6A:9B-4.12(a) and (b), alleging that he had evidence of alternative education and/or experience that he believed was equivalent to the areas of deficiency.

The petitioner contends that the Board failed to exercise its discretion when it declined to accept information provided by him that he had alternative education and/or experience that corrected the deficiencies in his application. The Board considered the information provided by the petitioner as well as the July 23, 2019, VOPC from Seton Hall University, which clearly indicated that the petitioner had failed to complete the required internship at the University and was not yet eligible for certification of the completion of the educator-preparation program. His application was deficient in that regard at the time it was submitted to the Board in February.

Indeed, in his own certification the petitioner acknowledged that he did not complete the required 150-hour internship in educational leadership until December 2019, a date well after his application had been filed with the Board and after the Board had met to consider his appeal.

N.J.A.C. 6A:9B-4.12(c) provides the limitations on actions the Board can take when reviewing any supplemental evidence of equivalent training and/or experience:

> (c) The Board of Examiners shall not:
>
> 1. Waive any test, GPA, degree completion, or approved educator preparation program completion requirements;
>
> 2. Permit a candidate to substitute education and/or experience for any test, GPA, degree, or approved educator preparation program completion requirements . . . .

Here, no material facts are in dispute. The internship was mandatory, and it is undisputed that it had not been completed by the time the petitioner applied for his School Administrator CE in February 2019, or even by the time the Board considered his appeal in November or early December 2019. Accordingly, the application for the School Administrator CE was incomplete and the petitioner had failed to demonstrate that he was eligible for the CE. The Board acted appropriately in determining that the petitioner had not qualified for its issuance. Accordingly, the Board's motion for summary decision shall be granted and the petition shall be dismissed.

ORDER

I hereby **ORDER** that the respondent's motion for summary decision is **GRANTED**. The petition is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 1, 2021
DATE

SUSAN M. SCAROLA, ALJ
(Ret., on recall)

Date Received at Agency: October 1, 2021 (emailed)

Date Mailed to Parties:

SMS/mel

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

Reply Brief

For respondent:

Brief and Reply

282-21

282-21

OAL Dkt. No. EDU 5835-20
Agency Dkt. No. 98-5/20

New Jersey Commissioner of Education

Final Decision

N.H., on behalf of minor child, E.R.,

Petitioner,

v.

Board of Trustees of the Paterson Charter School for Science and Technology,
Passaic County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled September 20, 2021 OAL hearing, has been reviewed. Petitioner did not file an explanation for the failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 4, 2021
Date of Mailing: November 4, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

286-21

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

November 5, 2021

286-21L

VIA EMAIL

Lester E. Taylor, Esq.
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Steven P. Goodell, Esq.
Parker McCay PA
3840 Quakerbridge Road
Suite 200
Hamilton, New Jersey 08619

Re: *Board of Education of the City of Camden, Camden County v. New Jersey State Interscholastic Athletic Association, Agency Dkt. No. 206-11/21.*

Dear Counsel:

I have reviewed the materials filed in connection with the petition of appeal and motion for emergent relief filed by the petitioner, the Camden City School District, in the above-captioned matter. The petitioner is appealing the decision of the Protest Committee of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying the petitioner's request for a waiver of the NJSIAA's decision to disqualify the Camden High School football team (Camden) from participating in the state playoffs for accumulating four player disqualifications.

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. The party seeking such relief must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

Athletic competition in New Jersey's public schools is overseen by the respondent, NJSIAA – a voluntary, non-profit organization which promulgates the rules and regulations governing high school athletics that are adopted annually by the member schools. Section 19 of the Specific Sport Regulations states:

> 4.f. Any varsity team accumulating three or more player or coach disqualifications for flagrant unsportsmanlike conduct prior to the team's participation in an NJSIAA tournament will not be permitted to participate in same. Seeded teams will forfeit their right to compete if a disqualification limit is reached prior to the start of the tournament for the team.

In appropriate cases, the NJSIAA may grant a waiver of its rules if the overall objectives of the association and its member schools will not be undermined. *See generally, Board of Education of the City of Union, Union County v. New Jersey Interscholastic Athletic Association*, Commissioner Decision No. 455-04, decided November 10, 2004.

It is undisputed that on October 16, 2021 a high school football game between Camden and Pleasantville High School (Pleasantville) ended abruptly with 10 minutes to go in the game when a fight broke out on the field between players on both teams. Several players from both teams left the bench during the altercation and ultimately the police were called to the field. On October 18, 2021, the referees issued a Disqualification Report disqualifying four Camden players and two Pleasantville players for flagrant unsportsmanlike misconduct. Since Camden accumulated more than three player disqualifications, under Section 19, 4.f., the team was disqualified from participating in the playoffs. Thereafter, Camden sought a waiver from the NJSIAA to enable the football team to participate in the playoffs. Following a hearing where Camden had the opportunity to present evidence and witness testimony, the members of the Protest Committee voted to deny the waiver request.

On appeal, Camden argues that the NJSIAA erred in denying its waiver request because the NJSIAA's failure to provide notice and a hearing prior to the initial suspension from state playoffs was arbitrary, capricious and unreasonable, and inconsistent with the NJSIAA's Bylaws. Camden also contends that while the NJSIAA decision states that the disqualification rule "has been in place and uniformly enforced for 17 years," the rule has not been uniformly enforced under similar circumstances involving altercations during football games. Camden further maintains that if emergent relief is not granted, the entire team will be deprived of playing in a meaningful game with a chance to be seen by scouts from collegiate programs. Finally, allowing the student athletes to play in the playoffs would be consistent with the NJSIAA Mission Statement, which supports academic achievement, good citizenship, and fair and equitable opportunities.

Upon review of the parties' submissions, I find that Camden has not met the standard required for emergent relief. Most notably, Camden has failed to demonstrate a likelihood of success on the merits of the underlying appeal. It is well established that the Commissioner's scope of review in matters involving NJSIAA decisions is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of*

the City of Camden v. NJSIAA, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, I may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that it applied such rules in a patently arbitrary, capricious or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a)(2); *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Nor may I substitute my own judgment for that of the NJSIAA, where due process has been provided and where there is sufficient credible evidence in the record as a whole to serve as a basis for the decision reached by the NJSIAA. *N.J.A.C.* 6A:3-7.5(a)(1).

Petitioners seeking to overturn decisions of the NJSIAA bear a heavy burden and, considering the record of this matter and the prescribed standard of review, I find that Camden has failed to demonstrate a likelihood of success on the merits.[1] Specifically, Camden has not made a preliminary showing that the NJSIAA applied its rules in a patently arbitrary or unreasonable manner in light of its duty to ensure fairness and integrity in athletic competition statewide. It is important to recognize that individual player disqualifications are judgment calls made by the officials and are not appealable to the NJSIAA. Section 19, 4.a. Although player disqualifications are not appealable, the NJSIAA afforded Camden ample due process and the opportunity to seek a waiver of Section 19, 4.f., which automatically disqualifies a team from the playoffs when three player disqualifications occur. There is no dispute that a serious altercation broke out during the Camden and Pleasantville football game; the game had to be abruptly halted; the police were called to the field; and players from both teams were disqualified. Therefore, the NJSIAA's determination that granting a waiver in this situation would undermine the overall objectives of the Association, which includes preventing fighting, protecting safety and encouraging sportsmanship, was not arbitrary, capricious or unreasonable.

Accordingly, Camden's request for emergent relief and an order permitting the football team to participate in the state playoffs is hereby denied. Further, because the relief sought in the petition will become moot once the playoffs begin on November 5, 2021, this decision shall resolve the entire controversy without further proceedings.[2]

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

c: State Law Library

[1] Since all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the three remaining factors.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

287-21

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

November 8, 2021

VIA E-MAIL ONLY

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Mitchell H. Kizner, Esq.
Flaster Greenberg, PC
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Cherry Hill, NJ 08002

Re: ***Board of Education of the City of Vineland, Cumberland County v. Board of Education of the Cumberland County Vocational School District, Cumberland County, OAL Dkt. No. EDU 00249-21, Agency Dkt. No. 248-12/20.***

Dear Counsel:

I have reviewed the papers filed in connection with respondent's request for interlocutory review of Administrative Law Judge Tama B. Hughes' order issued October 22, 2021, denying respondent's motion for summary decision. Upon full consideration of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, respondent's request for interlocutory review is hereby denied.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

c: Tama B. Hughes, Administrative Law Judge
Clerk, Office of Administrative Law

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288-21

OAL Dkt. No. EDU 05479-21
Agency Dkt. No. 77-5/21

New Jersey Commissioner of Education

Final Decision

D.S. and J.S., on behalf of minor child, L.S.,

Petitioners,

v.

Board of Education of the Township of Cinnaminson, Burlington County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement to the extent that she has jurisdiction over the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 16, 2021
Date of Mailing: November 16, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05479-21
AGENCY DKT. NO. 77-5/21

D.S. and J.S. on behalf of minor child, L.S.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,
Respondent.

Julie Warshaw, Esq., for petitioners (Warshaw Law Firm, PC, attorneys)

Alyssa K. Weinstein, Esq., for respondent (The Busch Law Group, LLC, attorneys)

Record Closed: September 30, 2021 Decided: October 4, 2021, 2021

BEFORE **JUDITH LIEBERMAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 1, 2021, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement and Release indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement and Release resolves all issues in dispute.

I have reviewed the record and the terms of settlement, and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 4, 2021
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: 10/6/2021

Date Mailed to Parties: 10/6/2021

mph

SETTLEMENT AGREEMENT AND RELEASE

D.S. and J.S. o/b/o L.S., Petitioners, v. CINNAMINSON TOWNSHIP BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW **OAL EDS 02203-2021** Agency 2021-32557
D.S. and J.S. o/b/o L.S., Petitioners, v. CINNAMINSON TOWNSHIP BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW **OAL EDU 05479-2021** Agency No. 77-5/21

This Settlement Agreement and General Release (the "Agreement") is entered into by and between D.S. and J.S. o/b/o L.S. ("Petitioners"), and the Cinnaminson Township Board of Education ("District" or "Board") with administrative offices located at 2195 Riverton Road, Cinnaminson, New Jersey 08077 (Petitioners and District are collectively referred to as the "Parties").

WHEREAS, a dispute has arisen regarding, *inter alia*, L.S.'s education, discipline, evaluation, and investigation by the District, and the District's alleged treatment of L.S. and his family members; and

WHEREAS, the Parties have negotiated in good faith and have a desire to settle their dispute in an amicable way without any admission of wrongdoing by any Party, and accordingly the Parties hereby agree as follows:

1. On February 11, 2023, so long as L.S. does not accrue another multi-day suspension as outlined specifically for each infraction set forth in the Code of Student Conduct

section of the effective Cinnaminson High School Student Handbook, the District will remove the twenty-day suspension (which ran from February 11, 2021 - March 11, 2021), any discipline points associated therewith, and any reference to the corresponding HIB finding against L.S., from L.S.'s student record. Removal of this information from L.S.'s student record shall be confirmed in writing by the Superintendent of Schools to Petitioners within 10 days from February 11, 2023. The aforementioned suspension shall not prevent L.S. from participating in any school club or sport, provided that he satisfies all other requirements for participation and does not accrue any additional multi-day suspension(s) as set forth hereinabove. Petitioners expressly acknowledge and agree that the District will not remove the aforementioned HIB finding from the HIB tracking information that must, by law, be reported to the State of New Jersey. If L.S. accrues more than 10 days of suspension (consecutive or cumulative) in any school year, the District will convene a meeting with Petitioners within 10 days of the suspension decision, to determine if the conduct was a manifestation of L.S.'s disability(ies). Petitioners expressly reserve and retain all rights with respect to any suspension and/or manifestation determination subsequent to the approval of this Agreement.

2. The District's Child Study Team will conduct psychological, educational, and social history evaluations and will convene an Eligibility Meeting to discuss same no later than November 19, 2021 (or as soon thereafter as practicable in the event that the COVID-19 pandemic renders compliance with this timeframe impossible). Petitioners expressly reserve and retain the right to challenge any decisions made at the aforementioned Eligibility Meeting or thereafter. Petitioners' signatures on this Agreement shall constitute consent to conduct the aforementioned evaluations.

3. L.S.'s most recent 504 Accommodation Plan will remain unaffected by this Agreement. Petitioners may request a meeting to discuss same as provided for by law.

4. The District will credit Petitioner J.S. with one (1) personal day to compensate for the one (1) personal day that she utilized to attend an Office of Administrative Law conference in connection with this dispute.

5. The Board, through its insurer, will provide payment to Petitioners' attorney, Julie Warshaw, Esq. of the Warshaw Law Firm, LLC, in the amount of forty-two thousand five-hundred dollars ($42,500.00), for attorney fees and litigation costs incurred on Petitioners' behalf. Said payment shall be contingent upon the Board's receipt and verification of a statement of legal services from Petitioners' attorney, and payment shall be made within thirty (30) calendar days of the next scheduled regular Board meeting following the Board's receipt of such statement of services. The amount paid by the Board's insurer to Petitioners' attorney shall not include the fees or costs associated with any third-party vendors or private experts retained by Petitioners. The amount paid by the Board's insurer to Petitioners' attorney shall constitute the full extent of the Board's obligation with respect to Petitioners' attorney fees and litigation costs pursuant to 20 U.S.C.A. 1415 and any other Federal or State statute, regulation, or common law, regardless of the total amount of attorney fees and costs actually incurred.

6. The Parties expressly agree that this Agreement resolves any and all issues between the Parties which were or could have been asserted in the above-captioned due process action (OAL EDS 02203-2021, Agency 2021-32557), the above-captioned HIB appeal (OAL EDU 05479-2021, Agency No. 77-5/21), Petitioners' 4/2/2021 Notice of Tort Claim, and/or any other action, which arose or could have arisen from the beginning of time through the date of approval of this Agreement. In consideration for the items set forth in this Agreement,

Petitioners (on their own behalf and on L.S.'s behalf) hereby waive and release any and all rights to file or cause to be filed any suit, petition, demand, administrative, judicial, or other proceeding, claim, complaint, or other action of any kind relating to the allegations which were or could have been asserted in the above-captioned due process action, the above-captioned HIB appeal, the above-referenced Notice of Tort Claim, and/or any other action, against the District or its board members, officers, administrators, agents, attorneys, insurers, employees, or assigns, which have allegedly occurred or which may occur from the beginning of time through the date of approval of this Agreement. This waiver and release includes but is not limited to any and all claims, procedural, substantive, or otherwise, which were or could have been asserted in the above-captioned due process action, the above-captioned HIB appeal, the above-referenced Notice of Tort Claim, and/or any other action. Notwithstanding the provisions of this paragraph, all Parties expressly reserve the right to file a claim to enforce this Agreement.

7. The Parties expressly agree that, because this Agreement is the result of a compromise, there is no "prevailing party" in these matters, and each Party is responsible for its own attorney fees, consultant fees, expert fees, and litigation costs, except as provided in paragraph 5 above.

8. The terms of this Agreement are specifically contingent upon Petitioners' and L.S.'s continued domicile in Cinnaminson, New Jersey. If at any time while this Agreement is in effect, Petitioners or L.S. cease to be domiciled in Cinnaminson, Petitioners shall notify the District immediately, and the Board's obligations under this Agreement shall immediately cease.

9. This Agreement represents the entire agreement between these Parties on these issues and cannot be modified in whole or in part except by mutual written agreement.

10. This Agreement is subject to Board approval and is without prejudice to any Party if the terms are not agreed upon and approved by the Board. The District will make its best effort to present and recommend this Agreement to the Board at the next scheduled regular Board meeting following execution of this Agreement by Petitioners. In the event this Agreement is not approved by the Board, this Agreement shall be inadmissible in any legal proceeding between the Parties, and neither Party shall be bound to same. Approval of this Agreement shall be evidenced by a certified copy of the resolution passed by the Board.

11. Following Board approval of this Agreement, the Parties will submit this Agreement to the administrative law judge handling these matters for the judge's entry of a Final Order Approving Settlement.

12. It is acknowledged that this Agreement has been entered into freely, willingly, and voluntarily, without duress or coercion, with a full understanding of its contents, and with the opportunity for the Parties to consult with representation of their choosing and at their option. Petitioners have been represented by Julie Warshaw, Esq. of the Warshaw Law Firm, LLC, and are satisfied with her representation. The District has been represented by Alyssa K. Weinstein, Esq. of The Busch Law Group, LLC, and is satisfied with her representation. The Parties acknowledge that they understand the contents of this Agreement and that they were given the opportunity to review it with representatives of their choosing.

13. This Agreement is made without any admissions or findings of liability or responsibility by any Party hereto.

14. The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the respective Party.

15. This Agreement shall be construed fairly, according to the plain language of its terms.

16. This Agreement shall be governed by the Laws of the State of New Jersey and constitutes a legal release of any and all claims that were or could have been raised in these matters.

17. The settlement of these matters and the terms of this Agreement shall remain confidential to the maximum extent permitted by law and shall not be disclosed by either Party to any third party other than a Party's attorney, accountant or other tax preparer, governmental entity or agency, sports recruiter, college or university, medical provider or therapist, or the like, and as otherwise required by law. If either Party is asked about the outcome or status of the dispute, such Party may respond "The dispute has been resolved."

18. It is expressly agreed that no Party to this Agreement shall engage in any disparagement of any other Party to this Agreement at any time.

19. Neither Party will undertake any retaliation against the other in connection with the dispute or with this Agreement.

-signatures on page 7-

IN WITNESS WHEREOF, the Parties hereto set their hands to this Agreement as follows:

PETITIONERS, D.S. and J.S. o/b/o L.S.:

Daniel Smith, Individually and o/b/o L.S.
Dated: 9-15-21

Johnna Smith, Individually and o/b/o L.S.
Dated: 9/15/2021

STATE OF NEW JERSEY, COUNTY OF BURLINGTON:

I CERTIFY that, on September 15 2021, Daniel Smith, individually and o/b/o L.S., personally came before me and acknowledged under oath, to my satisfaction, that he: (a) is named in and personally signed this document; and (b) signed, sealed, and delivered this document as his act and deed.

Attorney or Notary Public

STATE OF NEW JERSEY, COUNTY OF BURLINGTON:

I CERTIFY that, on September 15 2021, Johnna Smith, individually and o/b/o L.S., personally came before me and acknowledged under oath, to my satisfaction, that she: (a) is named in and personally signed this document; and (b) signed, sealed, and delivered this document as her act and deed.

Attorney or Notary Public

CINNAMINSON TOWNSHIP BOARD OF EDUCATION:

Dated: 9-29-21

Board President

Cinnaminson Township Public Schools

Administrative Offices
P.O. Box 224
Cinnaminson, New Jersey 08077
Tel 856-829-7600 Fax 856-786-9618

I, Thomas W. Egan, Jr., Secretary of the Board of Cinnaminson Township Schools, hereby certify that the foregoing extract from the minutes of the Regular Meeting of the Board of Education of said district duly called and held on September 28, 2021, is a true and complete copy of the original minutes so as the same relate to the subject matter referred to in said extract.

The following motion was introduced by Mrs. Quinn seconded by Mrs. Trampé , roll call vote 8 ayes, 0 nays, 1 absent in favor of the following resolution:

16. BUSINESS & FINANCIAL

D. Contracts

1. Settlement Agreement and Release

That the Board approves the settlement agreement and release as attached.

Thomas W. Egan, Jr.
Board Secretary/Business Administrator

Date

289-21

289-21

New Jersey Commissioner of Education

Final Decision

Tess Iannocco,

Petitioner,

v.

Board of Education of the Borough of Wood Ridge, Bergen County,

Respondent.

Synopsis

Petitioner – a tenured teacher – suffered a medical episode in her classroom and required emergency services. Subsequently, the Board required that she undergo a fitness for duty evaluation before returning to work and placed her on sick leave until the evaluation was completed. The petitioner filed the within appeal, arguing that she should have been placed on paid administrative leave rather than forced to use her accrued sick time while she waited for clearance to return to work; petitioner demanded that her sick days be reinstated. The parties filed a joint stipulation of facts and motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case and the matter is ripe for summary decision; under *N.J.S.A.* 18A:16-2(a), boards of education may conduct physical or psychiatric evaluations of its teachers to ensure they are mentally and physically fit to perform their duties; *N.J.S.A.* 18A:16-4 addresses what occurs after a fitness evaluation and the use of sick time if the employee is not able to return to work such that when a physician determines there is a mental or physical issue precluding job service, the tenured employee may use sick leave until the board of education is satisfied that the employee has recovered; here, however, no physician concluded that petitioner was unfit to teach; rather, the physician performing the fitness evaluation permitted petitioner to return to her teaching position. The ALJ concluded that the Board could not compel petitioner to utilize her sick days before the completion of the fitness evaluation. Accordingly, the ALJ granted summary decision to petitioner and ordered the Board to return 39.5 days of sick leave to her.

The Commissioner concurred with the findings and determination of the ALJ herein; accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

289-21
OAL Dkt. No. EDU 11442-20
Agency Dkt. No. 233-11/20

New Jersey Commissioner of Education

Final Decision

Tess Iannacco,

Petitioner,

v.

Board of Education of the Borough of Wood-Ridge, Bergen County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the Board pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto, have been reviewed and considered.

Petitioner, a tenured teacher, suffered a medical episode in her classroom and was required by the Board to undergo a fitness for duty evaluation before returning to work. The Board required her to use sick leave until the evaluation was completed, and petitioner appealed, arguing that she should have been placed on paid administrative leave. The Administrative Law Judge (ALJ) granted petitioner's motion for summary decision and denied the Board's cross-motion for summary decision, concluding that the Board could not require petitioner to use sick days before the completion of the fitness evaluation.

In its exceptions, the Board argues that there is no statutory provision authorizing the use of administrative leave. The Board further contends that the cases cited by the ALJ to support her

conclusion are distinguishable and do not directly address the issue of how the dates between a medical episode and a clearance to return to work should be characterized. According to the Board, there was no way for either the Board or petitioner to gauge whether she was able to return to the classroom after her medical incident, such that she must be placed on sick leave until she was cleared to return to work.

In reply, petitioner argues that the ALJ's decision was correct because the Board lacks statutory support to impose involuntary sick leave when a fitness evaluation had not been completed and no physician had determined that petitioner was unfit. Petitioner contends that the ALJ was correct in finding that a medical justification is required for sick leave and that the Board does not have the medical expertise to conclude that petitioner was too ill or disabled to work.

Upon review, the Commissioner concurs with the ALJ that the Board must reinstate petitioner's sick days. While a board of education may place a tenured teacher on involuntary sick leave pursuant to *N.J.S.A.* 18A:16-4, such leave may only be ordered after an examination is performed that indicates "mental abnormality or communicable disease." A board of education cannot require the use of sick leave without medical justification. *Mary Roberts v. Clinton Township Board of Education*, 1991 S.L.D. 751, 760 (Initial Decision, March 26, 1991), *aff'd* 1991 S.L.D. 763 (Commissioner Decision, May 14, 1991), *aff'd* 1991 S.L.D. 767 (State Board of Education Decision, September 4, 1991).

The Board's argument that a medical justification was present based on the medical incident in petitioner's classroom is unavailing. As the ALJ noted, simply having a medical condition does not necessarily make an individual too ill or disabled to work and requiring medical attention on a given day does not necessarily mean the individual is unable to work the next day. The Board does not have the medical expertise necessary to reach the conclusion

that petitioner was too ill or disabled to work. Unless and until a medical professional declared petitioner unable to work, there was no medical justification for her sick leave, and therefore she was not required to use her sick days.[1] While the Board contends that no statutory provision requires administrative leave during this time, the statutory framework protects an employee's sick days until after a fitness evaluation determines she is unable to work and further limits suspensions without pay to circumstances that do not apply here. Accordingly, a paid leave of absence – whether termed "administrative leave" or something else – is the only permissible option.

Accordingly, petitioner's motion for summary decision is granted, and the Board's motion for summary decision is denied. The Board is ordered to reinstate 39.5 days of sick leave to petitioner.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 18, 2021
Date of Mailing: November 18, 2021

[1] This is consistent with the definition of sick leave as an "absence . . . because of personal disability due to illness or injury" or because of exclusion from school due to a contagious disease or quarantine. *N.J.S.A.* 18A:30-1.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 11442-20
AGENCY DKT. NO. 322-11/20

TESS IANNACCO,

Petitioner,

v.

WOOD-RIDGE BOARD OF EDUCATION,

Respondent.

Colin M. Lynch, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C., attorneys)

Daniel R. Roberts, Esq., for respondent (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: September 29, 2021 Decided: October 4, 2021

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

Tess Iannacco, a tenured teacher, suffered a medical episode in her classroom while wearing a mask due to COVID and needed emergency services. The Wood-Ridge Board of Education (Wood-Ridge) immediately placed Iannacco on sick leave. Is Iannacco required to use her sick days pending medical clearance to return to work? No. A teacher would use sick leave following a fitness examination revealing "mental abnormality or communicable disease," not before. N.J.S.A. 18A:16-4.

PROCEDURAL HISTORY

On November 17, 2020, Iannacco filed a Verified Petition with the Commissioner of Education (Commissioner), contesting Wood-Ridge's insistence that she use sick leave pending the outcome of a fitness for duty evaluation. Instead, she maintains that while Wood-Ridge can require a teacher to undergo a psychiatric or physical examination, Wood-Ridge must place her on paid administrative leave pending the results of that evaluation.

On December 8, 2020, Wood-Ridge filed its answer, maintaining the propriety of its actions.

On December 11, 2020, the Department of Education (DOE) transmitted this case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -13, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On January 21, 2021, I held a pre-hearing conference wherein the parties advised of their desire to resolve the case.

On May 28, 2021, the parties advised that settlement negotiations were unsuccessful. Still, the parties agreed that the material facts were undisputed, and no hearing was necessary to resolve the legal issue presented. Moreover, the parties agreed to give a joint stipulation of facts and exhibits with the motions for summary decision.

On August 6, 2021, the parties filed cross-motions for summary decision, and on September 10, 2021, the parties filed responses.

On September 17, 2021, Iannacco supplied a reply.

On September 29, 2021, the parties revised the joint stipulation of facts, and I closed the record.

FINDINGS OF FACT

The parties presented a joint stipulation of facts and exhibits. Thus, I **FIND** the following as **FACT** for purposes of these motions only:

Wood-Ridge employed Iannacco as an Italian teacher, and she acquired tenure as a teacher.

Iannacco suffers from a medical condition that makes it difficult for her to wear a face mask. Iannacco requested medical accommodation during the COVID-19 pandemic, and Wood-Ridge permitted her to remove her mask when students were not in her classroom.

On October 26, 2020, Wood-Ridge's school physician evaluated Iannacco about mask-wearing. The physician concluded that Iannacco did not qualify for an exemption from wearing a mask while teaching in the classroom.

On October 27, 2020, while in her classroom, Iannacco suffered a medical episode requiring local emergency medical services. Iannacco's mask-wearing prompted the medical event, and Iannacco used half of a sick day on October 27, 2020.

Later that same day, former Superintendent of Schools Nicholas Cipriano advised Iannacco that Wood-Ridge placed her on immediate sick leave due to the medical episode and required Iannacco to use her sick days pending a fitness for duty evaluation.

On December 22, 2020, Iannacco underwent a fitness examination.

On January 14, 2021, the school principal contacted Iannacco and advised her that the evaluation's results permitted Iannacco to return to work.

On January 15, 2021, Iannacco returned to teaching, providing in-person instruction.

Wood-Ridge did not grant Iannacco any paid administrative leave pending her medical clearance and return to teaching in the classroom. Instead, Wood-ridge required Iannacco to utilize thirty-nine and one-half sick days.

DISCUSSION AND CONCLUSIONS OF LAW

Summary-Decision Standard

A party may move for summary decision upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). Briefs, with or without affidavits must accompany the motion. When the filed papers and discovery, together with any affidavits, show that no genuine issue of material fact exists and that the moving party is entitled to prevail as a matter of law, the judge may grant the motion. N.J.A.C. 1:1-12.5(b). When a party makes such a motion, an adverse party, to prevail, must submit

an affidavit setting forth specific facts showing that a genuine issue of material fact exists that an evidentiary proceeding can only determine. Ibid.

Even though a statute calls for a "hearing," where a party makes a motion for summary decision supported by documentary evidence and the objector submits no evidence to demonstrate that a genuine issue of material fact exists, the motion procedure constitutes the hearing, and no trial-type hearing is necessary. Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120–21 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

To determine whether a genuine issue of material fact exists that precludes summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to demonstrate that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins., 142 N.J. 520, 540 (1995).

In this case, no genuine issue about the material facts exists. The only question presented is whether Iannacco is required to use sick days beyond October 27, 2020, pending the outcome of a fitness for duty evaluation about a known medical condition. More pointedly, no genuine issue exists that Iannacco is a tenured teacher with a medical ailment causing difficulties with mask-wearing. Further, she suffered a medical episode in her classroom when wearing a face mask required by the COVID-19 pandemic. After the medical incident, Wood-Ridge placed Iannacco on sick leave and charged her thirty-nine and one-half sick days until her clearance and return to work. Since these facts are clear and undisputed, I **CONCLUDE** that this case is ripe for summary decision.

Fitness for Duty and Sick Leave

Under N.J.S.A. 18A:16-2(a), the Legislature authorized boards of education to conduct physical or psychiatric evaluations of its teachers to ensure they are mentally and physically fit to perform their duties:

> Every board of education may require its employees and shall require any candidate for employment, who has received a conditional offer of employment to undergo a physical examination. The board may require individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical, or mental health.
>
> [Ibid.]

However, as Judge Lane cautioned in Kochman v. Keansburg Board of Education, 124 N.J. Super. 203, 212 (Ch. Div. 1973), the Legislature also "recognized that although a board of education may observe signs of what it considers a harmful, significant deviation, it does not have the expertise to question the teacher on the matter itself but must rely on the expertise of a psychiatrist." See N.J.S.A. 18A:16-3 (a physician chosen by the board at the board's expense may conduct the examination or a physician selected by the employee at the employee's expense).

N.J.S.A. 18A:16-4 addresses what occurs after a fitness evaluation and the use of sick time if ineligible for service:

> If the result of any such examination [by a physician] indicates mental abnormality [or impaired physical condition] . . . , the employee shall be ineligible for further service until proof of recovery, satisfactory to the board, is furnished, but if the employee is under contract or has tenure, he may be granted sick leave with compensation as provided by law and shall, upon satisfactory recovery, be permitted to complete the term of his contract, if he is under contract, or be reemployed with the same tenure as he possessed at the time his services were discontinued, if he has tenure, unless his absence shall exceed a period of two years.

[Ibid.]

In other words, when the physician determines there is a mental or physical issue precluding job service, the tenured employee may use sick leave until the board of education is satisfied that the employee recovered.

Numerous cases addressing teacher fitness for duty evaluations demonstrate that school districts routinely place the employee on paid administrative leave before the fitness examination, not sick leave. See, e.g., Dickerson v. Pittsgrove Twp. Board of Education, 2011 N.J. AGEN LEXIS 538 (October 14, 2011); Hayes v City of Camden, State-Operated School District, Camden County, 2016 N.J. AGEN LEXIS 4 (January 04, 2016); Cummings v. Little Egg Harbor Twp. Board of Education, Ocean County, 2018 N.J. AGEN LEXIS 968 (October 19, 2018); Diaz v. Mahwah Twp. Board of Education, 2010 N.J. AGEN LEXIS 101 (March 2, 2010); Bristol v Northern Valley Regional High School District, Bergen County, 2004 N.J. AGEN LEXIS 472 (July 1, 2004).

Still, other decisions have considered the correct fitness-for-duty process. In Roberts v. Clinton Board of Education, 1991 N.J. AGEN LEXIS 2419 (Initial Decision, March 26, 1991), the board of education received parent complaints about Roberts, a tenured teacher, and placed Roberts on involuntary medical leave pending a psychiatric evaluation. Notably, the board filed no disciplinary charges against Roberts. Once Roberts' sick leave and accumulated sick leave expired, the board stopped paying her salary. Roberts sought to restore sick leave days she claimed the board improperly required her to use and her unpaid salary. Unlike here, Roberts refused to undergo a psychiatric examination. Regardless, the Administrative Law Judge (ALJ) ordered the restoration of Roberts' sick leave, highlighting that a medical determination must first occur:

> It is recognized that a board of education may place a tenured teacher on involuntary sick leave under N.J.S.A. 18A:16-4. However, such leave may be ordered only after a physical or

> psychiatric examination is performed and the results thereof "indicate mental abnormalities or communicable disease."
>
> [Id. at *23.]

Moreover, the ALJ noted rejected that a dangerous situation permits a board to disregard procedural safeguards:

> In the absence of an indictment or charges certified to the Commissioner, there is no acknowledged standard as 'clear and present danger' which would justify the suspension of a tenured teacher from employment through placement on involuntary sick leave without medical justification and to suspend the teacher's salary when accumulated sick leave expires.
>
> [Id. at *24.]

The Commissioner upheld the ALJ"s conclusions observing that other decisions address the correct process regarding psychiatric or medical evaluations to assess fitness. Specifically, the Commissioner highlighted conclusions reached in Emil Scachetti v. Board of Education of the Twp. of Rockaway, 1977 S.L.D. 142, affirmed State Board 153. In Scachetti, "a suspension without pay pending administration and results of a disputed psychiatric exam was [found] improper and [the ALJ] ordered Scachetti restored to employment with mitigated back pay until a medical exam properly led to the invocation of N.J.S.A. 18A:16-4 [requiring the use of sick leave] or filing of tenure charges." Roberts, 1991 N.J. AGEN LEXIS 2419 (Commissioner's Decision, May 14, 1991) at *4-5.

Wood-Ridge suggests that Roberts is distinguishable because Iannacco has a known medical condition and required emergency services, whereas the board in Roberts had no medical justification for its actions. Yet, this position belies the explicit procedural protections under N.J.S.A. 18A:16-4, precluding a board of education from substituting its judgment for that of a physician. Simply having a medical condition does not make an individual too ill or disabled to work. Similarly, requiring medical

assistance on a given day cannot determine the employee is too ill to work beyond that incident.

In addition to procedural defects, Iannacco also maintains that using sick leave in this situation conflicts with the statutory framework for such absences. The Legislature defines "sick leave" as "absence from [work] . . . because of personal disability due to illness or injury." N.J.S.A. 18A:30-1. Under N.J.S.A. 18A:30-2, all employees have sick leave with full pay for a minimum of ten school days in any school year. Iannacco maintains she was neither sick nor disabled during the imposed sick leave and Wood-Ridge's evaluating physician concurred.

Consistently, the Appellate Division addressed whether an employee could use sick time for a period when she was not ill but as a means to extend her maternity leave. In re Hackensack Bd. of Education, 184 N.J. Super. 311 (App. Div. 1982). The court reviewed the statutory framework of sick leave and concluded that sick leave could not be "used for child-rearing purposes by a nondisabled teacher." Id. at 317. Indeed, "the teacher simply would not be sick, as that term is [specifically] defined in N.J.S.A. 18A:30-1." Id.

The court highlighted that while N.J.S.A. 18A:30-3 provides for the accumulation of unused sick leave "to be used for additional sick leave as needed in subsequent years," any use "for other purposes would be directly contrary to N.J.S.A. 18A:30-3." Id. The court concluded that the Legislature's inclusion of the terms "as needed" must mean the need "for additional sick leave." Id. Consequently, the Board has the right to request a physician's note before granting sick leave. N.J.S.A. 18A:30-4. Yet, the statute does not authorize a board to determine whether a teacher is sick or disabled.

Here, no physician concluded that Iannacco was unfit to teach, and instead, the physician performing the fitness evaluation permitted Iannacco to return to her teaching position. Therefore, even if Wood-Ridge observed Iannacco's "deviation from normal,

physical, or mental health," then I **CONCLUDE** it must wait until a physician determines she is unfit for teaching before requiring her to utilize sick days.

Further, I **CONCLUDE** that Wood-Ridge could not require Iannacco to utilize thirty-nine and one-half sick days before the fitness-for-duty evaluation and her return to work, and thus, Iannacco is entitled to summary decision in her favor as a matter of law.[1]

ORDER

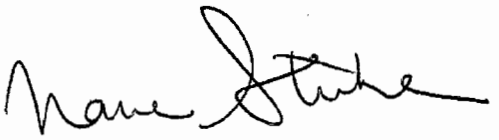
Given my findings of fact and conclusions of law, I **ORDER** that Iannacco be **GRANTED** summary decision and that the Wood-Ridge Board of Education be **DENIED** summary decision. I further **ORDER** that Iannacco be returned thirty-nine and one-half days of sick leave.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

[1] Iannacco also maintains that the improper use of sick leave violates her tenure rights by reducing her compensation without cause or the due process required by N.J.S.A. 18A:6-10. Yet, I need not reach this issue because I granted her relief on other grounds.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



October 4, 2021

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: October 4, 2021

Date Mailed to Parties: October 4, 2021

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290-21

290-21

New Jersey Commissioner of Education

Final Decision

Ana David-Pedi,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

Respondent.

Synopsis

Petitioner – a school bus driver – appealed the Department's determination to suspend her school bus endorsement pursuant to *N.J.S.A.* 18A:39-28 *et seq.* after an incident in which a Central Jersey Prep student was left on petitioner's school bus at the end of one of her assigned bus routes on February 24, 2021. Petitioner did not dispute that the child was left on the bus but contended that the student was never left alone. Petitioner conceded that she had only conducted a visual "turn around" inspection of the bus, not a full visual walk-through, asserting that she had nowhere to pull over safely to walk through of the bus before continuing to her next route. Petitioner did conduct the required walk-through after her next stop and found the student asleep in a seat, after which she returned the unharmed child Central Jersey Prep. The respondent Department filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner has admitted that on February 24, 2021, she did not conduct a full visual inspection of her school bus when she dropped off students at the Central Jersey Prep in Franklin Township, before proceeding to her next assigned stop in South Brunswick; pursuant to *N.J.S.A.* 18A:39-28, petitioner had an affirmative duty to visually inspect the school bus at the end of the transportation route to determine that no pupil had been left on the bus, and her argument that at no point was the student left unattended since petitioner never stepped off the bus before finding the child is without merit; in accordance with *N.J.S.A.* 18A:39-29, if a school bus driver is found to have left a pupil on the bus at the end of a route, the driver's school bus endorsement shall be suspended for six months for the first offense. Accordingly, the ALJ granted summary decision to the respondent and affirmed the petitioner's six month suspension for leaving a child on the school bus at the end of a route.

Upon full review, the Commissioner concurred with the ALJ that the respondent is entitled to summary decision. Accordingly, the petition was dismissed; respondent was directed to notify the Motor Vehicle Commission of its obligation to suspend petitioner's school bus endorsement pursuant to *N.J.S.A.* 18A:39-26 *et seq.*, and to notify petitioner's employer that she is ineligible for the period of suspension for continued employment as a school bus driver.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

290-21
OAL Dkt. No. EDU 04317-21
Agency Dkt. No. 41-3/21

New Jersey Commissioner of Education

Final Decision

Ana David-Pedi,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge that petitioner violated *N.J.S.A.* 18A:39-28 when she failed to conduct a visual inspection of her school bus at the end of her route and, as a result, a child was left on the bus while petitioner continued on to her next route.

Accordingly, respondent's motion for summary decision is granted and the petition of appeal is dismissed. Petitioner's "S" endorsement is hereby suspended for six months from the date of this decision. Respondent is directed to notify the Motor Vehicle Commission of its obligation to suspend petitioner's school bus endorsement pursuant to

N.J.S.A. 18A:39-26*et seq.*, and to notify petitioner's employer that she is ineligible for the period of suspension for continued employment as a school bus driver.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 18, 2021
Date of Mailing: November 18, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDU 04317-21

AGENCY DKT. NO. 41-3/21

ANA DAVID-PEDI,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

OFFICE OF STUDENT PROTECTION,

Respondent.

Michael Policastro, Esq., for petitioner (The Policastro Law Firm, attorneys)

Sydney Finkelstein, Deputy Attorney General, for respondent Andrew J. Bruck, Acting Attorney General, attorney)

Record Closed: October 11, 2021 Decided: October 13, 2021

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

Petitioner appeals the six-month suspension of her "S" endorsement to operate a school bus, based on the determination by respondent New Jersey Department of

Education, Office of Student Protection, (DOE) that a child was left on the school bus to which petitioner was assigned.

PROCEDURAL HISTORY

Petitioner was notified of the DOE's determination on or about March 1, 2021. She filed a timely appeal on or about March 10, 2021. The DOE Office of Controversies and Disputes transmitted the matter to the Office of Administrative Law (OAL), where it was filed on May 14, 2021, as a contested case. N.J.S.A. 52:14B-1 to-15; N.J.S.A. 52:14F-1 to-13. The matter was assigned to me on June 4, 2021, and the first prehearing status conference was conducted on August 2, 2021. During the status conference, respondent advised that it submitted to DOE a motion to dismiss the appeal in lieu of an answer and sought leave to proceed with the motion before the OAL. Because petitioner advised that she had retained counsel, the prehearing conference was rescheduled to August 13, 2021, to permit counsel's appearance. The motion was discussed during the August 13, 2021, prehearing conference. It was determined that the motion would be treated as a motion for summary decision and petitioner would file a brief in opposition to the motion no later than September 13, 2021. Oral argument would be permitted if either party requested.

On September 15, 2021, petitioner asked respondent for a one-week extension of time to respond to the motion. The request was not presented to the OAL until September 20, 2021, which was one week after the September 13, 2021, deadline. At that time, petitioner did not specify the length of the requested extension. On October 7, 2021, because petitioner did not respond to my legal assistant's inquiries concerning the length of the requested extension, petitioner was advised in writing that she must submit her response to the pending motion for summary decision no later than October 11, 2021. She was further advised that if the response was not received by that date, the motion would be decided without petitioner's response. As of the date of this opinion, petitioner did not submit a response to respondent's motion. Accordingly, the motion was deemed unopposed.

FACTUAL DISCUSSION

The following facts are undisputed and, therefore, I **FIND** the following as **FACT:**

Petitioner possessed an "S" endorsement to operate school buses. On February 24, 2021, petitioner worked as a school bus driver. That day, she dropped off the children on her bus at Central Jersey Prep in Franklin Township, New Jersey. At that time, she observed, "from a turnaround view, [that] there were no children left on the bus." March 10, 2021, Petition. She was unable to stop the vehicle to "perform a full child check" because her "routes are too close in time gap" and, thus, she had "nowhere to pull over safely[.]" Ibid. Petitioner left Central Jersey Prep at 7:43 a.m. and proceeded to South Brunswick, where her first stop was at 7:53 a.m. "Upon [her] drop off to the next school in South Brunswick, [she] conducted a walk through and noticed that a child . . . was slouched over asleep in one of the seats." Ibid. Petitioner alerted her dispatcher that she would return to Central Jersey Prep to drop off the child and asked that another bus driver take over the rest of her route. Petitioner returned to Central Jersey Prep and walked the child into the school. Petitioner asserted, "At no point during this time was the child left unattended as I never stepped off the bus." Ibid.

The dispatcher, Robert Wojciechowicz, wrote a letter in which he described his interaction with petitioner. He asked her if she exited the bus at any time. P-1. Petitioner told him she "never exited the bus at all[.]" Ibid. Wojciechowicz wrote that he knew petitioner was "telling the truth because all her routes run together. So there is no time for [her] to stop[.]" Ibid.

DOE determined that petitioner's "S" endorsement to operate a school bus must be suspended because a child was left on the school bus to which she was assigned. It proposed a six-month suspension because it was petitioner's first offense.

LEGAL ANALYSIS AND CONCLUSION

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). Summary decision may be granted when

> the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
>
> Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995)(quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)).

See also R. 4:46-2(c)("An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact"). Here, the facts are not in dispute and, therefore, the matter is ripe for summary decision.

N.J.S.A. 18A:39-28 addresses school bus drivers' obligation to ensure that children are not left on their busses. It provides:

> A school bus driver shall visually inspect the school bus to which he is assigned at the end of the transportation route to determine that no pupil has been left on the bus. For the purposes of this act, "school bus" means every motor vehicle operated by, or under contract with, a public or governmental agency, or religious or other charitable organization or corporation, or privately operated for compensation for the transportation of children to or from school for secular or

> religious education, which complies with the regulations of the Department of Education affecting school buses, including "School Vehicle Type I" and "School Vehicle Type II" as defined pursuant to R.S.39:1-1.

A penalty must be imposed if a bus driver is found to have violated the statute:

> In the event that, after notice and opportunity to be heard, a school bus driver is found to have left a pupil on the school bus at the end of his route, his school bus endorsement shall be:
>
> a. suspended for six months, for a first offense; or
> b. permanently revoked, for a second offense.
>
> [N.J.S.A. 18A:39-29.]

The statue does not require that the child must suffer an injury before a penalty may be imposed. See Garner v. New Jersey State Department of Education, Criminal History review Unit, OAL Dkt. No. EDU 06655-08, adopted, Comm'r, Final Decision (May 1, 2009)(bus driver who exited the bus without first conducting mandatory visual inspection to determine that no children were left on the bus was subject to a six-month suspension for first offense, regardless of past employment record or absence of harm to the child who was left on the bus).

In Arcos v. New Jersey Department of Education, Office of Criminal History Review Unit, OAL Dkt. No. 01752-18, adopted, Comm'r, Final Decision (September 20, 2018), the bus driver failed to observe that a student remained on her bus after she dropped students off at their school. The bus driver did not leave the school bus and relied upon the representations of a teacher who was on the bus that all students had exited the bus. The Commissioner affirmed the decision of the Administrative Law Judge (ALJ), who granted summary decision in favor of the Department. The ALJ found that the driver had an "affirmative duty" to visually inspect the bus at the end of the transportation route. Initial Decision at *4. In examining when the end of the transportation route occurred, the ALJ referenced Klein v. New Jersey Department of Education, Criminal History Review Unit, Agency Dkt. No. 713-12/10, Final Decision (February 21, 2012) at *2, in which it was

determined that the "end of the transportation route" was the "point where all of the children in that group leave the bus to enter their school and the bus is empty of riders, and before the driver moves on to her next route." Thus, the end of the transportation route was not synonymous with the end of the driver's entire shift and the driver was obligated to inspect the bus for remaining children each time she reached a destination at which children departed the bus. Arcos at *5-6.

Here, it is undisputed that petitioner intended to drop off all students at Central Jersey Prep. She had thus reached the end of her route with respect to Central Jersey Prep. It is also undisputed that a Central Jersey Prep student remained on the school bus after the end of the route and when petitioner began her next route. Accepting petitioner's assertion in her petition that she inspected the bus by way of a "turnaround view," and that she did not have time to stop the bus, it is clear that she merely turned around while in the driver's seat, and did not walk through the bus, in an effort to ensure that all children had exited the vehicle. As discussed in Arcos v. New Jersey Department of Education, Office of Criminal History Review Unit, it is of no moment that petitioner did not exit the vehicle. Rather, the fundamental inquiry is whether petitioner conducted a full visual inspection of the vehicle. She did not discover the child until she conducted an inspection at the end of her next transportation route. While petitioner and her dispatcher assert that there was not time to stop the bus to conduct an inspection, it is undisputed that a full inspection was not conducted. The controlling statute does not permit exceptions under circumstances such as this. I, therefore, **CONCLUDE** that respondent properly determined that petitioner violated N.J.S.A. 18A:39-28

The penalty for a first offense of failing to comply with the mandatory inspection statute is a six-month suspension. The penalty may not be waived or compromised. Having found that petitioner violated the controlling statute, I **CONCLUDE** that she is properly subject to a six-month suspension of her endorsement to operate a school bus.

ORDER

I **ORDER** that respondent's motion for summary decision is **GRANTED** and its six-month suspension of petitioner's "S" endorsement is **AFFIRMED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 13, 2021
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: October 13, 2021

Date Mailed to Parties: October 13, 2021

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APPENDIX

List of Exhibits

For petitioner:

March 10, 2021, Petition

P-1 Undated letter from Robert Wojciechowicz

For respondent:

May 12, 2021, Brief

291-21

291-21

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Brick,
Ocean County,

Petitioner,

v.

New Jersey Natural Gas Company,

Respondent.

Synopsis

This matter involves a provision of the Public School Contracts Law (PSCL) that prohibits boards of education from contracting with companies doing certain business in Iran. Pursuant to *N.J.S.A.* 18A:18A-49.4, an entity bidding on or entering into a contract with a board of education must certify that the entity is not on the State Department of the Treasury's list of entities engaged in investment activities in Iran (Disclosure Form). In this case, the Board filed a motion for summary decision, seeking a ruling that respondent – which supplies natural gas to the Board – must provide a Disclosure Form as a condition for payment. Respondent filed a cross-motion for summary decision, seeking a ruling that it is not required to provide a Disclosure Form, and ordering the Board to pay amounts due for gas already supplied by respondent.

The ALJ found, *inter alia,* that: there are no material facts at issue in this matter, and the case is ripe for summary decision; the threshold issue here is one of jurisdiction; respondent is a public utility that provides natural gas services in several counties in New Jersey in accordance with a tariff approved by the New Jersey Board of Public Utilities (BPU); the petitioning Board contended that the respondent is required by the PSCL, through the law prohibiting public contracts with companies doing business with Iran, to sign the Disclosure Form "as a prerequisite to formalizing a purchase order/payment of public funds"; respondent argued that New Jersey public utilities are regulated by the BPU, not the Department of Education, so the case must be dismissed for lack of jurisdiction. The ALJ concluded that respondent is not required to provide a Disclosure Form as a condition for payment by the Board, because the tariff under which respondent supplies gas to the Board is not a contract subject to the PSCL. Accordingly, the ALJ denied the Board's motion for summary decision and granted respondent's motion for summary decision as to the issue of the Disclosure Form; however, the portion of respondent's motion dealing with the payment of amounts due was denied, as the ALJ concluded that jurisdiction over such issues lies with the BPU and not the Commissioner.

Upon a comprehensive review of this matter, the Commissioner agreed with the ALJ's findings and conclusions. Accordingly – finding petitioner's exceptions to be unpersuasive – respondent's motion for summary decision was granted to the extent that the Commissioner found that respondent is not required to provide a Disclosure Form to the Board; however, respondent's motion for summary decision was denied with regard to its request to require the Board to pay its outstanding balance, on the basis of jurisdiction.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

291-21
OAL Dkt. No. EDU 03720-21
Agency Dkt. No. 17-2/21

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Brick, Ocean County,

Petitioner,

v.

New Jersey Natural Gas Company,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the Board pursuant to *N.J.A.C.* 1:1-18.4, and respondent's reply thereto, have been reviewed and considered.

This matter involves a provision of the Public School Contracts Law (PSCL) that prohibits boards of education from contracting with companies doing certain business in Iran. Pursuant to *N.J.S.A.* 18A:18A-49.4, an entity bidding on or entering into a contract with a board of education must certify that the entity is not on the State Department of the Treasury's list of entities engaged in investment activities in Iran (Disclosure Form). *See also N.J.S.A.* 52:-32.58. Here, the Board filed a motion for summary decision, seeking a ruling that respondent, which supplies gas to the Board, must provide a Disclosure Form as a condition for payment. Respondent filed a cross-motion for summary decision, seeking a ruling that it is not required to provide a Disclosure Form, and ordering the Board to pay amounts due for gas already supplied

by respondent.[1] The Administrative Law Judge (ALJ) concluded that respondent is not required to provide a Disclosure Form as a condition for payment by the Board, because the tariff under which respondent supplies gas to the Board is not a contract subject to the PSCL. Accordingly, the ALJ denied the Board's motion for summary decision, and granted respondent's motion for summary decision as to the issue of the Disclosure Form. However, the ALJ denied the portion of respondent's motion for summary decision regarding payment of amounts due, concluding that jurisdiction over such issues lies with the Board of Public Utilities (BPU).

In its exceptions, which reiterate arguments made below, the Board contends that the definition of contract in the PSCL includes purchase orders, which is the mechanism by which the Board pays respondent. Therefore, according to the Board, respondent is required to complete a Disclosure Form as a condition for payment.

In reply, respondent argues that the ALJ properly found that the PSCL does not apply to respondent because it is a public utility that provides services pursuant to a tariff, not a contract with the Board. Respondent also contends that purchase orders unilaterally issued by the Board do not create an agreement between the parties or a legally binding relationship enforceable by law, such that the purchase orders are not contracts governed by the PSCL.

Upon review, the Commissioner concurs with the ALJ that the question of whether respondent is required to provide a disclosure form arises from the PSCL and is therefore within the Commissioner's jurisdiction. The Commission further agrees with the ALJ that respondent is not required to provide a Disclosure Form as a condition for payment by the Board, because the tariff under which respondent supplies gas to the Board is not a contract subject to the

[1] The Board has withheld payments since July 2018, totaling approximately $1.3 million as of August 2021.

PSCL. As the New Jersey Supreme Court explained in *Application of Saddle River*, 71 *N.J.* 14 (1976), a tariff is a schedule of rates that applies equally to all customers, rather than a contract that is individually negotiated between parties.

The Commissioner does not find the Board's exceptions persuasive. The PSCL defines a contract as "any agreement, including but not limited to a purchase order or a formal agreement, which is a legally binding relationship enforceable by law, between a vendor who agrees to provide or perform goods or services and a board of education which agrees to compensate a vendor, as defined by and subject to the terms and conditions of the agreement." *N.J.S.A.* 18A:18A-2(n). However, the "purchase orders" generated by the Board as part of its payment processing system do not represent an agreement between the Board and respondent regarding terms for the provision of and payment for natural gas. Those terms are set by – and enforceable based upon – the tariff. The Commissioner also concurs with the ALJ that the Commissioner lacks jurisdiction to require the Board to pay its outstanding balance to respondent, as the BPU has jurisdiction over billing. *N.J.S.A.* 48:2-13.

Accordingly, the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.D.S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 18, 2021
Date of Mailing: November 18, 2021

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 03720-21
AGENCY DKT. NO. 17-2/21

BRICK TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

NEW JERSEY NATURAL GAS COMPANY,

Respondent.

Ryan Amberger, Esquire, for petitioner (Montenegro, Thompson, Montenegro & Genz, P.C., attorneys)

Teresa L. Moore, Esquire, for respondent (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Record Closed: August 31, 2021 Decided: October 5, 2021

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

In this matter, petitioner Brick Township Board of Education (Brick) seeks an order finding that respondent New Jersey Natural Gas Co. (NJNG), which is a public utility that supplies gas to Brick, must, as a condition for payment, provide Brick with a signed Disclosure of Investment Activities in Iran Form (Disclosure Form) pursuant to N.J.S.A. 18A 18A-49.4. Under that provision, which is part of the Public School Contracts Law (PSCL), N.J.S.A. 18A:18A-1 to -68, a board of education "shall implement and comply with [N.J.S.A. 52:32-55 to -61]," which "require[s] a person or entity that submits a bid or proposal or otherwise proposes to enter into or renew a contract [with a state or local agency] to certify, prior to the time a contract is awarded and at the time the contract is renewed, that the person or entity is not identified on a list" maintained by the Department of the Treasury "as a person or entity engaging in investment activities in Iran[.]" N.J.S.A. 52:32-58(a).

As part of this matter, the parties have filed cross-motions for summary decision regarding their respective obligations under N.J.S.A. 18A:18A-49.4. For the following reasons, I deny Brick's motion and grant in part NJNG's motion by finding that NJNG is not obligated by law to provide Brick with a signed Disclosure Form.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

NJNG is a public utility that provides natural gas services in several counties in New Jersey in accordance with a tariff approved by the New Jersey Board of Public Utilities (BPU). Petition for Declaratory Ruling, ¶ 9; Answer, ¶ 9, First Affirmative Defense.[1] NJNG, a wholly owned subsidiary of New Jersey Resources Company, is the sole provider of natural gas services in Brick Township and has supplied natural gas to Brick since 1995. Certification of Suzanne Bostwick, ¶¶ 2-3. According to Brick, "[l]ike all payments for the receipt of services by the District, payments are made to NJNG pursuant to a purchase order[.]" Petition, ¶ 20.

[1] NJNG's tariff is available at Microsoft Word - Tariff 9-1-21 monthly BGSS.docx (njng.com).

In 2012, Governor Christie signed into law a bill amending the PSCL to specifically prohibit boards of education from contracting with companies doing certain business with Iran. L. 2012, c. 25, § 8 (eff. July 30, 2012). As a result, any person or entity that contracts with a board of education must certify through a Disclosure Form that the person or entity is not on the Department of the Treasury's list of companies engaged in business in Iran.[2]

In 2018, Brick asked NJNG to sign the Disclosure Form. NJNG declined to do so. In response, Brick has withheld payments from NJNG since August 2018. NJNG has continuously supplied Brick with natural gas despite Brick's nonpayment of its monthly bills. As of August 15, 2021, Brick's outstanding balance with NJNG was $1,307,330.22.[3] Bostwick Cert., ¶ 5.

On February 5, 2021, Brick filed with the Commissioner of Education (Commissioner) a petition for a declaratory ruling, "pray[ing] that the Commissioner shall construe the provisions of N.J.S.A. 18A:18A:49.4 and N.J.S.A. 52:32-55 et seq. and determine and declare whether [NJNG] is required to or exempt from providing the [Disclosure Form], and, if not exempt, declare when and how often the form must be provided to [Brick] for continued receipt of services." Petition. According to Brick, the arrangement between the school board and NJNG for the provision of natural gas services is governed by N.J.S.A. 18A:18A-49.4 and N.J.S.A. 52:32-55 et al., such that NJNG must sign the Disclosure Form "before the Board can finalize a purchase order and relinquish payment to NJNG for services." Petition, ¶ 21.

On March 30, 2021, NJNG filed an answer with the Commissioner. In its answer, the company set forth several affirmative defenses, including (1) the tariff under which NJNG supplies gas to its customers "governs all terms and conditions" of its services, and since the tariff does not require NJNG to provide Brick with the Disclosure Form, NJNG has no duty to provide it; (2) a tariff is not a public contract that is subject to the

[2] Available at DisclosureofInvestmentActivitiesinIran.pdf (state.nj.us).

[3] According to Brick, "[t]he funds to make payment in full have at all times been encumbered and available for payment." Motion, Statement of Facts, ¶ 11.

law requiring the Disclosure Form or the PSCL; (3) Brick is in violation of N.J.A.C. 14:3-7.6(a), which requires gas service customers to "pay all undisputed charges," and should be ordered to pay its outstanding balance for services received; (4) the matter should be dismissed because the BPU, and not the Commissioner of Education, has jurisdiction over public utilities like NJNG, and the Department of the Treasury, and not the Commissioner of Education, has jurisdiction over N.J.S.A. 52:32-55 et seq.

On April 16, 2021, the Acting Commissioner, Angelica Allen-McMillan, notified the parties that she had declined Brick's request for a declaratory ruling pursuant to N.J.S.A. 52:14B-8 and N.J.A.C. 6A:3-2.1, and that the matter would proceed instead as a petition of appeal pursuant to N.J.A.C. 6A:3. The same day, the Department of Education, Office of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) as a contested case. The transmittal sheet states that "[p]etitioner seeks an order declaring whether respondent is required to file the [Disclosure Form], but that "[j]urisdiction is a threshold inquiry."

In August 2021, the parties filed cross-motions for summary decision. According to Brick, NJNG is required by the PSCL, through the law prohibiting public contracts with companies doing business with Iran, to sign the Disclosure Form "as a prerequisite to formalizing a purchase order/payment of public funds."

On the contrary, NJNG submits, as also reflected in its affirmative defenses, that BPU has approved a tariff that governs the provision and payment for services provided by NJNG, and Brick is obligated under the tariff and public utilities law to pay for the services it has received from NJNG; Brick has no legal basis for its stance that payment may be withheld absent NJNG's certification regarding any investment activities it conducts with Iran; NJNG's tariff governs the terms and conditions of its relationship with Brick and other customers, and the tariff is not a contract that is subject to the law prohibiting public contracts with companies doing business in Iran or the PSCL; it is undisputed that NJNG is not on the Department of the Treasury's list of companies with

investment activities in Iran, another reason NJNG should not have to sign the Disclosure Form as a prerequisite to payment by Brick for outstanding charges.

LEGAL DISCUSSION

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Such motion "shall be served with briefs and with or without supporting affidavits" and "[t]he decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). When the motion "is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

In this dispute, there are no genuine issues of material fact and, for the reasons that follow, NJNG is entitled to partial summary decision as a matter of law.

As a threshold matter, it is necessary to address the Commissioner's jurisdiction over the dispute between the parties. NJNG raised jurisdictional issues in it affirmative defenses and in transmitting the matter to the OAL, the Commissioner advised that "[j]urisdiction is a threshold inquiry."

By its petition and motion for summary decision, Brick requests that the Commissioner "construe the provisions of N.J.S.A. 18A:18A-49.4 and N.J.S.A. 52:32-55 et seq. and determine and declare whether [NJNG] is required to or exempt from providing the Disclosure of Investment Activities in Iran form, and, if not exempt, declare when and how often the form must be provided to [Brick] for continued receipt of services."

In its affirmative defenses and cross-motion, NJNG argues that "[t]he Commissioner should dismiss the Petition for lack of jurisdiction because New Jersey public utilities are regulated by the [BPU], not the Department of Education," and "because N.J.S.A. 52:32-55 et seq., the law on which the Petition is based, is enforced by the Department of the Treasury and not the Department of Education." NJNG also argues that Brick is in violation of N.J.A.C. 14:3-7.6(a), which requires gas service customers to "pay all undisputed charges," and by cross-motion seeks an order requiring Brick to pay its outstanding balance for services rendered by NJNG.

To the extent that Brick's appeal arises under the PSCL, the Commissioner has jurisdiction over this matter. Pursuant to N.J.S.A. 18A:6-9, the Commissioner generally has "jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws[.]" It is clear that this dispute arises under a school law—the PSCL, which at N.J.S.A. 18A:18A-49.4 mandates that a school board like Brick comply with N.J.S.A. 52:32-55 to -61 and require "a person or entity that submits a bid or proposal or otherwise proposes to enter into or renew a contract [with the school board] to certify" that it is not on the Department of the Treasury's list of companies doing business with Iran. Thus, to resolve this dispute, it is necessary to interpret whether N.J.S.A. 18A:18A-49.4 applies to NJNG, such that the public utility must submit the Disclosure Form as argued by Brick. This question is squarely within the Commissioner's jurisdiction to decide disputes arising under the school laws, and not within the BPU or the Department of the Treasury's jurisdiction.

However, to the extent that NJNG seeks by way of its cross-motion for summary decision an order "requiring [Brick] to immediately pay the amounts admittedly due for gas service," the Commissioner does not have jurisdiction. Under the Department of Public Utilities Act, N.J.S.A. 48:2-1 to –91, the BPU "shall have general supervision and regulation of and jurisdiction and control over all public utilities, and more specifically "all services necessary for the transmission and distribution of . . . gas, including but not limited to safety, reliability, metering, meter reading and *billing*, [are within] the jurisdiction of the Board of Public Utilities." N.J.S.A. 48:2-13(a) and (d) (emphasis added). Since the Commissioner's jurisdiction in this matter extends only to deciding

the parties' respective obligations under N.J.S.A. 18A:18A-49.4, any remaining dispute the parties have over nonpayment for service is properly governed by public utilities law and subject to the jurisdiction of the BPU.

NJNG does not have to sign the Disclosure Form for Brick because the tariff under which NJNG supplies gas to Brick is not a contract subject to the PSCL or the law prohibiting government agencies from contracting with companies that support Iran.

As noted above, in 2012, Governor Christie signed into law a bill prohibiting state and local agencies from awarding public contracts to companies with investments in the energy or finance sectors of Iran. For purposes of that law, a "public contract" is defined as "any contract or agreement entered into by a state or any instrumentality of that state to purchase goods, services or both." N.J.S.A. 52:32-1.3.

Under the law, the Legislature recognized that "[t]here are moral and reputational reasons for state and local governments to not engage in business with foreign companies that have business activities benefiting foreign states, such as Iran, that pursue illegal nuclear programs, support acts of terrorism and commit violations of human rights." N.J.S.A. 52:32-55(f).

The law covers any person or entity that "provides goods or services of $20,000,000 or more in the energy sector of Iran, including a person that provides oil or liquefied natural gas tankers, or products used to construct or maintain pipelines used to transport oil or liquefied natural gas, for the energy sector of Iran" and any "financial institution that extends $20,000,000 or more in credit" to anyone who "will use the credit to provide goods or services in the energy sector in Iran." N.J.S.A. 52:32-56(f). The law mandates that "the Department of the Treasury shall, using credible information available to the public, develop a list of persons or entities it determines engage in investment activities in Iran," such that "*[a] person or entity that, at the time of bid or proposal for a new contract or renewal of an existing contract*, is identified on" the list "shall be ineligible to, and shall not, bid on, submit a proposal for, or enter into or renew,

a contract with a State agency for goods or services." N.J.S.A. 52:32-57(a) and (b) (emphasis added).

Relevant to this matter, the Legislature, through the act, amended the PSCL to specifically prohibit boards of education from contracting with companies that do business with Iran. L. 2012, c. 25, § 8. Thus, under N.J.S.A. 18A:18A-49.4, a board of education "shall implement and comply with the provisions of P.L.2012, c.25 (C.52:32-55 et al.), except that the board shall rely on the list developed by the State Department of the Treasury pursuant to section 3 of P.L.2012, c.25 (C.52:32-57)." N.J.S.A. 18A:18A-49.4(a).

And "[i]f the board determines that a person or entity has submitted a false certification concerning its engagement in investment activities in Iran under section 4 of P.L.2012, c.25 (C.52:32-58), the board shall report to the New Jersey Attorney General the name of that person or entity, and the Attorney General shall determine whether to bring a civil action against the person[.]" N.J.S.A. 18A:18A-49.4(b).

The PSCL "establishes specific requirements with which public schools must abide when contracting for services and goods" in order to "protect [] the public interest by keeping costs at a minimum and preventing fraud." Williams Scotsman, Inc. v. Garfield Bd. of Educ., 379 N.J. Super. 51, 56 (App.Div.2005); Bd. of Educ. of the City of Asbury v. Hoek, 38 N.J. 213, 231 (1962). Thus, "[e]very contract for the provision or performance of any goods or services, the cost of which in the aggregate exceeds the bid threshold [set by N.J.S.A. 18A:18A-3], shall be awarded only by resolution of the board of education to the lowest responsible bidder after public advertising for bids and bidding therefor, except as is provided otherwise in this chapter or specifically by any other law." N.J.S.A. 18A:18A-4(a).

As otherwise provided by N.J.S.A. 18A:18A-5, "[a]ny contract, the amount of which exceeds the bid threshold, shall be negotiated and awarded by the board of education by resolution at a public meeting without public advertising for bids and

bidding thereof if the subject matter thereof consists of . . . [t]he supplying of any product or the rendering of any service by a public utility, which is subject to the jurisdiction of the Board of Public Utilities, in accordance with the tariffs and schedules of charges made, charged and exacted, filed with said board." N.J.S.A. 18A:18A-5(a)(7).

The PSCL defines a "contract" as "any agreement, including but not limited to a purchase order or a formal agreement, which is a legally binding relationship enforceable by law, between a vendor who agrees to provide or perform goods or services and a board of education which agrees to compensate a vendor, as defined by and subject to the terms and conditions of the agreement." N.J.S.A. 18A:18A-2(n). The act further defines "purchase order" as "a document issued by the purchasing agent authorizing a purchase transaction with a vendor to provide or perform goods or services to the board of education, which, when fulfilled in accordance with the terms and conditions of a request of a purchasing agent and other provisions and procedures that may be established by the board of education, will result in payment by the board of education." N.J.S.A. 18A:18A-2(v). Finally, the PSCL allows "competitive contracting," which "means the method . . . of contracting for specialized goods and services in which formal proposals are solicited from vendors; formal proposals are evaluated by the purchasing agent or counsel or school business administrator; and the board of education awards a contract to a vendor or vendors from among the formal proposals received." N.J.S.A. 18A:18A-2(p).

The BPU is vested with the "general supervision and regulation of and jurisdiction and control over all public utilities[.]" N.J.S.A. 48:2-13(a). In relevant part, "[t]he term 'public utility' shall include every . . . corporation . . . that now or hereafter may own, operate, manage or control within this State any . . . pipeline, gas . . . system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof." Ibid.

Under the rules governing public utilities, N.J.A.C. 14:1-1.1 to -31-1.18, "[e]ach public utility shall, prior to offering a utility service to the public, submit a tariff or tariff amendments to the Board for approval." N.J.A.C. 14:3-1.3(a). The tariff must include such information as "the public utility's service area;" "all services that the utility offers, and all terms and conditions regarding the services;" and, "all of the public utility's rates and charges for all services that the utility offers." N.J.A.C. 14:3-1.3(b).

The rules recognize, however, that a public utility may enter into a contract or agreement separate from the tariff. N.J.A.C. 14:3-1.3(e). Thus, for example, "[i]f a gas . . . utility plans to enter into a contract or agreement with a particular customer or group of customers, for service at rates different from those authorized under the utility's Board-approved tariff, the utility shall file a petition for approval[.]" Ibid.

In Application of Saddle River, 71 N.J. 14 (1976), on which NJNG relies in support of its motion, the Court discussed the difference between a tariff and a contract. First, the Court recognized that "many public utilities . . . are required to publish tariffs which apply equally to all customers and hence preclude the negotiation of individual agreements," while others "conduct many of their operations pursuant to contract. Id. at 22. Second, the Court explained "the distinction between the terms 'tariff' and 'contract' as applied to public utilities." Id. at 29.

According to the Court, "[a] tariff is a published schedule of rates, filed by a public utility, and thereafter, in the absence of successful challenge, applicable equally to all customers," and "such a tariff is not a mere contract[;]" instead, "[i]t is the law, and its provisions are binding on a customer whether he knows of them or not." Ibid (citing Essex Cnty. Welfare Bd. v. New Jersey Bell Tel. Co., 126 N.J. Super. 417, 421-22 (App.Div.1974). By contrast, "[a] contract . . . is an agreement individually negotiated between a utility and a particular customer, with rates that may differ according to circumstances." Ibid.

Importantly, the Court pointed out that "[w]here a public utility has been granted a franchise to serve a designated area, whether it sets its rates by tariff or by negotiated contract, advertising for competitive bids is of little avail since generally only one possible supplier of the service exists." Id. at 31. The PSCL and other public bidding statutes "dispense[] with public bidding where a public utility is involved . . . because the legislative purpose behind public bidding—that is, to obtain a benefit for the taxpayers by securing competition and guarding against favoritism, improvidence, extravagance and corruption—becomes an impractical objective." Capasso v. L. Pucillo & Sons, Inc., 132 N.J. Super. 542, 550 (Ch. and Law Divs. 1974), aff'd, 132 N.J. Super. 473 (App.Div.1974).

Since "it is necessary and desirable in our society that there be certain services rendered on a continuous basis without cutthroat competition, we have the notion of public utilities." Id. at 550-51. Thus, "[i]n order to guard against abuses by the publicly sanctioned monopoly it is required that the rates to be charged by the public utility be regulated," and "[t]hat is the protection afforded to the public" and "that is the same kind of protection which the general bidding statutes seek to achieve for the taxpaying public." Id. at 551. As such, "[t]he Legislature had in mind that it would be impractical if not impossible, as a general proposition, to require a public utility to bid for services a municipality [or school board] needed." Ibid.

As Brick notes, under the PSCL, a school board "shall implement and comply with the provisions of P.L.2012, c.25 (C.52:32-55 et al.)," which requires "a person or entity that submits a bid or proposal or otherwise proposes to enter into or renew a contract to certify, prior to the time a contract is awarded and at the time the contract is renewed, that the person or entity is not" on the Department of the Treasury's list of companies engaged in business in Iran. N.J.S.A. 18A:18A-49.4(a); N.J.S.A. 52:32-58(a). However, it is clear from this language that the Disclosure Form needs to be signed only when a statute requires the submission of competitive bids or proposals by a company in order to contract with a public entity. And because the PSCL exempts NJNG, as a public utility regulated by the BPU, from public bidding and because NJNG supplies gas to Brick, and its many other customers, by tariff and not by contract, NJNG

does not have to fill out the Disclosure Form as urged by Brick. The relevant laws—N.J.S.A. 52:32-58 and N.J.S.A. 18A:18A-49.4—simply do not apply to NJNG's relationship with Brick.

As the Court explained in Saddle River, "[a] tariff is a published schedule of rates . . . applicable equally to all customers," and "such a tariff is not a mere contract," which "is an agreement individually negotiated between a utility and a particular customer, with rates that may differ according to circumstances." The fact that Brick may submit a purchase order, which generally falls under the definition of contract under N.J.S.A. 18A:18A-2, for NJNG's services does not mean Brick "contracts" with NJNG in a sense governed by the PSCL or the law prohibiting public contracts with companies engaged in business in Iran. Instead, as discussed, the PSCL exempts NJNG from its requirements such as public bidding and certifying that it does not do business in Iran because NJNG supplies its product to Brick through a tariff subject to the jurisdiction of the BPU.[4]

I CONCLUDE that based on the foregoing, Brick's motion for summary decision should be **DENIED** and NJNG's cross-motion for summary decision **GRANTED** in part by finding that N.J.S.A. 18A:18A-49.4 (through N.J.S.A. 52:32-55 to -61) does not apply to NJNG's relationship with Brick. Likewise, NJNG's cross-motion is **DENIED** in part by finding that any remaining dispute over payment by Brick for NJNG's services is subject to the jurisdiction of the BPU, and not the Commissioner.

[4] The Department of the Treasury's Iran list is available at Chapter25List.pdf (state.nj.us). Clearly, NJNG is not on the list. However, because NJNG is not required to sign the Disclosure Form attesting that the company is not on the list, it is unnecessary to reach NJNG's argument that the company does not have to sign the Disclosure Form because N.J.S.A. 18A:18A-49.4 provides that a board of education such as Brick can simply check the list instead of having a company sign the form certifying that the company is not on the list.

ORDER

It is hereby **ORDERED** that Brick's motion for summary decision should be **DENIED**. It is further **ORDERED** that NJNG's cross-motion for summary decision is **GRANTED** in part by finding that N.J.S.A. 18A:18A-49.4 (through N.J.S.A. 52:32-55 to -61) does not apply to NJNG's relationship with Brick. It is further **ORDERED** that NJNG's cross-motion is **DENIED** in part by finding that any remaining dispute over payment by Brick for NJNG's services is subject to the jurisdiction of the BPU, and not the Commissioner

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 5, 2021
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 10/5/2021

Date Mailed to Parties: 10/5/2021

mph

292-21

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

November 18, 2021

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Re: *Board of Education of the Township of Union, Union County v. New Jersey State Interscholastic Athletic Association, Dkt. No. 214-11/21.*

Dear Counsel:

I have reviewed the materials filed in connection with the motion for emergent relief filed by the Union Township Board of Education (Union) in the above-captioned matter. Union is seeking an Emergent Order requiring the New Jersey State Interscholastic Athletic Association (NJSIAA) to allow the Union High School football team to participate in the state football playoffs. After winning its first playoff game, Union was scheduled to play Paterson Eastside High School (Paterson) in the second round of the playoffs. After a Covid-19 outbreak on the Union High School football team, the Union Superintendent voluntarily withdrew the team from the tournament the day of the game to limit further transmission of the virus.

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The party seeking such relief must demonstrate

the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

Upon review of the parties' submissions, I find that Union has not met the standard required for emergent relief. It is well established that the Commissioner's scope of review in matters involving NJSIAA decisions is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, I may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that it applied such rules in a patently arbitrary, capricious or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a)(2); *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Nor may I substitute my own judgment for that of the NJSIAA, where due process has been provided and where there is sufficient credible evidence in the record as a whole to serve as a basis for the decision reached by the *NJSIAA*. *N.J.A.C.* 6A:3-7.5(a)(1).

Petitioners seeking to overturn decisions of the NJSIAA bear a heavy burden and, considering the record of this matter and the prescribed standard of review, I find that Union has failed to demonstrate a likelihood of success on the merits.[1] In September 2021, the NJSIAA adopted a Covid-19 Policy for state tournaments in all sports that was distributed to all member schools on September 15, 2021. According to the policy:

> 1. NJSIAA will not delay or modify any state tournament schedule for a team that cannot participate due to Covid-19 issues.
>
> 2. Once a state tournament officially starts, the tournament will progress as scheduled – this is regardless of a team's first scheduled event in the tournament.
>
> 3. For any team that cannot participate on the date scheduled, or play by date, then the opponent will advance.

Here, Union has not presented any evidence to demonstrate that the NJSIAA applied the Covid-19 Policy in a patently arbitrary or unreasonable manner in light of its duty to ensure fairness and integrity in athletic competition statewide.[2] It is important to recognize that the NJSIAA did not disqualify Union from the playoff game against Paterson; rather, Union itself made the decision to pull out of the game because of Covid-19 issues. Therefore, under the

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[1] Since all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the three remaining factors.

[2] The Covid-19 policy has been applied to other teams that had to withdraw from a tournament during the 2021-2022 school year because of Covid-19 issues.

Covid-19 Policy, Paterson automatically advanced to the next round of the tournament. Under these circumstances and in light of the express language in the policy, there is nothing to suggest that the Union High School football team should be permitted to re-enter the tournament at this juncture.

In light of the fact that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the three remaining factors. Accordingly, the petitioner's request for emergent relief and an Order permitting the Union High School football to participate in the state playoffs is hereby DENIED.[3]

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

c: State Law Library

292-21L

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

293-21

293-21SEC

SEC Dkt. No. T08-20
Agency Dkt. No. 199-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Yunxia Chen,
Edison Township Board of Education,
Middlesex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent completed training after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 23, 2021
Date of Mailing: November 23, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T08-20
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Yunxia Chen,
Edison Township Board of Education, Middlesex County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, and also served on July 27, 2021, via electronic mail.[1] The OTSC directed Yunxia Chen (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on July 27, 2021, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Edison Township Board of Education (Board), located in Middlesex County. As a result of her position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by December 31, 2020.

On or about May 17, 2021, the NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2020, and the list provided included Respondent. Prior to this time, multiple communications about mandated

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the Business Administrator about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, the Middlesex County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in mid-May 2021, the Commission's staff notified the County that Respondent was identified as a school official who failed to complete training by December 31, 2020. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated June 10, 2021, via electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was served on Respondent, via electronic mail, on July 27, 2021.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2020, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement on July 28, 2021, and also filed a response to the Commission's OTSC. More specifically, Respondent (through counsel) stated, she "attempted to complete the mandatory training course on the [NJSBA] website" on July 2, 2021, "but was unable to access and/or locate the e-learning portal." The Business Administrator then advised Respondent that "she would receive an email with instructions for the online training program," and on July 28, 2021, she "again attempted and was successful in accessing and/or locating the e-learning portal and at that time completed the required training course." Importantly, Respondent did not deny that she did not complete training in a timely fashion.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes

that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to five (5) board of education members throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

EXHIBIT 1

I, Vincent DeLucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of board of education member and charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding board of education members and charter trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of school board members who are elected in November of each year who had not completed their mandated training for year 2020 to the NJSEC, due by December 31, 2020.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) about mandated training through an email on December 8, 2020, December 18, 2020, December 22, 2020, February 23, 2021, March 4, 2021, April 16, 2021 and April 22, 2021.

5. Prior to preparing the July 1, 2021 report, NJSBA communicated with school board members about mandated training through an email to all board members to those out of compliance on November 18, 2020, December 7, 2020, December 16, 2020, December 24, 2020, January 22, 2021, February 10, 2021, March 4, 2021, March 24, 2021, April 15, 2021 and April 22, 2021.

6. On July 16, 2021, Yunxia Chen was registered to take Governance 2 training and an email with the link was sent to their registered email address.

7. On November 18, 2020, NJSBA sent an email to Yunxia Chen, a board member of the Edison Township Board of Education, advising that they had not completed Governance 2 for 2020 and provided a link to the online training module.

8. An additional notice was sent to the Edison Township Board of Education Business Administrator on December 8, 2020, December 18, 2020, December 22, 2020, February 23, 2021, March 4, 2021, April 16, 2021 and April 22, 2021, advising that Yunxia Chen had not completed the Governance 2 training. Phone calls were also made the week of April 8th, 2021.

9. On March 4, 2021, March 24, 2021, April 15, 2021, and April 22, 2021 NJSBA communicated through email with Yunxia Chen with the link and instructions for completing Governance 2. Phone calls were also made the week of April 28th, 2021.

10. All members and Business Administrators received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

11. Yunxia Chen did complete Governance 2 training on July 28, 2021.

August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T08-20

Whereas, Yunxia Chen (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her training program by December 31, 2020; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by December 31, 2020, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed her training requirement, and also filed a response to the Commission's OTSC that did not dispute that she did not complete training in a timely fashion; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on August 30, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen

Kathryn A. Whalen, Director

295-21

OAL Dkt. No. EDU 12793-19
Agency Dkt. No. 196-8/19

New Jersey Commissioner of Education

Final Decision

Debra Sheldon,

Petitioner,

v.

Board of Education of the City of Perth Amboy, Middlesex County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled September 2, 2021 OAL hearing, has been reviewed. Petitioner did not file an explanation for the failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 29, 2021
Date of Mailing: November 30, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
FAILURE TO APPEAR
OAL DKT. NO. EDU 12793-19
AGENCY DKT. NO. 196-8/19

DEBRA SHELDON,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY.

Respondent.

Debra Sheldon, petitioner pro se

Isabel Machado, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: September 7, 2021 Decided: October 19, 2021

BEFORE **MARY ANN BOGAN**, ALJ:

STATEMENT OF THE CASE

Petitioner, Debra Sheldon (Sheldon), who was formerly employed by the Board of Education of the City of Perth Amboy (the Board) as a Special Education Teacher, asserts that the reason the Board did not renew her contract was retaliatory. She requested that the decision by the Board to not renew her contract be reversed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Petitioner filed her appeal with the Commissioner of Education (the Commissioner) on August 8, 2019. An answer was filed on behalf of the Board, and the contested case was transmitted to the Office of Administrative Law (OAL), on September 16, 2019.

Initially, petitioner was represented by Charette Matts-Brown, Esq. A telephone conference was held on November 18, 2019, at which time Ms. Matts-Brown appeared to represent petitioner. A second conference call was held on January 8, 2020, and then again on February 11, 2020. Each time Ms. Matts-Brown appeared on behalf of petitioner. Due to COVID-19 the telephone conference scheduled for March 23, 2020, was adjourned. On April 7, 2020,[1] Ms. Matts-Brown filed a motion for leave to withdraw as counsel. Petitioner was sent a copy of the motion. A telephone conference was held on June 2, 2020. During this conference, Ms. Matts-Brown reported that petitioner informed the President of Perth Amboy Federation-AFT Local 857, Patricia Paradiso that she no longer wished to pursue the matter and consented to the withdrawal of counsel. Petitioner did not respond to the motion or send correspondence withdrawing the appeal. A conference call was scheduled for September 2, 2020. All parties including petitioner were notified. Petitioner did not appear. An explanation from petitioner explaining her non-appearance was not received.

ANALYSIS AND CONCLUSIONS OF LAW

N.J.A.C. 1:1-14.4(a) provides that, if, after appropriate notice, a party does not appear in any proceeding scheduled by a judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge may direct the Clerk to return the matter to the transmitting agency for appropriate disposition. Petitioner failed to appear at the scheduled proceeding, and she failed to provide an explanation one day following her

[1] The OAL did not receive a copy of the motion until August 13, 2020.

nonappearance or thereafter. Accordingly, the Clerk should return this matter to the Department of Education.

Based on the foregoing facts and the applicable law, I **CONCLUDE** that petitioner has abandoned this matter and that it should be returned to the transmitting agency.

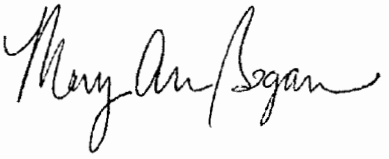
ORDER

It is **ORDERED** that the Clerk return this matter to the Department of Education for appropriate disposition.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



October 19, 2021_
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency:

Date Mailed to Parties:

MAB/lam

296-21

296-21
OAL Dkt. No. EDU 11354-20
Agency Dkt. No. 230-11/20

New Jersey Commissioner of Education

Final Decision

S.C., on behalf of minor child,

Petitioner,

v.

Board of Education of the Township of Freehold, Monmouth County,

Respondent.

The record of this matter, the proposed Stipulation of Settlement and Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 29, 2021
Date of Mailing: November 30, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11354-20

AGENCY DKT. NO. 230-11/20

S.C. O/B/O MINOR CHILD,

Petitoner,

v.

BOARD OF EDUCATION OF TOWNSHIP OF FREEHOLD, MONMOUTH COUNTY,

Respondent.

S.C., parent, pro se

Gabrielle A. Pettineo, Esq., for respondent *Kenny, Gross, Kovats & Parton, attorneys)

Record Closed: October 4, 2021 Decided: October 13, 2021

BEFORE **MARY ANN BOGAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on December 3, 2020, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement, along with the Board Resolution, indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Mary Ann Bogan

October 13, 2021
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 10-13-21

Date Mailed to Parties: 10-14-21

/lam

KENNEY, GROSS, KOVATS & PARTON
ATTORNEYS AT LAW
THE COURTS OF RED BANK
130 MAPLE AVENUE, BUILDING 8
RED BANK, NEW JERSEY 07701

MALACHI J. KENNEY (1944-2011)
MICHAEL J. GROSS
DOUGLAS J. KOVATS
CHRISTOPHER B. PARTON
DANIEL R. ROBERTS
GABRIELLE A. PETTINEO

TEL. 732-530-7500
FAX. 732-530-1739

EMAIL: *gapettineo@kenneygross.com*

September 29, 2021

RECEIVED
2021 OCT -1 A 10:12
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

VIA ELECTRONIC MAIL (only)

Honorable MaryAnn Bogan, A.L.J.
Office of Administrative Law
Quakerbridge Plaza - Building 9
Trenton, New Jersey 08619

RE: S.C. v. Freehold Township Board of Education
OAL Docket No.: EDU 11354-2020S
Agency Ref. No.: 230-11/20

Dear Judge Bogan:

Please be aware the parties have reached a mutual agreement in the above captioned-matter. Attached is the fully finalized and executed agreement. It is the parties understanding that this matter will now be closed.

Thank you for your consideration in this matter.

Respectfully submitted,

KENNEY GROSS KOVATS & PARTON

Gabrielle A. Pettineo

cc: S.C. *pro se*. (*via electronic mail*)

KENNEY, GROSS, KOVATS & PARTON
130 Maple Avenue, Bldg. 8
Red Bank, New Jersey 07701
(732) 530-7500
Attorneys for Respondent Freehold Twp. Board of Education

RECEIVED
2021 OCT -4 A 10:12
STATE OF NEW JERSEY
OFFICE OF

S.C. Petitioner, v. FREEHOLD TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY, Respondent.	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL Docket No.: EDU 11354-20** **Agency Ref. No.: 230-11/20** **CIVIL ACTION** **SETTLEMENT AGREEMENT**

The Freehold Township Board of Education (the "Respondent or "District") having its administrative offices at 384 West Main Street, Freehold, New Jersey 07728, and S.C. (the "Petitioner"), residing within the boundaries of Freehold Township, desiring to mutually resolve the issues in the above-captioned petition of appeal, hereby set forth as follows:

WHEREAS, S.C. is a resident of Freehold Township, New Jersey and has a student who will attend the 8th grade at the Clifton T. Barkalow Middle School within the District; and

WHEREAS, the District is charged with the operations of the public schools of the Freehold Township School District, County of Monmouth, a pre-K to 8th grade school system, pursuant to Title 18A of the New Jersey Statutes; and

WHEREAS, S.C. questioned the placement of her student for accelerated/honors math for the 2020-2021 and 2021-2022 school years; and

WHEREAS, S.C. had questions and concerns regarding the District's gifted and talented program for middle school math; and

WHEREAS, a dispute arose between Petitioner and Respondent regarding the provision of math programs to gifted and talented students in middle school; and

WHEREAS, Petitioner filed a Petition of Appeal on or about November 4, 2020 with the Commissioner of Education, Office of Controversies and Disputes, challenging the District's gifted and talented program and alleging it did not meet State guidelines; and

WHEREAS, the parties engaged in multiple settlement discussion in order to resolve the issues raised in this matter; and

WHEREAS, the parties seek a resolution to the above-referenced matter in order to resolve all issues and avoid the time and cost of litigation, having mutually reached an agreement to settle.

NOW, THEREFORE, for the considerations specified below, the parties set forth the following mutual covenants and agreements:

1. The parties agree to meet at a mutually convenient date and time to discuss Petitioner's concerns about the District's 7th and 8th grade honors math program. Topics for discussion may include curricular and instructional adaptations, identification of gifted and talented students, staff training, and parental communication regarding the program. The meeting participants shall include Petitioner, the Director of Curriculum and Instruction, the Assistant Principal (who is familiar with the gifted and talented program),the Supervisor of Mathematics and Science, and the District's legal counsel. If Petitioner has any follow-up questions after this meeting, she may place them in writing to the District, and they will be answered by the District accordingly.

2. The parties agree to conduct an additional meeting that may take place immediately after the meeting set forth in Paragraph 1 above or at another mutually convenient

date and time to discuss Petitioner's concerns regarding the specific placement of her student in the District's gifted and talented math program. Both the District's legal counsel, a school administrator and the student's math teacher for the 2021-2022 school year shall be present for that meeting. Topics may include the student's needs, instructional and curricular adaptions and SEL infusion for gifted learners. If Petitioner has any follow-up questions after this meeting, she may place them in writing to the District, and they will be answered by the District accordingly.

3. The parties agree and acknowledge that this Agreement resolves all issues between the parties regarding the District's gifted and talented programs, accelerated programs and honors programs. Petitioner withdraws the Petition of Appeal with prejudice and without costs.

4. The parties acknowledge that they have reviewed this Agreement in detail and fully understand its requirements and limitations. Petitioner is signing this Agreement voluntarily of her own free will and not under duress or coercion of any kind. The parties have had full opportunity to review the Agreement and are satisfied with the terms and conditions of this Agreement.

5. This Settlement Agreement contains the full and complete agreement of the parties hereto with respect to all matters, that it supercedes any prior or contemporaneous representations, whether oral or written, and that it may not be modified or amended except by a written instrument signed by all parties hereto.

6. This Settlement Agreement shall be construed fairly according to the plain language of its terms and not for or against any party hereto.

7. Notwithstanding anything to the contrary herein, it is expressly understood and agreed that, following the full execution of this Settlement Agreement, neither Petitioners,

Respondent District, Respondent District's staff, nor either parties' attorneys will take any action to publicize the terms and nature of this Settlement Agreement, except that disclosure is permitted: (1) as necessary with regard to any proceedings for the enforcement of the Settlement Agreement; (2) as may be required by any court of agency of competent jurisdiction; and (3) as may be required by law.

8. In consideration for the above, Petitioner agrees that the terms of this Settlement Agreement shall constitute a full and complete settlement of all claims or complaints she made or could have made, individually or jointly, as part of the above-captioned Petition of Appeal and resolves all issues prior to the execution of this Agreement and any issues in the future regarding the District's gifted and talented programs and the placement of S.C.'s student within any of those programs. Petitioner withdraws the Petition of Appeal with prejudice and without costs.

IN WITNESS WHEREOF, the undersigned put their signatures on this _____ day of August 2021.

For Petitioner

S.C.

Dated: 9/2/2021

For Respondent

Superintendent

Dated: 9/17/21

Business Administrator

Dated: 9/17/21

Extract of the Minutes
Regular Meeting
Tuesday, September 28, 2021 at 7:00 p.m.
North Hunterdon-Voorhees District Office

Board President J. Viotto called the meeting to order at 7:03 pm and read the Public Meeting Notice.

Roll Call

Debra Bonomi-Present	Califon Borough / Tewksbury Township
Bryan Chapman-Present	Clinton Township / Lebanon Borough
Shelley Crisologo-Present	Town of Clinton / Franklin Township / Glen Gardner Borough
Vacant	Union Township
Tara Marie Hintz-Present	High Bridge Borough / Lebanon Township
Robert Kirchberger-Present	Clinton Township / Lebanon Borough
Rachel McLaughlin-Present	Clinton Township / Lebanon Borough
John Melick-Present	Califon Borough / Tewksbury Township
M. Rion Hoffmann-Present	High Bridge Borough / Lebanon Township
Kimberly Solino-Present	Bethlehem Township / Hampton Borough
Roger Straight-Present	Clinton Township / Lebanon Borough
Jessica Viotto-Present	Town of Clinton / Franklin Township / Glen Gardner Borough

Also present: R. Bergacs - Assistant Superintendent, K. Blew - School Business Administrator/Board Secretary, R. Broan - Director of Curriculum, Articulation and Student Achievement, M. Squarcia - Director of School Counseling Services, Z. Baharev - Director of Special Services, G. Vargas-Dellacasa - District Technology Coordinator, G. Cottrell - Principal of North Hunterdon High School, R. Peterson, Principal of Voorhees High School, J. Comegno - School Board Attorney, Comegno Law Group P.C.

Motion by K. Solino and **second by M. Rion Hoffman** to approve the motion for the Settlement Agreement discussed in Executive Session for student 20193001. **Motion carried unanimously by roll call vote.**

Ayes: D. Bonomi, B. Chapman, S. Crisologo, T. Hintz, R. Kirchberger, R. McLaughlin, J. Melick, M. Rion Hoffman, K. Solino, R. Straight, J. Viotto
Nays: None
Abstentions: None
Absent: None

I, Kathryn Blew, School Business Administrator, Board Secretary of the North Hunterdon-Voorhees Regional High School District, do hereby certify, the foregoing to be a true and correct extract of the minutes from the meeting held on September 28, 2021.

Kathryn Blew, School Business Administrator/Board Secretary

Board Seal

297-21

297-21

OAL Dkt. No. EDU 03722-21
Agency Dkt. No. 35-3/21

New Jersey Commissioner of Education

Final Decision

Mary McDermott,

Petitioner,

v.

New Jersey Department of Education, State Board of Examiners,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled September 30, 2021 OAL hearing, has been reviewed. Petitioner did not file an explanation for the failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 29, 2021
Date of Mailing: November 30, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

298-21

298-21

New Jersey Commissioner of Education

Final Decision

Linda Mitchell,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

Respondent.

Synopsis

Petitioner – a school bus driver employed by the Mount Laurel Board of Education – appealed the Department's determination to suspend her school bus endorsement pursuant to *N.J.S.A.* 18A:39-28 *et seq.* after a March 2021 incident in which she failed to visually check her bus for students before leaving the bus unattended while she dropped off paperwork at the transportation center building. Petitioner did not dispute that she failed to conduct the required visual inspection before exiting the bus, and that a child was therefore left unattended on the bus for a brief period of time; however, petitioner contended that she had "not yet parked the bus" when she left it to enter the transportation center. Further, petitioner pointed out, *inter alia*, that two staff members were standing near the bus when she exited, and that the student on the bus was quickly returned home without incident. The Department argued that petitioner violated the requirements of *N.J.S.A.* 18A:39-28, and that such violation carries a mandatory penalty pursuant to *N.J.S.A.* 18A:39-29. The Department filed a motion to dismiss, which was converted to a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner has admitted that on March 4, 2021, she did not conduct a full visual inspection of her school bus when she stopped at the transportation center building to drop off paperwork; pursuant to *N.J.S.A.* 18A:39-28, petitioner had an affirmative duty to visually inspect the school bus at the end of the transportation route to determine that no pupil had been left on the bus; petitioner failed to conduct the required visual inspection; a violation of *N.J.S.A.* 18A:39-28 carries a mandatory penalty; in accordance with *N.J.S.A.* 18A:39-29, if a school bus driver is found to have left a pupil on the bus at the end of a route, the driver's school bus endorsement shall be suspended for six months for the first offense. Accordingly, the ALJ granted summary decision to the respondent.

Upon full review, the Commissioner concurred with the ALJ that the respondent is entitled to summary decision. Accordingly, the respondent was directed to notify the Motor Vehicle Commission of its obligation to suspend petitioner's school bus endorsement pursuant to *N.J.S.A.* 18A:39-26 *et seq.*, and to notify petitioner's employer that she is ineligible for the period of suspension for continued employment as a school bus driver. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

298-21
OAL Dkt. No. EDU 04117-21
Agency Dkt. No. 42-3/21

New Jersey Commissioner of Education

Final Decision

Linda Mitchell,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge that petitioner violated *N.J.S.A.* 18A:39-28 when she failed to conduct a visual inspection of her school bus at the end of her route and, as a result, a child was left on the bus.

Accordingly, respondent's motion for summary decision is granted and the petition of appeal is dismissed. Petitioner's "S" endorsement is hereby suspended for six months from the date of this decision. Respondent is directed to notify the Motor Vehicle Commission of its obligation to suspend petitioner's school bus endorsement pursuant to

N.J.S.A. 18A:39-26*et seq.*, and to notify petitioner's employer that she is ineligible for the period of suspension for continued employment as a school bus driver.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 29, 2021
Date of Mailing: November 30, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 04117-21
AGENCY DKT. NO. 42-3/21

LINDA MITCHELL,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF STUDENT PROTECTION ,
Respondent.

Linda Mitchell, pro se

Colin Klika, Deputy Attorney General for respondent (Andrew J. Bruck, Acting Attorney General of New Jersey, attorneys)

Record Closed: September 30, 2021 Decided: October 18, 2021

BEFORE **EDWARD J. DELANOY, JR.**, Deputy Director and ALAJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Linda Mitchell (Mitchell), seeks a determination that the respondent, New Jersey Department of Education, Office of Student Protection (Department), erred in its decision to suspend Mitchell's "S" endorsement to operate a school bus for six

months, due to Mitchell's alleged violation of N.J.S.A. 18A:39-28, et seq., in leaving a child on a school bus assigned to her on March 4, 2021.

Mitchell filed her Petition of Appeal with the Department on March 18, 2021. On or about May 5, 2021, the Department filed a motion to dismiss in lieu of an answer ("Motion"), pursuant to N.J.A.C. 6A:3-1.10 [1]. The matter was transferred to the Office of Administrative Law (OAL), where it was filed on May 7, 2021, as a contested case under N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13.

A telephone status conference was held on July 26, 2021, where the parties agreed that the facts were not in dispute, that the Department had filed a motion to dismiss in lieu of answer, and that Mitchell had not yet filed her opposition to the same. It was agreed that the Department would not need to re-file a motion for summary decision, and Mitchell would file her opposition to the Department's motion on or before August 31, 2021.

Having not received Mitchell's response to the Department's motion, on September 7, 2021, this tribunal forwarded an e-mail to Mitchell advising her that no response had been received from her as agreed, and that she would need to request an extension of time to file her response. Having not received any response to that e-mail, on September 17, 2021, this tribunal forwarded another e-mail to Mitchell advising her that no response had been received from her as agreed, and that her response was due no later than September 30, 2021. That second e-mail also advised Mitchell that if her response was not received by September 30, 2021, the record would close, and a decision would be issued on the unopposed motion. Mitchell failed to respond to that e-mail, nor did she file her response on or before September 30, 2021. As a result, the record closed on September 30, 2021.

[1] The Department had initially filed a Motion to Dismiss in Lieu of an Answer with the Commissioner of Education under N.J.A.C. 6A:3-1.10. The Department requested in its motion that once the matter was transferred to the Office of Administrative Law (OAL), that the Department's motion be converted to a summary decision motion under N.J.A.C. 1:1:12.5, as no material facts are in dispute.

The Department's Motion, containing the facts of this case as set forth by petitioner in her petition of appeal of March 18, 2021, are undisputed by the Department, and I therefore **FIND** them to be the **FACTS** of this case. Those facts are as follows:

1. Petitioner, as of the date of her appeal, had been driving a school bus for over seven years with the Mount Laurel Board of Education, and during that time had an unblemished record. (See, Petition at 1-2; Department brief at 3).
2. The student was on petitioner's bus for less than five minutes. Ibid.
3. Two staff members were standing next to the bus the entire time. Ibid.
4. The student was home within five minutes of discovery. Ibid.
5. The student was not injured or harmed and was in no danger. Ibid.
6. Petitioner had not parked the bus. Petitioner had simply stopped at the office door to drop off paperwork. Ibid.
7. The student's parent was notified, and the parent was content with how the situation was handled. Ibid. at 3-4.

DISCUSSION

To succeed in the suspension of Mitchell' "S" endorsement to operate a school bus vehicle, the Department must establish that Mitchell violated N.J.S.A. 18A:39-28. This statute specifies an affirmative duty that the school bus driver "shall visually inspect the school bus to which (s)he is assigned at the end of the transportation route to determine that no pupil has been left on the bus." N.J.S.A. 18A:39-28.

A violation of 18A:39-28 results in a mandatory penalty. N.J.S.A. 18A: 39-29. The statute dictates "in the event that, after notice and opportunity to be heard, a school bus driver is found to have left a pupil on the school bus at the end of his route, his school bus endorsement shall be A) suspended for six months, for a first offense; or B) permanently revoked, for a second offense." N.J.S.A. 18A: 39-29.

Mitchell filed a Petition of Appeal under N.J.A.C. 6A:3-1.3(i)(3) that was both timely and compliant.[2] This regulation holds that:

> A petition seeking to be heard as to why his or her endorsement to operate a school bus should not be suspended or revoked pursuant to 18A:39-28 et seq., because a child was found to have been left on the school bus to which he or she was assigned, shall file a petition within 10 business days of the date of the Department's written notice to petitioner of such finding. Ibid.

Mitchell's request for a hearing is subject to N.J.A.C. 6A:3-12.1.[3] This regulation holds that the petitioner can contest the suspension or revocation brought under N.J.S.A. 18A:39-28 et seq. by filing a petition within ten business days. N.J.A.C. 6A:3-12.1(a).

Mitchell can contest the following aspects of the Department's determination: (1) That pupil was left on the bus at the end of the driver's route; (2) That the incident in question was the driver's second offense; (3) That pupil was harmed as a result of foreseeable danger; and (4) That the driver acted with gross negligence. N.J.A.C. 6A:3-12.1(b).

If the petitioner does not file on time or fails to demonstrate that the Department made an error, the Motor Vehicle Commission ("MVC") is then notified that the driver's "S" endorsement has been suspended and that the Department will notify the driver's employer that the driver is no longer eligible to continue employment effective immediately from the time of suspension. N.J.A.C. 6A:3-12.1(c).

In the within matter, the criteria for contesting the Department's determination set forth in N.J.A.C. 6A:3-12.1(b) 2 through 4 above are not applicable. The Department does not assert that the incident was a second offense or that the child was harmed as a result of a foreseeable danger or that Mitchell acted with gross negligence. The issue in

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[2] Mitchell filed her petition within four business days of receipt of the notification from the Office of Student Protection, having received an e-mail notification on March 15, 2021 and filed a petition on March 18, 2021. Brief in support of Department.

[3] N.J.A.C. 6A:3-12.1 was recodified from N.J.A.C. 6A:3-13.1

this case is whether Mitchell complied with the statutory requirement that she "shall visually inspect the school bus to which (s)he is assigned at the end of the transportation route to determine that no pupil has been left on the bus." N.J.S.A. 18A:39-28.

There is no affirmative defense to the violation that the Department alleges against Mitchell by statute. See N.J.S.A. 18A:39-28, N.J.S.A. 18A: 39-29. The only defense available to Mitchell is the Department's failure to establish that she failed to visually inspect the school bus to which she was assigned at the end of the transportation route to determine that no pupil has been left on the bus. (Emphasis supplied).

The School Bus Safety Act imposes an affirmative duty on school bus drivers to visually inspect the school bus at the end of every route to insure no child has been left on the school bus. N.J.S.A. 18A:39-28. If a school bus driver is found to have left a pupil on his bus at the end of a route, his school bus endorsement shall be suspended for six months for a first offense. N.J.S.A. 18A:39-29.

Mitchell has not disputed the Department's findings that petitioner left her bus unattended when she dropped off documents at the transportation center building. Mitchell does not dispute that a student was left on her bus. Petitioner did not state in her petition that she did visually inspect the bus when she dropped off the documents. Mitchell argues in her Petition that she had "not yet parked the bus," and that she had simply, "stopped at the office door to drop off paperwork" (Petition, at 3-4), implying that her route ends at the end of her workday when all children have been dropped off. Mitchell also impliedly argues that the child was never left alone and was with her at all times. The question that must be answered is when did Mitchell's bus route end?

The legal determination rests on the meaning of the phrase "the end of the transportation route." This phrase is not defined in the "School Bus Safety Act." Herman v. N.J. Dept. of Ed., Crim. Hist. Rev. Unit, EDU10473-14, Initial Decision (June 25,2018) http://njlaw.rutgers.edu/collections/oal/html/initial/edu10473-14_1.html. The Department, in its motion to dismiss, cites Klein v. N.J. Dept. of Ed., Crim. Hist. Rev. Unit, Agency Dkt. No. 713-12/10, Final Decision at 2 (February 21, 2012), which determined that the "end

of the route" pursuant to N.J.S.A 18A:39-26 "terminates at the point where all of the children in that group leave the bus to enter their school and the bus is empty of riders, and before the driver moves on to her next route." Final Decision 3 (February 21, 2012).[4] Further, Klein holds that this is the point at which the driver should conduct the visual inspection of the vehicle for any remaining students. Id.

The OAL came to a conflicting conclusion in an initial decision. Herman Initial Decision. In Herman, a bus driver did not conduct a visual inspection of the bus at the drop-off point of the first group of children, and a child remained on the bus. Id. at 2. The bus driver left the bus for one minute to deliver a forgotten backpack and promptly returned to the bus. Id. The ALJ applied N.J.A.C. 6A:27-12.3(a)(1), reasoning that the bus driver remained in the vicinity of the child at all times. Id. at 8-9. The ALJ's initial decision, like in Klein's initial decision, was not adopted and the Commissioner stated that the ALJ relied wrongly on N.J.A.C. 6A:27-12.3(a)(1). Herman v. N.J. Dept. of Ed., Crim. Hist. Rev. Unit, Final Decision 7 (July 30, 2015).[5]

Based upon these decisions, whether Mitchell did or did not remain in the vicinity of the child is therefore not relevant to her claim that the child was never left alone. The critical analysis is did the Department fail to establish by a preponderance of the credible evidence that Mitchell failed to visually inspect the school bus to which she was assigned at the end of the transportation route to determine that no pupil has been left on the bus. (Emphasis supplied).

In her Petition, Mitchell does not deny or dispute the fact that she failed to visually inspect her bus when she left her bus unattended and dropped off documents at the transportation center building. She seeks to mitigate her failure to inspect the school bus in arguing that 1) two staff members were standing by the bus the entire time (Petition at 3-4); and 2) the student was on petitioner's bus for less than five minutes; and 3) that the student was home within five minutes of discovery. (Ibid.)

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[4] This decision is not available through Lexis or the Rutgers Law School website. However, the decision is available on the N.J. DOE's website, http://www.nj.gov/education/legal/commissioner/2012/feb/68-12.pdf/.
[5] This decision is not available through Lexis or the Rutgers Law School website. However, the decision is available on the SADC's website, http://www.nj.gov/agriculture/sadc/.

As the School Bus Safety Act does not provide a definition for "end of the transportation route", the undersigned is left to find a meaning from a "discriminating search" of the record, consisting as it may of documentary exhibits and any other evidence filed by the movant, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion, and the arguments made by the parties in their respective motions for summary decision. Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520, 530 (1995).

I **CONCLUDE** that Mitchell's painstaking explanation in her Petition of the individuals who did and did not conduct the school bus inspection for children on the bus at the time the children were dropped off serves to underscore the conclusion that the meaning of "end of the transportation route" under N.J.S.A. 18A:39-28 occurs when the children are dropped off. In essence, Mitchell provides a common-sense definition to "end of the transportation route" in acknowledging that the school bus should be inspected when the children are dropped off and not upon completion of her transportation route at the end of the day.

I **CONCLUDE** further that Mitchell's attempt to mitigate her failure to check the school bus for children serves only to strengthen the Department's argument that "the end of the transportation route" triggering the school bus driver's affirmative duty to inspect the school bus under N.J.S.A. 18A:39-28 occurs when Mitchell left her bus unattended when she dropped off documents at the transportation center building and not when the bus driver competes all of her assigned routes for the day.

The Department seek relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c) which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary judgment requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Our courts have held that the "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Anderson, 477 U.S. at 252. Conversely, it is critical that a favorable ruling on a summary judgment motion not "shut a deserving litigant from his [or her] trial." Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 77 (1954).

I **CONCLUDE** that the evidence presented by the parties does not establish any facts in material dispute. Given the limited facts that must be established to support a violation of the duty imposed by the Legislature on a school bus driver to properly inspect the bus at the end of a route to assure that no child is left on the bus, the arguments offered by the Department amply support summary decision in its favor. And given the mandatory nature of the penalty for a first-time violator of the mandate, the six-month suspension is the only outcome where the violation is proven. N.J.S.A. 18A:39-29a. The Department's motion for summary decision is hereby **GRANTED**.

ORDER

It is hereby **ORDERED** that the Department's motion for summary decision is hereby **GRANTED** and it is further **ORDERED** that the petitioner's "S" endorsement shall be suspended for six months.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 18, 2021
DATE

Edward J Delanoy Jr

EDWARD J. DELANOY, JR., Deputy Director and ALAJ

Date Received at Agency: Oct 18, 2021

Date Mailed to Parties: Oct 18, 2021

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299-21

299-21
OAL Dkt. No. EDU 05323-21
Agency Dkt. No. 93-6/21

New Jersey Commissioner of Education

Decision

S.P., on behalf of minor children, J.P. and K.P.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions. Upon review, the Commissioner agrees with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that no issues remain in dispute and that the petition of appeal should be dismissed. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 29, 2021
Date of Mailing: November 30, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 05323-21

AGENCY DKT. NO. 93-6/21

S.P. ON BEHALF OF MINOR CHILDREN,

J.P. AND K.P.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF

ELIZABETH, UNION COUNTY,

Respondent.

S.P. on behalf of minor children J.P. and K.P., *pro se*

Christina M. DiPalo, Esq., for respondent, Elizabeth Board of Education (LaCorte, Bundy, Varady & Kinsella, attorneys)

Record Closed: October 13, 2021 Decided: October 20, 2021

BEFORE **ELISSA MIZZONE TESTA,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 22, 2021, the above captioned matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case pursuant to N.J.A.C. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On August 9, 2021, a telephone conference was held with the petitioner, S.P. on behalf of minor children, J.P. and K.P. (hereinafter, "Petitioner") and Christina M. DiPalo, counsel for the Board of Education of the City of Elizabeth, Union County (hereinafter, "Respondent" or "District"). At said time, counsel for respondent confirmed that the District has determined that the petitioner's minor children, J.P. and K.P. would be permitted to remain students in the Elizabeth Public Schools and thus were withdrawing its counterclaim for tuition. Petitioner was instructed to send to the undersigned a letter withdrawing her petition because it was moot.

On August 10, 2021, respondent submitted an email withdrawing its counterclaim. To date, petitioner has failed to submit a letter or email withdrawing her petition even after repeated attempts to contact petitioner by my chambers and counsel for respondent. On October 13, 2021, respondent submitted a Certification setting forth the basis of the withdrawal of the petition and counterclaim. See Attached. In light of same, it is concluded that this matter is moot and should be **DISMISSED**.

ORDER

It is therefore **ORDERED** that this matter is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 20, 2021

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: October 20, 2021

Date Mailed to Parties: October 20, 2021

sej

300-21

New Jersey Commissioner of Education

Final Decision

Boonton Education Association and
Robert Davis,

Petitioner,

v.

Board of Education of the Town of Boonton,
Morris County,

Respondent.

Synopsis

Petitioner alleged that the respondent Board failed to provide an employee health plan equivalent to the New Jersey Educators Health Plan (NJEHP), in violation of *N.J.S.A.* 18A:16-13.2. The Board argued that the Commissioner lacks jurisdiction over the subject matter of the within appeal, which respondent contends falls under health benefits laws, not the school laws. The Board filed a motion to dismiss.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 1 BA:6-9, the Commissioner has jurisdiction to hear and determine all controversies and disputes arising under the school laws; the Commissioner's jurisdiction is limited to reviewing whether the Board's health plan design comports with the elements of the NJEHP as described in *N.J.S.A.* 52:14-17.46.13(f); the NJEHP statute does not set forth the age limit on dependent coverage as part of the plan design; and any terms not referenced in the NJEHP statute fall outside the Commissioner's jurisdiction. Accordingly, the ALJ granted the Board's motion to dismiss.

Upon review, the Commissioner reversed the Initial Decision and remanded the matter to the OAL for further proceedings. In so doing, the Commissioner, *inter alia*, disagreed with the ALJ that the petition should be dismissed for lack of jurisdiction and found instead that *N.J.S.A.* 18A:16-13.2 provides that a board of education shall offer a health plan that is the equivalent of the NJEHP, and that a determination regarding whether a board of education has done so falls squarely within the Commissioner's jurisdiction; as the record thus far is limited to the jurisdictional issue raised in the motion to dismiss, the Commissioner was unable to reach a decision regarding the merits of whether the Board's health plan is equivalent to the NJEHP. Accordingly, the matter was remanded for further proceedings consistent with this decision.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

300-21
OAL Dkt. No. EDU 04105-21
Agency Dkt. No. 45-3/21

New Jersey Commissioner of Education

Final Decision

Boonton Education Association and
Robert Davis,

Petitioners,

v.

Board of Education of the Town of Boonton,
Morris County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto, have been reviewed and considered.

Petitioner alleges that the Board failed to provide a health plan equivalent to the New Jersey Educators Health Plan (NJEHP), in violation of *N.J.S.A.* 18A:16-13.2. Specifically, petitioner contends that while the NJEHP permits dependents to remain covered until the end of the calendar year in which they turn 26 years old, the Board's plan terminates coverage at the end of the month in which a dependent turns 26. The Administrative Law Judge (ALJ) concluded that the Commissioner's jurisdiction is limited to reviewing whether the Board's health plan design comports with the elements of the NJEHP as described in *N.J.S.A.* 52:14-17.46.13(f) (NJEHP statute). The ALJ found that the NJEHP statute does not set forth the age limit on dependent coverage as part of the plan design and concluded that any terms not

referenced in the NJEHP statute fall outside the Commissioner's jurisdiction. Accordingly, the ALJ granted the Board's motion to dismiss.

In its exceptions, petitioner argues that resolving this dispute requires an interpretation of *N.J.S.A.* 18A:16-13.2 to determine whether the Board's health plan comports with the NJEHP. Therefore, according to petitioner, the dispute arises under the school laws, not insurance law, and the Commissioner has jurisdiction to decide the merits of the case.

In reply, the Board argues that the Commissioner lacks jurisdiction to decide what benefit levels should be in a health plan that is designed to mirror a plan created by another State agency. The Board contends that the ALJ correctly concluded that because the issue of dependent coverage is not one of the statutorily-prescribed elements of the NJEHP, the dispute would necessitate a comparison of the plans and implicate areas outside of the school laws.

Upon review, the Commissioner disagrees with the ALJ that the petition should be dismissed for lack of jurisdiction. *N.J.S.A.* 18A:16-13.2 provides that a board of education shall offer a health plan that is the equivalent of the NJEHP. A determination regarding whether a board of education has done so falls squarely within the Commissioner's jurisdiction. P.L. 2020, Chapter 44, outlines requirements for plans offered by employers who participate in the School Employees' Health Benefits Program (SEHBP), which is under the purview of the School Employees' Health Benefits Plan Design Committee or the State Treasurer, through the Division of Pensions and Benefits. These requirements are therefore codified as *N.J.S.A.* 52:17.46.13 through 16. However, none of these provisions require boards of education to offer equivalent plans if they do not participate in the SEHBP. Instead, non-participating boards are required to offer an equivalent plan based on *N.J.S.A.* 18A:16-13.2, an education statute. Under the

standard principles of statutory construction, the Commissioner presumes that the Legislature intended this distinction when it enacted P.L. 2020, Chapter 44. Therefore, the Commissioner concludes that jurisdiction over whether a non-participating board's plan is equivalent to the NJEHP lies with the Commissioner.

Although the ALJ correctly found that dependent coverage is not provided for in the NJEHP plan description in the NJEHP statute, the lack of any such provision does not go to the procedural question of jurisdiction, but rather to the substantive question of whether a plan that differs from the NJEHP regarding dependent coverage satisfies the requirements of *N.J.S.A.* 18A:16-13.2. As the record thus far is limited to the jurisdictional issue raised in the motion to dismiss, the Commissioner is unable to reach a decision regarding the merits of whether the Board's health plan is equivalent to the NJEHP.

Accordingly, the Initial Decision is reversed, and the matter is hereby remanded to the OAL for further proceedings consistent with this opinion.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 29, 2021
Date of Mailing: November 30, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 04105-21
AGENCY DKT. NO. 45-3/21

BOONTON EDUCATION ASSOCIATION
AND ROBERT DAVIS,
Petitioners,
v.
BOARD OF EDUCATION OF THE
TOWN OF BOONTON, MORRIS COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioners (Zazzali, Fagella, Nowack, Kleinbaum & Friedman, attorneys)

James L. Plosia, Jr., Esq., for respondent (Plosia Cohen, attorneys)

Record Closed: August 2, 2021 Decided: October 14, 2021

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

Petitioners, Boonton Education Association and Robert Davis, allege that respondent Board of Education of the Town of Boonton, Morris County, violated N.J.S.A. 18A:16-13.2 by failing to offer a plan equivalent to the New Jersey Educators Health Plan.

PROCEDURAL HISTORY

On March 25, 2021, petitioners Boonton Education Association (Association) and Robert Davis filed with the New Jersey Department of Education (Department) a Petition of Appeal (Petition) requesting that the Commissioner enter an order: declaring that respondent Board of Education of the Town of Boonton, Morris County (Board), is in violation of N.J.S.A. 18A:16-13.2(a)(1) and (2) by failing to provide a plan equivalent to the New Jersey Educators Health Plan (NJEHP); compelling the Board to provide a plan equivalent to the NJEHP, inclusive of eligibility terms that permit dependents to remain covered until the end of the relevant calendar year, to be effective January 1, 2021, in accordance with school laws; and compelling the Board to financially reimburse any affected Association members for any benefits or payment lost due to the Board's actions. On March 26, 2021, petitioners filed with the Department a letter amendment to Count One, paragraph 1 of the Petition and a corrected Exhibit A. The Commissioner acknowledged receipt of the Petition on March 23, 2021, and the letter amendment on April 13, 2021.

On May 5, 2021, respondent filed a motion to dismiss in lieu of answer for lack of jurisdiction. The Department transmitted the case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the rules of procedure established by the Department of Education to hear and decide controversies and disputes arising under school laws, N.J.A.C. 6A:3-1.1 to -1.17. The case was filed at the Office of Administrative Law (OAL) on May 7, 2021.

On July 16, 2021, petitioners filed a brief in opposition to the motion to dismiss. On August 2, 2021, respondent filed a reply brief.

MOTION TO DISMISS

Where a party seeks an order of a judge, the party must apply by motion. N.J.A.C. 1:1-1.12(a). Although a motion to dismiss is not specifically referenced in the Uniform Administrative Procedure Rules ("UAPR"), a respondent is not precluded from filing a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer. N.J.A.C. 6A:3-1.5(g). Further, per N.J.A.C. 1:1-1.3(a), in the absence of a rule, a judge may proceed in accordance with the New Jersey Court Rules, provided the rules are compatible. In this regard, Rule 4:6-2 states, in part: Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses, unless otherwise provided by R. 4:6-3, may at the option of the pleader be made by motion, with briefs: (a) lack of jurisdiction over the subject matter, (b) lack of jurisdiction over the person, (c) insufficiency of process, (d) insufficiency of service of process, (e) failure to state a claim upon which relief can be granted, and (f) failure to join a party without whom the action cannot proceed, as provided by R. 4:28-1.

Respondent's motion to dismiss argues that the Commissioner of the Department of Education (Commissioner) lacks jurisdiction over the subject matter of the Petition because the claims do not rest on school laws, but rather on health benefits laws, and that the Petition requires the Commissioner to "interpret a health insurance law and/or determine the District's negotiations obligations as overseen by the Public Employment Relations Committee ("PERC") and its governing laws." Conversely, petitioners argue that a petition should not be dismissed where a cause of action is suggested by the facts and that the Commissioner has jurisdiction over the subject matter of the Petition.

The Commissioner has jurisdiction to hear and determine "all controversies and disputes arising under the school laws," excepting those governing higher education, or under the rules of the State board or of the commissioner. N.J.S.A. 18A:6-9. Additionally, with respect to jurisdiction, the Appellate Division has stated as follows:

> We begin by noting our institutional respect for the Department's subject matter interest and for the Commissioner's first-instance jurisdiction "to hear and determine . . . all controversies and disputes arising under the school laws[.]" N.J.S.A. 18A:6-9. The Commissioner's authority is plenary. See Abbott v. Burke (I), 100 N.J. 269, 301, 495 A.2d 376 (1985). Manifestly, however, the sweep of the Department's interest and the Commissioner's jurisdiction does not extend to all matters involving boards of education. For example, contract claims against boards do not arise under the school laws but rather from statutory or common law. See Picogna v. Board of Educ. of Cherry Hill, 249 N.J. Super. 332, 335, 592 A.2d 570 (App.Div.1991). Claims of the latter type are, therefore, typically and appropriately adjudicated in the courts. See ibid.; South Orange-Maplewood Educ. Ass'n v. Board of Educ. of South Orange & Maplewood, 146 N.J. Super. 457, 463, 370 A.2d 47 (App.Div.1977).
>
> Archway Programs, Inc. v. Pemberton Tp. Bd. of Educ., 352 N.J. Super. 420, 424 (App. Div. 2002).

The statute relied upon by petitioners is N.J.S.A. 18A:16-13.2, which applies to local boards of education and employers, as specified in N.J.S.A. 18A:16-13.2(k)[1], who do not participate in the School Employees' Health Benefits Program (SEHBP). Any health insurance company may provide to local boards of education and to those employers defined pursuant to N.J.S.A. 52:14-17.46.2 who do not participate in the

[1] N.J.S.A. 18A:16-12(k) states: This section shall also apply when health care benefits coverage is provided though an insurance fund or joint insurance fund or any other manner. This section shall apply to any employer, as that term is defined in section 32 of P.L.2007, c.103 (C.52:14-17.46.2), that is not a participating employer in the School Employees' Health Benefits Program. This section shall not apply to charter school or renaissance school employers unless they have a collective negotiations agreement with any of their employees in effect on or after the effective date [July 1, 2020] of P.L.2020, c.44

SEHBP the equivalent of the New Jersey Educators Health Plan (NJEHP) in the SEHBP as that plan design is described in N.J.S.A. 52:14-17.46.13(f) and the Garden State Health Plan as that plan design is described in N.J.S.A. 52:14-17.46.13(d), notwithstanding the provisions of any other law, rule, or regulation, including any regulation of the New Jersey Department of Banking and Insurance, to the contrary. N.J.S.A. 18A:16-32. The term "employer" means local school district, regional school district, county vocational school district, county special services school district, jointure commission, educational services commission, State-operated school district, charter school, county college, any officer, board, or commission under the authority of the Commissioner of Education or of the State Board of Education, and any other public entity which is established pursuant to authority provided by Title 18A of the New Jersey Statutes, but excluding the State public institutions of higher education and excluding those public entities where the employer is the State of New Jersey. N.J.S.A. 52:14-17.46.2(c). Additionally, the term "dependents" means an employee's spouse, domestic partner, or partner in a civil union couple, and unmarried children under the age of 23 years who live in a regular parent/child relationship. N.J.S.A. 52:14-17.46.2(e).

Notwithstanding the provisions of any other law, rule, or regulation to the contrary, beginning January 1, 2021 and for each plan year thereafter, a board of education as an employer providing health care benefits coverage for its employees, and their dependents if any, in accordance with N.J.S.A. 18A:16-12 et seq. "shall offer to its employees, and their dependents if any, the equivalent of the [NJEHP] in the [SEHBP] as that plan design is described in N.J.S.A. 52:14-17.46.13." N.J.S.A. 18A:16-13.2(a)(1). The plans under this section shall be offered by the employer regardless of any collective negotiations agreement (CNA) between the employer and its employees in effect on the effective date [July 1, 2020] of this act, P.L.2020, c.44, that provides for enrollment in other plans offered by the employer. N.J.S.A. 18A:16-13.2(a)(2).

Per N.J.S.A. 52:14-17.46.13(f), which is specifically refenced in N.J.S.A. 18A:16-13.2, the plan design of the NJEHP shall be the following:

In Network Benefits

Coverage

Member Coinsurance: 10%, Applies Only to Emergency Transportation Care and Durable Medical Equipment

Deductible: N/A

Out-of-Pocket Maximum: $500 Single/ $1,000 Family (covers all in network copayments, coinsurance, and deductible)

Emergency Room Copayment: $125 (To be Waived if Admitted)

PCP Office Visit Copayment: $10

Specialist Office Visit Copayment $15 Out-of-Network Benefits

Coverage

Member Coinsurance: 30% of the Out-of-Network Fee Schedule

Deductible: $350 / $700

Out-of-Pocket Maximum: $2,000 Single / $5,000 Family Routine Lab: Paid at Out-of-Network Benefit Level

Out-of-Network Fee Schedule: 200% of CMS - Medicare Pharmacy

Out-of-Pocket Maximum: $1,600 Single / $3,200 Family (Indexed Annually Pursuant to Federal Law) Generic Copayment:$5 Retail 30 Day Supply / $10 Mail 90 Day Supply Brand Copayment:$10 Retail 30 Day Supply/ $20 Mail 90 Day Supply Mandatory Generic: Member Pays Difference in Cost Between Generic and Brand, Plus Brand Copayment Formulary: Closed Formulary as contracted with the Pharmacy Benefit Manager and the School Employees' Health Benefits Commission Other

Chiropractic, Physical Therapy, and Acupuncture:

Subject to the same Out-of-Network Limits as for the State Health Benefits Program as were in effect on June 1, 2020 to

> take effect as of July 1, 2020, or as soon thereafter as reasonably practicable.
>
> Under a patient centered medical home model, there shall be no office visit copay for primary care for participants who select and commit to a patient centered medical home for primary care in accordance with plan rules and regulations.

There can be no dispute, based upon the plain language of the statute, that the Board "shall offer. . . the equivalent of the NJEHP. . . as that plan is described in N.J.S.A. 52:14-17.46.13." While a health care benefits plan must be offered, the plan itself is governed by Title 52 of the New Jersey Annotated Statutes, Chapter 14, Article 3D "State Health Benefits" – which I agree with respondent are unquestionably not "school laws" statutes. However, I disagree with respondent that this results in an absolute bar to jurisdiction. Instead, what limited jurisdiction the Commissioner has would be with respect to whether or not the plan design comports with N.J.S.A. 52:14-17.46.13, and more specifically with N.J.S.A. 52:14-17.46.13(f), as to member coinsurance; deductible; out-of-pocket maximums; emergency room, PCP and specialist copayments; out of network fee schedule and limits; and chiropractic, physical therapy and acupuncture. None of the foregoing terms of the plan design require the Commissioner "to interpret a health insurance law and/or to determine the District's negotiations obligations as overseen by the [PERC] and its governing laws." Thus, beyond the design plan elements, I agree with respondent that the Commissioner lacks jurisdiction.

Petitioners allege that the Board failed to offer an "equivalent" plan, because the NJEHP "provides for dependent coverage until the end of the calendar year in which the dependent turns 26," that "[p]rior to the open enrollment period, the District provided employees with documents stating that dependent children are covered until the end of the calendar year in which they turn 26," and that "after the open enrollment period had ended, the Board advised petitioner Robert Davis that members' dependents . . . will have their coverage terminated at the end of the month the dependent turns 26." Notably, N.J.S.A. 18A:16-13.2 requires that the Board offer the "equivalent of the [NJEHP] in the [SEHBP] as that plan design is described in N.J.S.A. 52:14-17.46.13," and does not require that it offer an "identical" plan. The Petition alleges that the Association is the

majority representative pursuant to N.J.S.A. 43:13A-1 et seq. for its bargaining unit members employed by the Board with respect to collective negotiations for the terms and conditions of employment, and there exists a collective negotiations agreement (CNA) between the Association and the Board. Respondent argues that the dispute over dependent coverage would necessitate a comparison of the health plans and implicate areas of law outside of "school law". I concur. N.J.S.A. 52:14-17.46.13(f) does not set forth the age limit on dependent coverage as part of the plan design, and generally any terms not referenced therein would fall outside the jurisdiction of the Commissioner.

In view of the foregoing, I **CONCLUDE** that because no dispute was posited relative to any of the terms of the design plan required by N.J.S.A. 18A:16-13.2, which would be the only elements for which the Commissioner could readily determine if a violation existed, the Commissioner lacks jurisdiction over the subject matter of this dispute and the Petition should be dismissed.

ORDER

It is **ORDERED** that the respondent's motion to dismiss is **GRANTED** as to the Commissioner's jurisdiction over the specific subject matter of this Petition, and the Petition is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 14, 2021

DATE

KELLY J. KIRK, ALJ

Date Received at Agency: October 14, 2021

Date Mailed to Parties: October 14, 2021

db

301-21

301-21E
OAL Dkt. No. EDU 09324-21
Agency Dkt. No. 207-11/21

New Jersey Commissioner of Education

Order on Emergent Relief

L.B., on behalf of minor child, E.Y.,

Petitioner,

v.

Board of Education of the Monmouth Regional High School District, Monmouth County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL)[1], and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner finds that the petitioner has demonstrated entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6, with respect to the fact that the Board has not complied with the applicable regulatory provisions governing the process for determining whether E.Y.'s long-term suspension should continue. *N.J.A.C.* 6A:16-7.3(c)-(f).[2]

In this case, petitioner is challenging the Board's removal of her daughter from school after E.Y. physically assaulted another student when they got off the bus because she believed

[1] There was no recording of the final part of the proceedings, which included the testimony of Brian Evans and any concluding arguments.

[2] Based on the current record before the Commissioner, petitioner has not established an entitlement to emergent relief under *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), with respect to her claim that E.Y. should be immediately allowed back in the general education setting.

that the girl had called her a racial slur. As a result of the incident, the Board suspended E.Y. for 10 days pending an expulsion hearing. At the hearing, the Board determined to recommend that E.Y. attend an alternative school for one marking period (approximately ten weeks) so that she could receive counseling. It is important to note that the Board did not expel E.Y.[3] Expulsion is not simply the removal of a student from school but, rather, it is defined as "the discontinuance of educational services or the discontinuance of payment of educational services for a student." *N.J.A.C.* 6A:16-1.3. Here, the Board did not discontinue educational services; rather, the Board recommended that E.Y. attend an alternative school, and when petitioner declined, home instruction was provided.[4] At the expulsion hearing, the Superintendent indicated that the discipline was not an expulsion because the District would still be responsible for E.Y. Instead, the Board imposed what amounts to a long-term suspension. A long-term suspension is defined as the "removal of a student for more than 10 consecutive school days from the general education program, . . . but not the cessation of the student's educational services." *N.J.A.C.* 6A:16-1.3. The record includes a video of the incident that demonstrates E.Y. repeatedly punching another student who was attempting to avoid the altercation, which behavior is sufficiently serious to warrant a long-term suspension.

Despite the fact that a long-term suspension was warranted, the Board has failed to follow the applicable regulatory provisions governing the process for determining whether the long-term suspension should continue and/or when E.Y. should return to the general education

[3] According to *N.J.A.C.* 6A:16-7.4(a)(1), "[a] district board of education may expel a general education student from school, pursuant to *N.J.S.A.* 18A:37-2, only after the district board of education has provided . . . [t]he procedural due process rights set forth at *N.J.A.C.* 6A:16-7.1(c)3 and 7.3 [and] subsequent to a long-term suspension, pursuant to *N.J.A.C.* 6A:16-7.3 . . ." This was E.Y.'s first disciplinary infraction. Accordingly, the Board was not permitted to expel her as she had not previously served a long-term suspension.

[4] It appears from the record that E.Y. is not attending home instruction, except for meeting with a math teacher.

program, i.e., *N.J.A.C.* 6A:16-7.3(d)-(f). The regulations provide the Board with the authority, at the completion of a long-term suspension, to either reinstate the student or to continue the suspension. *N.J.S.A.* 18A:37-5; *N.J.A.C.* 6A:16-7.3(c). Pursuant to *N.J.A.C.* 6A:16-7.3(c), this determination must be made based on the following criteria:

> i. The nature and severity of the offense;
> ii. [The district board of education's] removal decision;
> iii. The results of any relevant testing, assessments or evaluations of the student; and
> iv. The recommendation of the chief school administrator, after considering input from the principal or director of the alternate education program or home or other in-school or out-of-school instruction program in which the student has been placed. [*N.J.A.C.* 6A:16-7.3(c)1.i.-iv.]

Typically, the suspension of a general education student shall not be continued beyond the district board of education's second regularly scheduled meeting following the suspension. *N.J.A.C.* 6A:16-7.3(c). Therefore, the petitioner has established a likelihood of success on the merits with respect to the Board's failure to comply with *N.J.A.C.* 6A:16-7.3.[5]

As a result, at the next regularly scheduled Board meeting, the Board is directed to evaluate the factors enumerated in *N.J.A.C.* 6A:16-7.3(c)1.i.-iv. to determine whether E.Y.'s long-term suspension should continue. If there is no scheduled Board meeting within the next ten days after the date of this decision, the Board is directed to schedule a special meeting to determine whether E.Y. should be returned to the general education program. Additionally, given the limited record in this matter surrounding home instruction, the Board is also directed to ensure it is providing E.Y. with the appropriate educational programs or services, to the extent that E.Y. will participate. *N.J.A.C.* 6A:16-7.3(f).

[5] The Commissioner is in accord with the ALJ's determinations with respect to the remaining *Crowe* factors.

Accordingly, the recommended decision of the ALJ is modified for the reasons expressed herein; the petitioner's application for emergent relief is granted with respect to the Board's non-compliance with the applicable regulatory provisions governing the process for determining whether the long-term suspension should continue. This case shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 30, 2021
Date of Mailing: November 30, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON
EMERGENT RELIEF
OAL DKT. NO. EDU 09324-21
AGENCY DKT. NO. 207-11/21

L.B. ON BEHALF OF MINOR CHILD, E.Y.,
Petitioner,
v.
BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent.

L.B., petitioner, pro se

Martin Barger, Esq., for respondent (Barger & Gaines, attorneys)

BEFORE **KIM C. BELIN**, ALJ:

STATEMENT OF THE CASE

By request for emergent relief, petitioner L.B., challenges the disciplinary decision of the respondent Board of Education of the Monmouth Regional High School District (Board or respondent), arising from E.Y.'s removal from the high school for allegedly physically assaulting another student.

PROCEDURAL HISTORY

On November 1, 2021, the petitioner filed a petition of appeal challenging respondent's determination that E.Y. engaged in behavior warranting temporary removal from the high school. On November 9, 2021, the Director of the Office of Controversies and Disputes within the Department of Education transmitted the petition and motion for emergent relief to the Office of Administrative Law (OAL). N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13; N.J.A.C. 1:1-8.2. Argument on the matter was held and the record closed on November 12, 2021.

FACTUAL DISCUSSION AND FINDINGS

The following FACTS are undisputed and I, therefore **FIND**:

For the 2020-21 school year, E.Y. was a ninth-grade student at the Monmouth Regional High School District (high school). She was a general education student. On or about September 14, 2021, after departing the school bus after school, E.Y. confronted another female student. A video of the encounter showed E.Y. approach the female student asking her "did you say it?" The other student replied "no" and E.Y. repeated the question. The student replied "no" again and E.Y. hit the other female student and the confrontation deteriorated into a physical altercation between the two students. E.Y. believed that the other student called her the "n" word while on the school bus which upset E.Y. The two students have had a troubled relationship dating back to eighth grade.

On September 15, 2021, a parent who wished to remain anonymous came to the high school to report a bullying incident. The parent showed a video of E.Y and the other student fighting to Vice Principals Kathy Mihalko and Sal Spampanato. Both Vice Principals spoke to the students (E.Y. and the other student) about the incident and interviewed witnesses. The Vice Principals determined that this incident was not a mutual fight but rather E.Y. assaulted the other student. On September 16, 2021, E.Y. was informed by Mr. Spampanato that she would be suspended for ten days.

The Vice Principals received conflicting reports from the witnesses and thus were unable to conclusively confirm whether the other student made the alleged derogatory statement to E.Y. Due to the severity of the incident, an expulsion hearing was scheduled and held on September 21, 2021. Notice of the hearing was sent to L.B., but L.B. did not attend the hearing.

The Board determined that E.Y. should be removed from the high school and attend the Regional Achievement Academy (Academy) for one marking period and return to the high school based if her grades and behavior were acceptable. Ms. Mihalko called L.B. with the results of the expulsion hearing and to schedule an intake with the Academy. L.B. stated that she would appeal the Board's decision and E.Y. would not be attending the Academy. Based upon this information, the high school counselor set up home instruction for E.Y. which was approved by L.B. on September 24, 2021.

E.Y. was to receive two hours of home instruction daily in the core subjects of Algebra 1, English 1, World History, Biology and Spanish. The initial home instruction sessions were held virtually, however, E.Y. encountered computer challenges and the sessions were moved to the county library. As of the date of the emergent relief hearing, E.Y. was only meeting with a math teacher.

E.Y. served the ten-day suspension. She had no prior disciplinary record of short or long-term suspensions. The school district's student code of conduct states that fighting for any reason on school grounds or at school events mandates an out-of-school suspension period of five to nine days and demerits. Physical assault on another student results in a minimum ten-day out-of-school suspension pending expulsion hearing, and the police are notified.

Testimony

For the petitioner:

E.Y. testified that she had trouble with this student while in eighth grade. E.Y. told her mother about the problem but there was no discussion on how to resolve the problem.

E.Y. waited until after school to confront the student because E.Y. did not want to get in trouble at school. She thought that she would not be subject to penalty for a fight that occurred after school off school grounds. She believed the other student's remarks were racist and E.Y. "snapped." She believed she had a right to stand up for herself but if she had to do it over, she would not fight. She believed the penalty of being expelled from school was too severe and she wants to return to the high school.

L.B., mother of E.Y., testified that E.Y. struggled with virtual instruction during the Covid-19 pandemic and thus L.B. knew that home instruction would be a challenge. In addition, L.B.'s work schedule limited her ability to ensure that E.Y. attended the home instruction sessions at the county library or did any virtual homework. L.B. did not attend the expulsion hearing because she thought the letter was about E.Y. being evaluated. L.B. believed that Board's decision to expel E.Y. was excessive. L. B. also thought the school district had no authority to impose a penalty since the fight occurred after school and after the students had departed off the bus. Her daughter will feel like an outcast by not attending the regular high school. Her older daughter graduated from the high school this past June and during her high school career also had several fights but was not expelled and is currently a college freshman. L.B. wants the same outcome for E.Y.

For the respondent:

Sal Spampanato, Vice Principal, testified that an anonymous parent showed him the video of the students fighting. He spoke with E.Y. and the other student and interviewed witnesses. He determined that E.Y. assaulted the other student. He could not confirm that the other student made racist remarks to E.Y. He called L.B. on September 15, 2021, to tell her that E.Y. had been involved in a fight. L.B. was already aware of the fight and stated that her daughter was justified because the other student made racists remarks about E.Y.

He attended the expulsion hearing and spoke to the Board. He believed that the additional penalty of expulsion was imposed because of the severity of the fight. The high school's policy was not to allow students who assault other students back into the school after being suspended. The state police were notified of the incident through the high

school's school resource officer. The parent of the student who was involved in the fight with E.Y. did not report the fight because the student did not want to be a "snitch."

Kathy Mihalko, Vice Principal, testified that on September 15, 2021, an anonymous parent came to the high school to report an incident of bullying. She viewed a video of the fight and saw E.Y. hit another student. Ms. Mihalko deemed this an assault because E.Y. initiated the first hit, and continued to hit the other student despite the other student's attempt to distance herself from E.Y. A five- to nine-day out-of-school suspension and demerits was the normal penalty for fighting. However, physical assault of another student resulted in a minimum ten-day out-of-school suspension pending an expulsion hearing.

Ms. Mihalko believed this fight was premeditated because the students were video-taping E.Y. before the fight began. She believed that enrollment in the Academy would give E.Y. an opportunity to succeed because of the additional counseling component available there.

Brian Evans, Principal, testified that he learned of the fight through Mr. Spampanato who showed him the video. He did not attend the expulsion hearing but was comfortable with the administration's recommendation to enroll E.Y. at the Academy because of its more intensive counseling component. However, he was willing to allow E.Y. to return to the high school provided there was a plan. His concern was that she had received limited home instruction and was eight weeks behind academically. He believed that with assistance she could catch up. He remembered E.Y.'s older sister and called her a "success story." He believed there was a small group of female freshmen who were carrying over issues from the previous school year.

LEGAL ANALYSIS AND CONCLUSION

Emergent Relief

The regulations governing controversies and disputes before the Commissioner of Education provide that "[w]here the subject matter of the controversy is a particular course

of action by a district board of education . . . the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case." N.J.A.C. 6A:3-1.6(a). The regulations further provide that the Commissioner may "[t]ransmit the motion to the OAL for immediate hearing on the motion." N.J.A.C. 6A:3-1.6(c)(3).

At such a hearing, a petitioner must show that he/she satisfies each of the following four standards:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 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.
>
> [N.J.A.C. 6A:3-1.6(b) (citing Crowe v. DeGioia, 90 N.J. 126 (1982)).]

Thus, the purpose of emergent relief is "to 'prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.'" Crowe, 90 N.J. at 132 (citing Thompson ex rel. Bd. of Chosen Freeholders v. Paterson, 9 N.J. Eq. 624, 625 (Sup. Ct. 1854)).

Irreparable Harm

Here, L.B. asserts that her daughter, E.Y. is suffering irreparable harm because she has not been in school since September. The current school year started on or about September 8, 2021, and the incident occurred on September 14, 2021. The disciplinary action affecting E.Y. included a ten-day suspension from school and school-related activities and removal to another school. E.Y. has received limited hours in home instruction, not the ten hours per week proposed. Principal Evans expressed his concern

that E.Y. is eight weeks behind academically and will need a vigorous program to catch up. It is not reasonable to presume that E.Y. will not make the needed progress by continuing in home instruction.

In a similar emergent relief case in which the student was expelled from the high school for violating the student code of conduct, the Administrative Law Judge (ALJ) stated: "irreparable harm is [also] rooted in the quality of the education" received by the student. K.C. and S.C. o/b/o K.C. v. Bd. of Ed. of Borough of Englewood Cliffs, 2011 N.J. AGEN LEXIS 100, *8. The ALJ concluded that the petitioners had satisfied the first prong of the Crowe test because the "quality of the education provided at [the petitioner's specialized high school was] distinctly different, by design, intent and expectation" than the local high school. Id.

In the current controversy, the respondent has recommended that E.Y. attend the Academy, which is an alternative school run by the Monmouth-Ocean Educational Services Commission (MOESC) which provides educational programs and services to local school districts.[1] Petitioner is opposed to this recommendation because she believes her daughter can succeed at the high school given a chance. L.B. contends that the Board's decision to remove E.Y. is premature and excessive. While the fight may be an indicator that E.Y. needs counseling services for anger management, it is undisputed that such counseling is available at the high school. It may well be that as the facts in this matter are developed the Board may show that E.Y.'s needs are best met by attending the Academy. However, the facts presented to date do not definitively show that such is the case. I **CONCLUDE** that the petitioner has satisfied the first prong of the Crowe test. Irreparable harm will result if E.Y. is not permitted to return to the high school.

Right to Claim is Settled

Next, emergent relief "should be withheld when the legal right underlying plaintiff's claim is unsettled." Crowe, 90 N.J. at 133 (citing Citizens Coach Co. v. Camden H. R.

[1] https://www.moesc.org/domain/16

Co., 29 N.J. Eq. 299, 304–05 (E & A 1878)). In K.C. et al. v. Bd. of Ed. of Borough of Englewood Cliffs, (citation omitted), the ALJ stated:

> each school district is obligated to provide a thorough and efficient system of education to all children residing in its school district. N.J. Const. (1947), Art. VIII, 1, N.J.S.A. 18A:33-1. To carry out this policy, local boards of education have been granted discretionary authority at N.J.S.A. 18A:11-1c and d to adopt rules for the management of the public schools of the district, and to perform all acts and do all things necessary for the lawful and proper conduct of the public schools of the district.
>
> In general, a board of education's actions are entitled to a presumption of lawfulness and good faith. Where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable. Schuster v. Ed. of Educ. Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Ed. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962)). [*10]
>
> The "arbitrary, capricious and unreasonable" standard of review imposes a heavy burden on challengers of board actions. This standard has been defined by the New Jersey courts as follows:
>
> > In the law, "arbitrary" and "capricious" means having no rational basis. Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is no room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached . . . Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling.
> >
> > [Piccoli v. Ed. of Educ. of Ramapo Indian Hills Regional School District, OAL Dkt. EDU 1839-98 (January 22, 1999) (citing Bayshore Sewage Co. v. Dent. of Envir. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974).]
> > [2011 N.J. AGEN LEXIS 100, *9-11]

In the present case, the Board has established rules of conduct for its students. Those rules set forth policies for disciplining students who violate those rules. Specifically, "fighting (for any reason) on school grounds/school event (NJSA 18A:37-2)[sic] carries a five to nine day out-of-school suspension/demerits." (R-4.) "Physical Assault on another student" carries a minimum ten-day out-of-school suspension pending expulsion hearing and the police are notified." Id. It is undisputed that the Board followed this policy and determined that E.Y. can no longer attend the high school and must instead attend the Academy for one marking period. However, the respondent failed to adhere to the procedural mandates of N.J.A.C. 6A:16-7.4(a)1 which provides:

> A district board of education may expel a general education student from school, pursuant to N.J.S.A. 18A:37-2, only after the district board of education has provided the following:
>
> 1. The procedural due process rights set forth at N.J.A.C. 6A:16-7.1(c)3 and 7.3, subsequent to a long-term suspension, pursuant to N.J.A.C. 6A:16-7.3; (Emphasis supplied.)

A long-term suspension is defined as a suspension lasting more than ten days. N.J.A.C. 6A:16-7.3. E.Y. did not serve a long-term suspension and thus I **CONCLUDE** that the petitioner has satisfied the second prong of emergent relief because the right underlying petitioner's claim that the expulsion was excessive and unwarranted is settled based upon the arbitrary, capricious, and unreasonable standard of review.

Likelihood of Success on the Merits

Under the third emergent relief standard, "a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits." Crowe, 90 N.J. at 133 (citing Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115–16 (E. & A. 1930)). This typically "'involves a prediction of the probable outcome of the case' based on each party's initial proofs, usually limited to documents." Brown v. City of Paterson, 424 N.J. Super. 176, 182–83 (App. Div. 2012) (quoting Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 397 (App. Div. 2006)). However, emergent relief "should not issue where all material

facts are controverted." Crowe, 90 N.J. at 133 (citing Citizens Coach, 29 N.J. Eq. at 305–06).

Based upon the respondent's failure to comply with the procedural requirements of N.J.A.C. 6A:16-7.4(a)1, I **CONCLUDE** that the petitioner has satisfied the third requirement of the Crowe test.

Balancing of the Equities

The fourth and final emergent relief standard involves "the relative hardship to the parties in granting or denying relief." Crowe, 90 N.J. at 134 (citing Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J. Eq. 506, 515 (Ch. 1941), mod. on other grounds, 132 N.J. Eq. 613 (E. & A. 1942)). It is a balancing of the equities and the interests of the parties.

The respondent contends that the expulsion was warranted because the confrontation and altercation appeared to be premeditated, it occurred at the beginning of the school year and was an assault, not a mutual fight. However, E.Y. served a ten-day suspension for her actions, which is the maximum time for a short-term suspension. Expelling her is an additional penalty.

The Board is responsible for the safety of all the students, and it is reasonable for the Board to be concerned about the potential risk in returning E.Y. to the high school. However, Principal Evans stated that he was willing to allow her to return to the high school if there was a plan. Principal Evans expressed concern about E.Y.'s academic success in losing approximately eight weeks of instruction at the beginning of the school year. Vice Principal Spampanato stated that the high school provides counseling services. Although the Academy may provide more extensive counseling services, there was no evidence presented that the respondent's counseling services would be inadequate for E.Y. If Principal Evans is willing to allow E.Y. to return to the high school, E.Y. can be granted counseling services and be given a written directive that is signed by E.Y. stating that engaging in any future behavior that violates the student code of conduct

will result in an automatic transfer to the Academy for the remainder of the current school year. All due process requirements must be met prior to the transfer.

This is E.Y.'s first year with the respondent and thus the teachers, and administrators have not had sufficient time to connect with her and establish a rapport. The animosity between the two students appears to be rooted in the past and remains unresolved. It appears unreasonable to expel E.Y. at such an early point in her high school career especially when the principal is willing to give her a second chance, and E.Y. does not have a disciplinary record apart from this incident.

Accordingly, under the circumstances outlined above, I **CONCLUDE** that the petitioner has satisfied the fourth prong of the Crowe test because the potential harm to E.Y. is greater than the harm to the respondent.

Conclusion

Based on the above, petitioner's request for emergent relief is **GRANTED** and E.Y. is returned to the high school immediately. The administration must develop a plan for her to make up any missed schoolwork and an agreement regarding the consequences of any future infractions.

ORDER

I **ORDER** that the petitioner's motion for emergent relief is **GRANTED.**

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who 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.

November 15, 2021
DATE

Kim C. Belin
KIM C. BELIN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

KCB/lam/mph

APPENDIX

EXHIBITS

For petitioner:

P-1 Petition of Appeal

For respondent:

R-1 Transcript of Expulsion

R-2 Video of Fight

R-3 Notice of Expulsion dated September 17, 2021

R-4 Student Code of Conduct (partial)

302-21

302-21

New Jersey Commissioner of Education

Final Decision

Alphonso Mastrofilipo, Jr.,

Petitioner,

v.

Board of Education of the Borough of Lodi, Bergen County,

Respondent.

Synopsis

In this consolidated matter, the petitioner – a former member of the respondent Board of Education, who had resigned to run for another public office – alleged that his rights were violated when the Board filled two vacancies without interviewing the petitioner for the positions. Petitioner claimed that the Board lacked a quorum when it voted to fill the two Board vacancies and further alleged that the Board violated the New Jersey Election Law by not interviewing petitioner nor considering his application as a candidate to fill one of the vacancies. The Board denied petitioner's allegations. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there is no genuine issue as to any material fact here, and the matter is ripe for summary decision; petitioner did not have a legal entitlement to be interviewed for a vacancy on the Board; the Board did not violate any law or otherwise abuse its discretion in declining to grant petitioner an interview for one of the two vacancies; and the Board's bylaws cannot supplant the common law quorum rule, under which the Board had a quorum when it voted to fill the vacancies on the Board. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion in this matter. Accordingly, the Board's motion for summary decision was granted, and the consolidated petitions of appeal were dismissed

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

302-21
OAL Dkt. Nos. EDU 00290-21 and EDU 09416-20 (Consolidated)
Agency Dkt. Nos. 208-9/20 and 210-9/20

New Jersey Commissioner of Education

Final Decision

Alfonso Mastrofilipo, Jr.,

Petitioner,

v.

Board of Education of the
Borough of Lodi, Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner does not have a legal entitlement to be interviewed for a vacancy on the Board, and that the Board did not violate any law or otherwise abuse its discretion in declining to grant petitioner an interview. The Commissioner further concurs with the ALJ that the Board's bylaws cannot supplant the common law quorum rule, under which the Board had a quorum when it voted to fill the vacancies on the Board.

Accordingly, the Board's motion for summary decision is granted, and the petitions of appeal are hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 29, 2021
Date of Mailing December 1, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENT'S
MOTION FOR SUMMARY
DECISION
(CONSOLIDATED)
OAL DKT. NO. EDU 09416-20
AGENCY DKT. NO. 210-9/20

ALFONSO MASTROFILIPO JR.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY,
Respondent.

---

and
OAL DKT, NO. EDU 00290-21
AGENCY DKT. NO. 208-09/20

ALFONSO MASTROFILIPO JR.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY,
Respondent.

Alfonso Mastrofilipo Jr., petitioner, pro se

Joseph A. Garcia, Esq., for respondent (Cleary, Giaccobe, Alfieri, Jacobs, attorneys)

Record Closed: June 10, 2021 Decided: October 14, 2021

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Alfonso Mastrofilipo Jr. (Petitioner or Mastrofilipo) alleges his rights were violated when, on or about September 16, 2020, respondent the Board of Education of Lodi (BOE) filled two vacancies on the Board, without first interviewing him for the positions. On September 28, petitioner filed two Petitions of Appeal with the New Jersey Department of Education, one alleging that the BOE lacked a quorum when it voted to fill two vacancies, the other alleging the Board violated the New Jersey Election Law by not interviewing petitioner nor considering his application as a candidate to fill one of the two vacancies. On September 29, 2020, Mastrofilipo filed a Petition for Relief on an Emergent Basis and sought to enjoin the Board from filing the vacancies pending adjudication pf his Petition of Appeal. On October 6, 2020, the New Jersey Department of Education, Office of Controversies and Disputes, transmitted this case to the Office of Administrative Law (OAL) for hearing as a contested case and for resolution of the petitioner's motion for emergency relief. The case was received by the OAL on October 8, 2020 and was heard the next morning October 9, 2020. By Order dated October 13, I dismissed the petitioner's request for Emergent Relief, finding among other things that petitioner failed to establish a likelihood of prevailing on the merits. By Consent Order dated March 31, 2021, the two matters were consolidated.

On this underlying appeal and request by both sides for summary decision, as in the application for emergent relief, the petitioner alleges that the BOE's appointments filling the two vacancies were unlawful 1) because he was not permitted to be interviewed as a prospective possible BOE member and 2) there was no quorum present when the two vacancies were filled. Respondent denies all the allegations, claims there are no real factual disputes, and filed electronically a Motion for Summary Decision on July 20, 2020. Petitioner also filed a motion for Summary Decision (Cross Motion) on July 23, 2020. The parties elected to proceed summarily agreeing to and signing a lengthy Joint Stipulation

of Facts. Briefs were submitted and argument was heard on June 10, 2021, at which time the record closed.

I agree with the BOE and grant summary decision in its favor and dismiss the consolidated complaint.

FACTUAL DISCUSSION

While there were additional facts stipulated to, the most relevant and probative to concluding the legal issues presented are the following stipulated facts[1] are:

1. On August 31, 2021, petitioner resigned his seat on the BOE, as a condition to his submitting a nominating petition to run for a new three-year term on the Lodi Borough BOE at the upcoming election in November 2020.
2. The Lodi Borough BOE is a nine member Board.
3. At the scheduled time for the September 16, 2020 meeting, three members of the BOE, Kerry Mastrofilipo, Jeffrey Telep and Joseph Ramos were absent from said meeting.
4. With four of the remaining seven BOE trustees present at said meeting, the BOE declared a quorum was satisfied under the common law quorum rule.
5. In view of the two vacancies, and the absence of the three remaining BOE members from the meeting, the BOE attorney advised the BOE that Bylaw 163 did not govern the quorum determination. Rather the BOE Attorney counseled the BOE that the common law quorum rule applied and a quorum was determined to exist pursuant to the common aw quorum rule.

[1] Some of the stipulated "facts" are actually legal arguments or conclusions which I cannot find to be facts. I have also edited some of the stipulated facts for clarity or brevity. Otherwise, I have adopted and find only the facts that have been so stipulated.

6. Although BOE Bylaw 163 requires five BOE members for a quorum, Bylaw 140 also provides for a nine member board which did not exist on September 16, 2020.[2]

7. The BOE Trustees in attendance at the at the September 16, 2020 Work Session determined that a quorum was present , and so proceeded to the meeting.

8. The BOE's September 16, 2020 Work Session certified minutes note that the BOE complied with its own policies and that a quorum was present.

9. In accordance with Bylaw 143, the BOE posted public notice of two BOE vacancies and advised that interested parties must submit their resumes to the BOE Secretary/Business Administrator James R Selesky ("Selesky") on or before Thursday September 10, 2020, at 4:00 p.m.

10. On or about September 10, 2020, at 3:55 p.m. petitioner sent an email to Selesky notifying him and the BOE in his "interest" in filling one of the vacancies as stated on the BOE's website. The email said in relevant part:

    a. "I have 3 years experience as a Former Lodi Board Trustee with extensive knowledge of Bylaws and Roberts Rules of Order and Procedures. I have ten years as a PTA/PTO Member and many school and no-school events. I have years of experience as a coach and working with [C]hildren. I have been told by many that I am a people person, I look forward to volunteering my time to improve Lodi Education" (Exhibit A)

11. Selesky concluded that the petitioner did not satisfy the requirement of submitting a resume by 4:00 p.m. on September 10, 2020.

12. On September 10, 2021, at 10:31 p.m., petitioner sent an email to Selesky attaching a document entitled "Al Mastrofilipo resume", and stated in the email "Here is the deficiency you asked me I rectify, which includes my resume. However, Selesky denies ever requesting Petitioner rectify a deficiency.[3]

[2] The Board consisted at that time of seven members with two vacancies.
[3] The two statements contradict each other and therefore are not useful as stipulated "facts"

13. On September 11, 2020, at 7:03 a.m. Selesky emailed petitioner regarding the interview process and the qualifications to be a school board member in New Jersey, in accordance with BOE Bylaws and N.J.S.A. 18A:12-1

14. Petitioner emailed Selesky on three separate occasions (September 11, 2020, September 15 and September 16, 2020 inquiring as to his interview time slot.

15. On September 16, 2020, Selesky informed petitioner that he had failed to meet the qualifying criteria (of submitting a resume no later than 4:00 p.m. on September 10, 2020) to be considered as a candidate to fill one of the two vacant BOE slots.

16. A BOE member cannot occupy two seats at the same time.

17. Joseph Bigica was interviewed for a vacant BOE trustee position.

18. Joseph Bigica appeared on the ballot for membership to the BOE during the November 3, 2020 general election.

19. Following his interview, Joseph Bigica was not selected to fill a vacant BOE trustee position.

20. The underlying basis as to why each candidate was or was interviewed was not recorded at the September 16, 2020 Work Session certified meeting minutes.

21. Petitioner filed for an Advisory opinion with the School Ethics Commission alleging three BOE trustees have conflicts of Interest. By Advisory Opinion A-18-20, sated September 29, 2020, the School Ethics Commission determined that the identified BOE trustees do not have per se conflicts in participating in discussions and voting on the individuals to fill the vacant BOE seats.

LEGAL ANALYSIS

Both petitioner and respondent move for summary decision on the basis of the Joint Stipulations of Fact and Joint Exhibits A and B.

Pursuant to N.J.A.C. 1:1-12.5(b), a summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary

judgment rule embodied in the New Jersey Court Rules, R. 4:46-2. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In connection therewith, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Id. at 75. In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

> [A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial'.
>
> [Brill, 142 N.J. at 540 (citations omitted).]

The Motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party...are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party. Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995). Even if the non-moving party comes forward with some evidence, the judge must grant summary decision if the evidence is "so one sided that [the moving party] must prevail as a matter of law" Id. at 536.

Actions of a board of education are presumed legitimate and will be upheld by the Commissioner of Education "absent a showing of bad faith, illegal motive or a lack of a rational basis." Raimondi v. Westwood Regional Board of Educ., OAL Docket No. EDU 5904-04, 2005 W.L. 2428743*5. (Initial Decision September 26, 2005), aff'd 2007 W.L. 2247246 (App. Div 2007). In challenging these actions, the petitioner bears the burden of proving the Board's actions were unlawful arbitrary capricious or unreasonable.

Respondent contends that in all respects the BOE's actions were lawful and violated no law, regulation or policy, nor anyone's rights. Respondent argues there are no genuine material issues of fact, and that three distinct identifiable issues, when

considered in light of the undisputed facts, entitle the BOE to a decision for Respondent as a Matter of Law. Petitioner also concedes what the three issues are and that there are no genuine issues of fact among them, but contrarily, he is entitled to summary decision. In light of that, I agree that there are no genuine issues of material fact, and for the reasons that follow, that the Respondent is entitled to summary decision in its favor

1. The Quorum Requirement

Respondent argues that pursuant to the common law quorum role " a majority of a municipal governing body constitutes a quorum ; and in the event of vacancy, a quorum consists of a majority of the remaining members." Citing M.J. Law Enf't Comm'n v Divincenzo, 445 N.J. Super 187, 199 (App.Div. 2016) which quotes Ross v, Miller, 115 N.J. L. 1935. As noted in Divincenzo, a vacant position "is not counted to determine what the legal quorum is. Id. at 200. Absent an applicable statute to the contrary, respondent argues, the common law quorum rule applies, citing Bihilla v. Local Finance Bd., 2016 W.L. 3408396 #2 (App. Div. 2016).

If Respondent is legally correct on this issue, then a lawful quorum existed when the Board filled the two vacancies on September 16, 2020, because there is no dispute that the Lodi Board of Ed is a 9 member Board, that is, a "full board" consists of 9 members. However at the time of the September 16, 2020 meeting, the Board had only seven members because of two vacancies. If the common law rule applies, the Board had a quorum at that time because four BOE members (trustees) were present.

Petitioner however bases his argument on Lodi BOE Bylaw 163, which provides that a quorum shall consist of five Board members, as well as State of New Jersey Office of the Attorney General Opinion # 3, on Edgewater Park Twp. Committee v. Edgewater Park Housing Authority 187 N.J. Super 588 (1982) and Prezlak v. Padrone, 67 N.J. 95, 102 (Law Div. 1961).

I agree with respondent however, that Board Bylaw 163 which states that a quorum consists of five members cannot supplant the common law quorum rule which is a matter of State law. I agree that since the Board's Bylaw was not specifically authorized by a

statute, the bylaw if enforced would unduly prohibit the BOE from exercising its authority and its lawful responsibility to govern, by in effect requiring a supermajority of Board members to be present when all meetings and all actions are taken. State law makes it clear that in absence of a statute which in relatively few instances require a supermajority vote, almost all actions by a local BOE may be taken by a simple majority of those present at a meeting. Respondent properly cites to Matawan Regional Teachers Ass'n v. Matawan-Aberdeen Regional School Dist. Bd. of Educ 233, N.J. Super 504, 506-508 (App.Div. 1988) which held that the Board was not bound by its bylaw requiring a supermajority (in this case two-thirds) for a vote to close and sell a school, where no such enabling statute authorized that quorum requirement. Here with no enabling statute whatsoever requiring certain numbers of Board members to be present when taking essential actions such as determining the composition of the Board when vacancies are created, the common law must be presumed to apply. Moreover, unintended chaos would occur if individual boards set their own unique numerical requirements for votes to fill vacancies. For example, a nine person Board with two vacancies which had a 8 person quorum requirement could not conduct business at all (except by the seldom used doctrine of necessity) and it would be a common occurrence where Boards with extra majority requirements for conducting general business could be effectively governed by the Board members in the minority who simply chose to be absent or even resign and thereby prevent the majority from taking action which the minority disfavor.

2. Petitioner's Eligibility for Office

Respondent argues that petitioner was not eligible for appointment on September 16, 2021, because he was a candidate for office to the same Board for a term years. They cite Kuken v Guzmen, 1990 S.L.D. 527 where the Commissioner of Education determined a a nominating position to stand for another term for a different term of years (i.e. a term other than seeking reelection to the same office) trustee with time remaining on his term must resign before submitting his nominating petition.

Although petitioner did not counter this point with another argument, I find there is not enough in the record to determine whether petitioner was disqualified to fill out the balance of one of the terms of the two vacancies simply because he was nominated for

a longer term. The Board clearly thought candidates for office should not be appointed because they also, as noted in the Joint Stipulation of facts refused to appoint another such would be appointee who was, like Mastrofilipo also running for office, but who was interviewed and considered for the position. But the Board's preferences are not enough to as a matter of law, to disqualify the would be appointee. To the respondent's point that Mastrofilipo when he was a Board member was forced to resign before submitting his petition to stand for office for a longer term, then logically, if petitioner had been appointed at the September 16, 2020 meeting he could have been compelled to withdraw his candidacy as a condition to assuming his office. I therefore conclude that at this stage there is insufficient proof that petitioner was disqualified to fill the vacancy simply because he stood for office in the upcoming election for another, longer term.

3. The Board's requirements for filling vacancies.

The Board clearly and deliberately chose not to interview petitioner for one of the two vacant positions. As both sides agree, there is no written record of why the Lodi BOE chose not interview Mastrofilipo for the position, and to speculate on such possible reasons would do neither side any good. The Board did require any person wanting to be considered to submit a resume by the September 16, 2020, 4 P.M. deadline. Mastrofilipo could argue that his email expressing interest in the position, where he wrote about some of his qualifications for the job could constitute a resume, and the email was received before the September 16, 2020, 4:00 p.m. deadline, albeit by five minutes. One wonders why Mastrofilipo would wait so long and why he would submit something less than the usual resume if he sought serious consideration. His email neglects basic information such as his home address, particularly important as candidates to fill vacancies in a municipal Board of Education only qualify if they have resided in the district for at least one year. Further Mastrofilipo's submission at 10:31 p.m., 6 hours after the deadline, of a resume, seems a tacit admission, as Mastrofilipo said, his application for the vacancy was deficient.

However, petitioner's argument need not be decided over what constitutes a resume. The fact is, and what Mastrofilipo protests, is that he was never given an interview by the BOE to consider his qualifications. However, no statute, regulation,

Board policy, or legal principle has been cited, nor can be found, which holds that every person, otherwise qualified to serve on a local Board of Education has a right to be interviewed for the position. Since the BOE has the right to fill the vacancy among the presumably great number of legally qualified residents of Lodi (who numbered 24,136 in the 2010 Census), it is axiomatic that they have the broadest discretion in determining to whom the Board wishes to give serious consideration to fill a vacancy, which consideration assumes might include granting an interview. As petitioner certainly has not raised even a hint of any invidious discrimination against him, in this case, the BOE had every right to ignore petitioner's interest or application for the vacancy and to refuse to grant him an interview. As for any due process issue, only Bylaw 143 is implicated in terms or helping to determine what process Mastrofilipo, and any other would-be candidate for the vacancy had to expect. But here, BOE Bylaw 143 merely requires the BOE give public notice of the vacancy and "invite any qualified person to submit a written request for consideration..." The BOE followed its policy by the posting of the public notice of the two vacancies. The Bylaw merely requires the invitation of the written requests to fill the vacancies. It does not require the Board to grant interviews. Therefore, the BOE did not violate its Bylaw 143.

CONCLUSIONS OF LAW

Summary decision may be granted when the papers and discovery that have been filed show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). No evidentiary hearing need be held if there are no disputed issues of material fact. Frank v. Ivy Club, 120 N.J. 73, 98, cert. denied, 498 U.S. 1073 (1991). "When the evidence is so one-sided that one party must prevail as a matter of law, the [tribunal] should not hesitate to grant summary [decision]." Della Vella v. Bureau of Homeowner Prot., New Home Warranty Program, CAF 17020-13, Initial Decision (March 31, 2014), adopted, Comm'r (May 12, 2014), http://njlaw.rutgers.edu/collections/oal/ (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)).

Where, as here, no further evidentiary hearing need be held as there are disputed issues of material fact, and the burden of proof rests with the petitioner, and considering

the undisputed proofs, **I CONCLUDE** respondent is entitled to summary decision as a matter of law. I agree that with respondent's contention that there is no evidence that the BOE abused its discretion, and further that petitioner's claims that a quorum did not exist for the BOE's September 16, 2020 meeting and/or that he should have been granted an interview before the Board chose persons to fill the vacancies, have no basis in law or fact. Nor is there any reasonable argument to deny the Board's reasonable exercise of discretion as exemplified in the agreed upon stipulated facts. I therefore **CONCLUDE** that petitioner's requested relief must be **DENIED** and his Complaint be **DISMISSED.**

ORDER

I hereby **ORDER** that respondent's requested motion to summary decision is **GRANTED**, and accordingly, these matters are hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 14, 2021

Ernest M. Bongiovanni

DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: 10/14/21

Date Mailed to Parties: 10/14/21

EMB/id

303-21

303-21SEC
SEC Dkt. No. C45-19
OAL Dkt. Nos. EEC02887-20, EEC01680-21
Agency Dkt. No. 187-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Deborah Anderson,
High Point Regional Board of Education,
Sussex County.

Respondent.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-24(b) of the School Ethics Act when she voted on a matter involving the district's superintendent while respondent's child was an employee of the district over whom the superintendent had supervisory authority. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty of a reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.* Upon review, the Commissioner concurs with the penalty recommended by the SEC. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 29, 2021
Date of Mailing: December 1, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
OAL Docket No.: EEC-01680-21
OAL Docket No.: EEC-02887-20 (On Remand)
SEC Docket No.: C45-19
Final Decision

In the Matter of Deborah Anderson,
High Point Regional Board of Education, Sussex County,
Respondent

I. Procedural History

This matter arises from a Complaint that was filed with the School Ethics Commission (Commission) on June 17, 2019, by John Mannion (Complainant), alleging that Deborah Anderson (Respondent), a member of the High Point Regional Board of Education (Board) violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq. Initial Decision (On Remand)* at 2. More specifically, the Complaint alleges that Respondent violated *N.J.S.A.* 18A:12-24(b) "by voting on matters concerning the [S]uperintendent while the High Point Regional School District (District) employed her child." *Id.*

At its meeting on December 17, 2019, and after reviewing Respondent's Motion to Dismiss in Lieu of Answer (Motion to Dismiss) and Complainant's response thereto, the Commission adopted a decision finding that the Complaint was timely filed, denying the Motion to Dismiss in its entirety, and directing Respondent to file an Answer to Complaint (Answer). On January 7, 2020, Respondent filed her Answer as directed, and the above-captioned matter was docketed so that the Commission could make a probable cause determination.

Thereafter, and at its meeting on February 25, 2020, the Commission adopted a decision finding probable cause for the alleged violation of *N.J.S.A.* 18A:12-24(b). *Id.* Based on its finding of probable cause, the Commission also voted to transmit the within matter to the Office of Administrative Law (OAL) for a plenary hearing and, pursuant to *N.J.A.C.* 6A:28-10.7(b), the attorney for the Commission (Petitioner) was charged with prosecuting the allegations in the Complaint which the Commission found probable cause to credit. *Id.* at 2-3.

At the OAL, the matter was assigned to the Honorable Nanci G. Stokes, Administrative Law Judge (ALJ Stokes). After the parties were unable to resolve the matter, Respondent filed a Motion for Summary Decision, and Petitioner filed an Opposition to Respondent's Motion for Summary Decision, as well as a Cross-Motion for Summary Decision. *Id.* at 3. Following Respondent's filing of an Opposition to Petitioner's Cross-Motion for Summary Decision, ALJ Stokes closed the record. *Id.*

On November 10, 2020, ALJ Stokes issued an Initial Decision detailing her findings of fact and legal conclusions. *Id.* In her decision, ALJ Stokes concluded that Respondent violated

N.J.S.A. 18A:12-24(b), and that reprimand was the appropriate penalty. *Id.* However, at its meeting on January 26, 2021, and after discussing and reviewing the full record, including ALJ Stokes' Initial Decision and the filed Exceptions (and related response), the Commission adopted a decision remanding the matter to the OAL. *Id.* In remanding the matter to the OAL, the Commission did not require the holding of a hearing, additional fact-finding, and/or the reopening of the record for the submission of supplemental materials, but rather that ALJ Stokes remove specific facts which were deemed irrelevant to the proceedings, to wit:

> Because ALJ Stokes determined that Commissioner Roberts' actions are not relevant to and are not the subject of this proceeding, and because the basis for the aforementioned "facts" emanates from exhibits which were not admitted as evidence, the inclusion of Commissioner Roberts' membership on the Middletown Township Board of Education, his child's employment, his unproven voting history on matters related to the Superintendent, and the statement that "the Commission has taken no action against [Commissioner] Roberts for these actions" is inappropriate and must be stricken from the Initial Decision. In this way, the Commission finds that it is arbitrary and capricious to find unverified and unproven conduct as "facts" when Commissioner Roberts was not a named party in this matter or otherwise afforded appropriate due process to formally respond to or answer such accusations following the filing of a complaint against *him*, and when ALJ Stokes concluded that this information was "not relevant to whether [Respondent] violated the Act" and was "not the subject of this proceeding."
>
> *Id.*

On remand, ALJ Stokes conducted "a telephone conference and directed the parties to provide written submissions addressing the Commission's remand." *Id.* On May 14, 2021, the parties' provided their written legal arguments as directed; Respondent's counsel provided a certification attaching records that were not previously submitted with her motion for summary decision; and the record closed on June 4, 2021. *Id.* at 4.

On June 25, 2021, ALJ Stokes issued an *Initial Decision (On Remand)*, with same detailing findings of fact, and conclusions of law. The Commission acknowledged receipt of ALJ Stokes' *Initial Decision (On Remand)* on the date it was issued (June 25, 2021); therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was August 9, 2021. Prior to August 9, 2021, the Commission requested a forty-five (45) day extension of time to issue its decision so as to allow the Commission, which only meets monthly, the opportunity to receive and review the full record, including the parties' Exceptions. Pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, and for good cause shown, the Commission was granted an extension until September 23, 2021.

Consequently, at its meeting on July 27, 2021, the Commission considered the full record in the above-captioned matter. Thereafter, at its special meeting on August 30, 2021, the Commission voted to adopt ALJ Stokes' findings of fact; to adopt the legal conclusion that

Respondent violated *N.J.S.A.* 18A:12-24(b); and to adopt the recommended penalty of reprimand.[1]

II. Initial Decision (On Remand)

Based on her review of the documents submitted in support of, and in opposition to, the parties' respective motions for summary decision, ALJ Stokes **found** the following as **fact**:

- Respondent has been a Board member since 2013 and has not received a prior sanction from the Commission. *Id.* at 4.

- On November 20, 2018, the Board had a meeting at which all six (6) members were present. At this meeting, the Board "voted unanimously to approve a resolution acknowledging that the [S]uperintendent ... completed a merit goal required by his employment contract with the [Board]." *Id.*

- The Superintendent's employment contract required a bonus of a set percentage of his salary following completion of a merit goal. *Id.*

- The Board did not discuss the resolution in closed or executive session, and Respondent did not comment on the resolution during public session of the Board's meeting. *Id.*

- Following approval from the executive county superintendent, the Superintendent received payment for the merit goal achievement. *Id.*

- On November 20, 2018, the date that the Board, including Respondent, voted unanimously to approve a resolution acknowledging that the Superintendent had completed a merit goal, Respondent's child was employed in the District as a tenured teacher. As such, at the time of Respondent's vote, the Superintendent had supervisory authority over Respondent's child. *Id.*

- Following the 2018-2019 school year, Respondent's child was subject to a reduction-in-force layoff and, as a result, her employment with the District ceased in June 2019. *Id.*

- Respondent was aware that she was unable to participate in the Superintendent's evaluation and contract approvals, but was "unaware" that she could not participate in votes concerning the achievement of contractual merit goals and attendant bonuses required by the Superintendent's employment contract. *Id.* at 4-5.

[1] Commissioner Dennis Roberts was not present in Executive Session on July 27, 2021, and/or August 30, 2021, when the above-captioned matter was discussed.

As for the remand specifically, ALJ Stokes further **found** the following additional facts:

- On June 26, 2020, Respondent supplied records concerning one of the Commission's members, and his actions as a school board member. *Id.* at 5.

- Respondent "urges that the actions of the Commission member are relevant to this case, especially as to the penalty attributed to any violation [Respondent] committed."

- Despite Respondent's arguments, ALJ Stokes "determined and still FIND[S] that the conduct of another person is not relevant to whether Respondent's actions constitute a violation of the ... Act." *Id.*

- In addition, "the Commission's action or inaction concerning its member's conduct is neither before this tribunal nor is what action, if any, known." *Id.*

- Therefore, ALJ Stokes "**FIND[S]** that the Commission member's actions, public or not, are irrelevant to what penalty should apply to any violation [Respondent] committed." *Id.*

In the "Discussion and Conclusions of Law" section of her *Initial Decision (On Remand)*, and after detailing the standard that applies to a motion for summary decision, ALJ Stokes stated, "In this case, there is no genuine issue as to the material facts, and the only issues presented are whether" Respondent's vote on November 20, 2018, violated *N.J.S.A.* 18A:12-24(b) and, if so, what sanction is appropriate. *Id.* at 5-6. According to ALJ Stokes, "no genuine issue exists that [Respondent] served as a Board member in the same [D]istrict that employed her [child] as a teacher from 2014 until 2019," nor that on November 20, 2018, Respondent voted to approve the Superintendent's merit goal achievement. *Id* at 6. As these facts are "clear and undisputed," ALJ Stokes **concludes**, "that this case is ripe for summary decision."

Regarding the Commission's order of remand, ALJ Stokes notes, "an Agency head may enter an order remanding a contested case to the OAL ... ." *Id.* at 6. Moreover, "the order of remand shall specifically state the reason and necessity for the remand and the issues or arguments to be considered." *Id.* In this case, the Commission "directs the striking of specific findings of fact regarding the conduct of one of its members and states the reasons for doing so." *Id.* Although an ALJ "determines what evidence to consider and its relevance under *N.J.A.C.* 1:1-14.6(i) and other UAPR provisions," ALJ Stokes finds that because the "actions of the Commission member are not relevant to either [Respondent's] alleged violation or any resulting penalty," any records provided by Respondent regarding the Commission member, and any specific reference to them, is "unwarranted." *Id.*

In her motion for summary decision, Respondent argues that she should not be found in violation of the Act because "the law required her action as a board member"; "her vote was simply a ministerial act"; her participation in the vote approving the resolution "had no impact on the result as only four affirmative votes of the six members present [were] needed to pass the resolution"; and when an improper vote does not change the outcome, "the error is harmless." *Id.* at 12.

After referencing the legislative intent/purpose of the Act; affirming the Commission's role as the "guardian of the public interest"; citing to decisions that reinforce the public policy that school officials must avoid "even the appearance of impropriety" (e.g., *Wyzsykowski v. Rizas*, 132 N.J. 509 (1993); *Friends Retirement Concepts v. Bd. Of Educ. Borough of Somerville*, 356 N.J. Super 203, 214 (Law Div. 2002) (*Friends*)); emphasizing that, per *Friends*, the "question will always turn on 'whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty'"; noting that "[a]n actual conflict of interest is not the decisive factor, nor is 'whether the public servant succumbs to temptation,' but rather whether there is a potential for conflict"; affirming that "[a] conflicting interest arises when the public official has an interest not shared in common with the other members of the public"; and citing to the Commission's advisory opinions which specifically address the limitations on a Board member's conduct/activity when they have a family member or relative employed by the Board on which s/he serves (e.g., *Advisory Opinion A24-17* (A24-17); *Advisory Opinion A07-18* (A07-18)), ALJ Stokes concluded:

> ... [Respondent's] arguments [for summary decision are] unpersuasive. The legislative findings and declarations, the seminal decision in *Friends*, and the advisory opinions make plain that [Respondent] should have recused herself. ... *A24-17*, issued more than a year before the vote, clearly mandates that [Respondent] be uninvolved in any matter regarding the [S]uperintendent while her [child] was an employee in the [D]istrict. [Respondent's] vote created the potential conflict the *Friends'* Court warned against and could reasonably be interpreted to show that it had the likely capacity to tempt [Respondent] from her sworn public duty. In other words, that she exerted an undue influence over the individual responsible for securing her [child's] employment. Notably, the board member needs not to secure unwarranted benefits for their relative to violate the Act. Thus, her [child's] subsequent layoff is not relevant to whether the violation occurred. Also, while harmless errors may prevent the invalidation of a [B]oard's action, this does not address whether the board member violated the Act's prohibitions against conflicts of interest.
>
> *Id.* at 12-13.

Consequently, and given her findings of fact and discussion of the applicable law, ALJ Stokes concluded that Respondent's "vote created a justifiable impression among the public that [Respondent] used her official position as a board member to secure an unwarranted privilege or advantage for her [child] in violation of *N.J.S.A.* 18A:12-24(b). *Id.* at 13.

As for the appropriate penalty for Respondent's violation, although the Commission urges censure for Respondent's violation, ALJ Stokes finds that the cases cited by the Commission, namely *I/M/O Michael Kilmurray*, Docket No. C12-94 (February 24, 1998) (*Kilmurray*), and *I/M/O James Famularo*, Docket No. C23-96 (February 24, 1998) (*Famularo*), are "distinguishable from the violation committed by [Respondent]." *Id.* at 14. Unlike the Respondents in *Kilmurray* and *Famularo*, Respondent's vote was a single violation of the Act;

did not directly involve her child; she did not attempt to influence other board members, or make comments to other Board members; and did not take direct and specific action to reward someone with whom she had a personal connection and prior business relationship. *Id.* As a result, and because there is no evidence that Respondent attempted to influence the vote and did not engage in "more direct action" as involved in *Kilmurray* and *Famularo*, and because she (Respondent) "believed the merit goals were contractual and that the [S]uperintendent's contract legally required the [Board] to pass on a resolution upon obtaining those goals," ALJ Stokes concludes that reprimand is appropriate. *Id.* at 15. Of note, although ALJ Stokes only recommended a reprimand, she states, "even in seemingly ministerial matters, the level of conduct expected of public officials must be such as to be beyond reproach." *Id.*

With the above in mind, ALJ Stokes orders that Complainant's motion for summary decision is granted as to Respondent's violation of *N.J.S.A.* 18A:12-24(b); Respondent's motion for summary decision is denied; and Respondent is reprimanded for having violated *N.J.S.A.* 18A:12-24(b). *Id.*

III. Exceptions

As of July 27, 2021, neither Petitioner nor Respondent filed Exceptions to the *Initial Decision (On Remand)*, or otherwise requested an extension to file same.

IV. Analysis

Upon a careful, thorough, and independent review of the record, the Commission **adopts** ALJ Stokes' findings of fact, and **adopts** the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24(b).

Pursuant to *N.J.S.A.* 18A:12-24(b), "No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others ... ." By voting to approve a resolution concerning the attainment of the Superintendent's merit goals while (a) her child was employed in the District and (b) the Superintendent had supervisory authority over her (Respondent's) child, facts which are not in dispute, the Commission wholeheartedly agrees that Respondent violated this provision of the Act.

In finding a violation of *N.J.S.A.* 18A:12-24(b), ALJ Stokes appropriately analyzed and considered the legislative intent/purpose of the Act; the Commission's previous decisions; as well as the Commission's advisory opinions which directly address the limitations on a board member's activities when s/he has an immediate family member(s) or relative(s) who is employed by the Board on which s/he serves. In this regard, the Commission cannot emphasize or underscore enough the fact that, as detailed in *A24-17* and *A07-18*, established in previous decisions, and affirmed by ALJ Stokes, board members who have an immediate family member(s) or relative(s) employed in the district **must always** abstain from involvement in, without limitation, ***any and all matters pertaining to the Superintendent***. This direction is clear, definitive, and unambiguous, and "any and all matters" is not conditional, or otherwise subject to exception or interpretation, even for what could be described as involvement in "ministerial"

acts. Any level of involvement in any matter(s) involving the Superintendent while an immediate family member(s) or relative(s) is employed in the district will, among other things, **always** create a justifiable impression among the public that a board member is using, or attempting to use, his/her position to secure an unwarranted privilege, advantage, or employment for him/herself, a member of his/her immediately family, or an "other." Moreover, and in recognition of the legislative intent of the Act, no degree of latitude can be afforded when a board of education member who is the subject of a complaint engages in such conduct, no matter how trivial or ministerial such conduct may appear to the school official. As such, ALJ Stokes' determination is entirely appropriate, and in line with the Commission's advisory opinions and decisions.

V. Decision

For all of the aforementioned reasons, the Commission **adopts** the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24(b) when she voted on a matter concerning an individual with the ultimate supervisory authority over her child, and her child's continued employment in the District.

VI. Penalty

Based upon the conclusion that Respondent violated *N.J.S.A.* 18A:12-24(b), ALJ Stokes recommended a penalty of reprimand. Following its careful, thorough, and independent review of the record, the Commission **adopts** the recommended penalty of reprimand. In adopting ALJ Stokes' recommended penalty, the Commission was primarily persuaded by the fact that the only finding of a violation stemmed from Respondent's *one-time vote* to approve a resolution concerning the Superintendent's attainment of a merit goal. As such, and based on the facts and circumstances presented here, the Commission does not believe that Respondent's one-time vote on what may be regarded as a "ministerial" matter is worthy of a penalty more harsh than a reprimand, especially for a board member who has served for nearly a decade without an adjudication by the Commission that she previously violated the Act.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. The parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, **within thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction," as well as to (ControversiesDisputesFilings@doe.nj.gov). A copy must also be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* **within thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

Resolution Adopting Decision in Connection with C45-19

Whereas, at its meeting on February 25, 2020, the School Ethics Commission (Commission) voted to find probable cause to credit the allegation that Respondent violated *N.J.S.A.* 18A:12-24(b), and voted to transmit the above-captioned matter to the Office of Administrative Law (OAL) for a plenary hearing; and

Whereas, following transmittal, the Honorable Nanci G. Stokes, Administrative Law Judge (ALJ Stokes) issued an *Initial Decision* dated November 10, 2020; and

Whereas, at its meeting on January 26, 2021, the Commission voted to approve a decision remanding the above-captioned matter to the OAL; and

Whereas, following remand, ALJ Stokes issued an *Initial Decision (On Remand)* dated June 25, 2021; and

Whereas, in her *Initial Decision (On Remand)*, ALJ Stokes found that Respondent violated *N.J.S.A.* 18A:12-24(b), and recommended that Respondent receive a reprimand; and

Whereas, at its meeting on July 27, 2021, the Commission reviewed the record in this matter, and discussed adopting ALJ Stokes' findings of fact; adopting the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24(b); and adopting the recommended penalty of reprimand; and

Whereas, at its special meeting on August 30, 2021, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on July 27, 2021; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its special meeting on August 30, 2021.

Kathryn A. Whalen, Director
School Ethics Commission

304-21

304-21SEC
SEC Dkt. No. C78-20
Agency Dkt. No. 186-8/21

New Jersey Commissioner of Education

Final Decision

Mervin Rose,

Complainant,

v.

Ronnie McDowell,

Respondent.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act when he made a motion and voted to approve a request to use district facilities from an entity with which he had a financial involvement. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty of a reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.* Upon review, the Commissioner concurs with the penalty recommended by the SEC. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 29, 2021
Date of Mailing: December 1, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: C78-20
Final Decision
Summary Disposition

Mervin Rose,
Complainant

v.

Ronnie McDowell,
Township of Union Board of Education, Union County,
Respondent

I. Procedural History

This matter arises from a Complaint that was filed on November 23, 2020, by Mervin Rose (Complainant), alleging that Ronnie McDowell (Respondent), a member of the Township of Union Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq*. More specifically, the Complaint avers that Respondent violated *N.J.S.A.* 18A:12-24(c).

On November 23, 2020, the Complaint was served on Respondent, via electronic mail, notifying him that charges were filed against him with the School Ethics Commission (Commission), and advising that he had twenty (20) days to file a responsive pleading.[1] On December 10, 2020, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and Complainant filed a response to the Motion to Dismiss on December 14, 2020.

At its meeting on March 23, 2021, the Commission adopted a decision denying Respondent's Motion to Dismiss in its entirety. Based on its decision, the Commission directed Respondent to file an Answer to Complaint (Answer) and, on April 12, 2021, Respondent filed an Answer as directed.

Thereafter, and at its meeting on May 25, 2021, the Commission voted to find probable cause for the alleged violation of *N.J.S.A.* 18A:12-24(c), and to decide the above-captioned matter by summary decision pursuant to *N.J.A.C.* 6A:28-10.7(c)(1). The Commission also directed Respondent to file, within twenty (20) days, a statement setting forth the reasons he should not be found in violation of the Act. *N.J.A.C.* 6A:28-10.7(c)(1). Respondent was advised that if he disputes any of the facts determined by the Commission to be both material and undisputed, he should set forth the facts with which he disagrees, and why they are material to the case. Finally, Respondent was advised that following expiration of the time period for

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

submission of his statement, the Commission may make a determination of a violation on a summary basis.

Despite the directive in the Commission's May 25, 2021, *Probable Cause Notice and Notice of Summary Decision*, as well as follow-up/reminder correspondence dated June 16, 2021, and July 1, 2021, Respondent failed to submit a written statement to the Commission for consideration.[2, 3]

Consequently, at its meeting on July 27, 2021, the Commission reviewed the record in this matter and, at its special meeting on August 30, 2021, the Commission voted to **find** that Respondent violated *N.J.S.A.* 18A:12-24(c), and to recommend a penalty of **reprimand** for Respondent's violation of the Act.

II. Summary of the Record

Respondent has served as a member of the Board "since January 3, 2019," and served a previous term "from 2015 to 2017." *Complaint* at ¶ 1-2, page 1. Respondent has filed Personal/Relative and Financial Disclosure Statements (Disclosure Statements) with the Commission for each year he has served as a member of the Board. *Complaint* at ¶ 3, page 1. In response to Question #2 on the "Financial Disclosure Statements" section of his Disclosure Statements,[4] Respondent has consistently disclosed "First Baptist Church of Vauxhall" as a "source." *Complaint* at ¶ 4, page 1; Exhibit A. Complainant submits that the basis for Respondent's disclosure of "First Baptist Church of Vauxhall" as a "source" is because he (Respondent) is "a well-known deacon at [First Baptist Church of Vauxhall (First Baptist)] and thereby serves as an ordained minister and subordinate officer of that church." *Complaint* at page 3. Despite his relationship to First Baptist Church of Vauxhall, at the Board's meeting on September 15, 2020, Respondent "moved and then voted to approve a request" from First Baptist Church of Vauxhall to use the Township of Union School District's (District) facilities. *Complaint* at ¶6, page 1.

Because Respondent is a "well-known deacon at First Baptist [Church of Vauxhall]," and annually receives "feels/honorariums or gifts/reimbursements or prepaid expenses having an aggregate amount exceeding $250[.00]," Complainant argues that Respondent violated *N.J.S.A.* 18A:12-24(c) when he moved and then voted to approve its (First Baptist Church of Vauxhall's) request to use the District's facilities. According to Complainant, "[t]here exists a relationship

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[2] At the Commission's meeting on July 27, 2021, Respondent appeared by telephone and offered public comments in defense of his alleged violation of the Act. More detailed information regarding the substance of Respondent's public comments can be found in the public minutes from the Commission's meeting on July 27, 2021.

[3] The Commission notes that, despite the offering of public comments at its meeting on July 27, 2021, the Commission's review of this matter on summary disposition was limited to the written record.

[4] Question #2 states, "List the name and address of each source of **fees/honorariums or gifts/reimbursements or prepaid expenses** having an aggregate amount exceeding $250 from any single source, excluding relatives, received by you or an immediate family member. Be sure to list any reimbursement received from the district or charter school for such things as **conference attendance, tuition/dues reimbursement, personal appearances, speeches, or writing**."

that directly affects the Respondent, creating a direct financial involvement that might reasonably be expected to impair ... Respondent's objectivity by a reasonable member of the public."

In his Motion to Dismiss, Respondent admitted that the following from the Complaint are "true statements."

- "1. [Respondent] is a ... member of the ... Board ... since January 3, 2019."
- "2. Respondent also served on the Board from 2015 to 2017 and was [P]resident of the Board in 2017."
- "3. Respondent filed and certified [Disclosure Statements] in 2014, 2015, 2016, 2017, 2019, and 2020 with the Commission."
- "5. Respondent is a deacon at First Baptist [Church of Vauxhall]."

Motion to Dismiss at page 1.

However, Respondent denies that, as a Deacon at First Baptist Church of Vauxhall, he receives any financial remuneration whatsoever. *Motion to Dismiss* at page 1-2. Instead, it is because of his volunteer work/service as an "unpaid Treasurer/bookkeeper and van driver" that First Baptist Church of Vauxhall gives Respondent "a once-a-year honorarium/gift of $2,000.[00]." *Motion to Dismiss* at page 2. Respondent denies that the once-a-year honorarium creates a direct or indirect financial involvement between he and First Baptist Church of Vauxhall; maintains the honorarium is a token of appreciation; denies that his receipt of such a "small" honorarium/gift could reasonably be expected to impair his objectivity or independence of judgment; and denies that First Baptist Church of Vauxhall is a "business organization." *Motion to Dismiss* at page 2.

Although Respondent admitted that "it may have been more prudent ... to err on the side of caution and not make the motion or vote" to approve the First Baptist Church of Vauxhall's request to use the District's facilities, Respondent maintains that his Board action did not violate *N.J.S.A.* 18A:12-24(c). *Motion to Dismiss* at page 3.

In his response to the Motion to Dismiss, Complainant reaffirmed the factual assertions in his Complaint, as well as the alleged violation of *N.J.S.A.* 18A:12-24(c). *See generally, Response to the Motion to Dismiss*. Complainant also advised the Commission that, in a voicemail message to him from Respondent, he (Respondent) purportedly acknowledged the legitimacy of the Complaint because he stated to Complainant, "I do see your point." *Response to the Motion to Dismiss* at page 2; Exhibit D.

In his Answer, which was submitted following the Commission's denial of his Motion to Dismiss, Respondent stated, "The error [he] made was not allowing for another Board member to make the motion" to approve the request to use the District's facilities. *Answer* at page 1. Regardless of whether he made the motion, Respondent notes, "In any case the motion would have been made and approved, which was indicated by its unanimous approval." *Answer* at page 1-2. It is Respondent's belief that Complainant filed the within matter "to create fodder for a negative ad campaign in the upcoming 2021 Board of Education election, in which ...

Respondent [is] running." *Answer* at page 2. Respondent concluded by stating, "I am an honest and forthright person who has faithfully served his family, his community, and his school district in the hope of making each better. I am certainly not doing this for money!" *Answer* at page 2.

III. Findings of Fact

Based on its thorough and independent review of the record, the Commission **finds** the following facts to be **undisputed**:

1. Respondent is a member of the Board, and his most recent term of service began on January 3, 2019. *Complaint* at ¶ 1, page 1; *Motion to Dismiss* at page 1.

2. As a member of a public board of education in the State of New Jersey, Respondent is a school official within the meaning of the Act. *N.J.S.A.* 18A:12-23.

3. As a school official, Respondent is required to complete and submit Disclosure Statements to the Commission on an annual basis. *N.J.S.A.* 18A:12-25 and *N.J.S.A.* 18A:12-26.

4. In each of his filings with the Commission, Respondent disclosed that he received "**fees/honorariums or gifts/reimbursements or prepaid expenses** having an aggregate amount exceeding $250.[00]" from First Baptist Church of Vauxhall. *Complaint* at ¶ 4, page 1; Exhibit A.

5. Respondent receives an annual honorarium from First Baptist Church of Vauxhall in the amount of $2,000.00. *Motion to Dismiss* at page 2.

6. Respondent receives an annual honorarium from First Baptist Church of Vauxhall in connection with volunteer services he provides as "unpaid Treasurer/bookkeeper and van driver." *Motion to Dismiss* at page 2.

7. Respondent is also a Deacon at First Baptist Church of Vauxhall, but does not receive any financial remuneration for this work. *Motion to Dismiss* at page 1-2.

8. At the Board's meeting on September 15, 2020, Respondent "moved and then voted to approve a request" from First Baptist Church of Vauxhall to use the District's facilities. *Complaint* at ¶6, page 1; *Motion to Dismiss* at page 3.

IV. Analysis and Conclusions of Law

The facts in this matter are simple, and straightforward: Respondent is a Board member; his Disclosure Statements, including his most recent filing, consistently indicate that he receives an honorarium from First Baptist Church of Vauxhall of at least $250.00; Respondent actually receives an annual honorarium of $2,000.00 from First Baptist Church of Vauxhall in connection with volunteer services he performs; and at a Board meeting on September 15, 2020, Respondent moved *and then* voted to approve First Baptist Church of Vauxhall's request to use the District's facilities. All of these facts are undisputed.

The only issue is whether Respondent's Board action, namely moving *and then* voting to approve the use of facilities request submitted by First Baptist Church of Vauxhall to the Board, violated *N.J.S.A.* 18A:12-24(c). Respondent denies that his receipt of an annual honorarium from First Baptist Church of Vauxhall creates the necessary "direct or indirect financial involvement," and further denies that his receipt of such a "small" honorarium could reasonably be expected to impair his objectivity or independence of judgment. Respondent also maintains that his "only error" was making the motion to approve the facilities use request because, thereafter, it was unanimously approved by the Board.

N.J.S.A. 18A:12-24(c) states, in relevant part:

> No school official shall act in his official capacity in any matter where he ... has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he ... has a personal involvement that is or creates some benefit to the school official ... .

Also of relevance to the Commission's analysis is the legislative findings and declarations relative to the adoption of the Act, to wit:

> ...
> a. In our representative form of government it is essential that the conduct of members of local boards of education ... hold the respect and confidence of the people. These board members ... must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.
> ... .

With the above in mind, the Commission finds that because Respondent regularly receives an honorarium of $2,000.00 from First Baptist Church of Vauxhall, he unequivocally has a direct or indirect financial involvement with any and all matters related to First Baptist Church of Vauxhall. It is certainly reasonable for any member of the public to believe that Respondent's objectivity or independence of judgment would be impaired when reviewing any matter(s) or request(s) from an entity that regularly pays him thousands of dollars. Although Respondent may quantify $2,000.00 as "small," the Commission finds this amount of money to be significant. The fact that the Act requires school officials to disclose any source that provides fees or honorariums greater than $250.00 only underscores the significant nature of a $2,000.00 annual honorarium.

In addition, the Commission disagrees that Respondent's only "error" was making a motion to approve the request to use the District's facilities. Not only was it inappropriate, and violative of *N.J.S.A.* 18A:12-24(c) for Respondent to have made the motion, it was also inappropriate, and similarly violative of *N.J.S.A.* 18A:12-24(c), for Respondent to have approved the request to use the District's facilities. When a school official, such as Respondent, has a direct or indirect financial involvement in an entity, the ***only*** course of action is to refrain from

involvement in any and all discussions and votes concerning that entity, regardless of the subject matter. Failure to do so will, as here, result in a finding of a violation of the Act.

Accordingly, and based on a complete and thorough review of the record, the Commission **finds**, based on the undisputed evidence as set forth herein, that Respondent violated *N.J.S.A.* 18A:12-24(c) when he moved and then voted to approve the request of First Baptist Church of Vauxhall to use the District's facilities.

V. Recommended Penalty

Having found that Respondent violated *N.J.S.A.* 18A:12-24(c), the Commission is authorized to recommend to the Commissioner of Education (Commissioner) an appropriate penalty, which may range from reprimand to removal. *N.J.S.A.* 18A:12-29(c).

In its review, the Commission finds that **reprimand** is the most appropriate penalty. In reaching this determination, the Commission does not believe that Respondent acted deliberately or intentionally, but rather under a false belief that his conduct was appropriate. The Commission also appreciated that Respondent, at least in part, acknowledged that his conduct was not the most prudent. Although Respondent ascribes a nefarious intent to the filing of the within matter, and submits that it was filed to create fodder in connection with Respondent's bid for re-election, such beliefs are irrelevant, especially when, as here, a violation is substantiated.

To be clear, the Commission's finding of a violation and a recommended penalty of reprimand is ***not*** a determination that Respondent is somehow unfit or unqualified to serve as a Board member. Instead, it is a reminder that he, like all other school officials, must be mindful of how their Board action can implicate, and potentially, violate the Act. *No one* is beyond reproach, and *everyone* is entitled to make a mistake.

VI. Decision

For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand** for the violation of *N.J.S.A.* 18A:12-24(c).

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. The parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, **within thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction," as well as to

(ControversiesDisputesFilings@doe.nj.gov). A copy must also be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* **within thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2021

Resolution Adopting Decision in Connection with C78-20

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) considered the entirety of the record in this matter; and

Whereas, at its meeting on July 27, 2021, the Commission discussed finding a violation of *N.J.S.A.* 18A:12-24(c); and

Whereas, at its meeting on July 27, 2021, the Commission discussed recommending a penalty of reprimand for the violation of *N.J.S.A.* 18A:12-24(c); and

Whereas, at its special meeting on August 30, 2021, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on July 27, 2021; and

Now Therefore Be It Resolved, that the Commission hereby adopts the decision and directs its staff to notify all parties to this action of its decision herein.

_____

Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its special meeting on August 30, 2021.

_____

Kathryn A. Whalen, Director
School Ethics Commission

305-21

305-21
OAL Dkt. No. EDU 09011-19
Agency Dkt. No. 80-4/19

New Jersey Commissioner of Education

Final Decision

James Mosser,

Petitioner,

v.

Board of Education of the City of Union,
Union County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the respondent, Union Board of Education (Board), and the petitioner's reply thereto.

This matter concerns two harassment, intimidation, and bullying (HIB) complaints against petitioner, a tenured teacher employed by the Board, and whether he received the due process required by the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* In May 2018, petitioner was informed that he was the subject of a HIB investigation. The Board's Student Assistance Counselor, Jill Hall (Hall), conducted the HIB investigation, which was completed on May 25, 2018 and found that petitioner's conduct constituted HIB. A second HIB complaint was filed against petitioner on May 30, 2018 by at least twelve students. Hall completed the second HIB investigation on June 12, 2018, with an addendum on June 14, 2018, and again found that petitioner's conduct constituted HIB.

The Board alleges the Superintendent sent letters to petitioner regarding each of the HIB determinations on June 25 and August 2, 2018. The letters both stated that the Superintendent had reviewed the HIB reports and that he concurred with the findings of the investigations. The results of the investigations were reported to the Board in August 2018.[1] Petitioner claims that he was unaware of the second HIB investigation, was never informed about the allegations or outcome in either investigation, and that he never received the Superintendent's letters. Petitioner filed the within petition of appeal in April 2019. Subsequently, on June 11, 2019, the Board held a hearing regarding the HIB investigations with petitioner and his counsel; petitioner alleges this was the first he learned about the second HIB complaint and the first time that he heard a general summary of the allegations against him, although no specifics were provided during the hearing. Petitioner denied the allegations, but the Board affirmed the HIB findings.

The petition of appeal was transmitted to the OAL, and following cross motions for summary decision, the Administrative Law Judge (ALJ) found that the Board did not follow the procedural requirements of the Act and failed to provide petitioner with due process because he was not provided with sufficient information about the investigations, even in advance of the June 2019 Board hearing. The ALJ found that the Board's decisions concerning the investigations should be reversed, and any disciplinary action imposed as a result of the HIB

[1] It does not appear that the Board imposed a penalty on petitioner as a result of the HIB determinations. Petitioner was, however, placed on administrative leave in May 2018, which appears to be due to a referral by the Board for an investigation by the New Jersey Department of Children and Families, Division of Child Protection and Permanency (DCPP). DCPP issued letters to petitioner on October 31, 2018 and February 7, 2019, finding that the allegations were "Not Established." Copies of the letters were also sent to the Superintendent on the same dates. Nevertheless, petitioner has remained on administrative leave to the present. The Board's reasoning for keeping petitioner on administrative leave is unclear, including whether the HIB investigations – which were completed by August 2018 – were part of the Board's rationale.

investigations should be rescinded. The ALJ also found that petitioner should be permitted to return to work if the District kept him on leave status due to the HIB investigations.

In its exceptions, the Board argues that the ALJ failed to apply the arbitrary, capricious and unreasonable standard to its HIB determinations. As such, the Board maintains that the ALJ exceeded her authority in reversing those determinations, and any discipline imposed as a result of the HIB findings, without applying the correct standard of review. The Board also contends that the ALJ erred in weighing in on a personnel action – petitioner's administrative leave – which is separate from the HIB investigations.[2]

The Board argues that the appropriate remedy to cure procedural errors would be to remand the matter to the Board for a new Board hearing, not the reversal of the HIB determinations. The Board points out that petitioner has now been provided with the unredacted HIB reports (although it maintains that it was not required to provide them initially under the Act), the unredacted notes regarding the interviews in connection with both HIB investigations, and a letter written by a student about petitioner's conduct. The Board argues that in light of the extensive documentation provided, petitioner would be able to have a new and fair hearing before the Board despite the time that has passed. Accordingly, the Board urges the Commissioner to reject the Initial Decision and find that the Board was not arbitrary, capricious or unreasonable in its HIB determinations; in the alternative, if procedural issues need to be cured, the Board asks the Commissioner to remand this matter for an additional Board hearing.

[2] The Board also argues that the ALJ erred in her finding that the results of the DCPP investigations were "Not Established" because there were no certifications on that topic in the record. However, the Commissioner notes that copies of the letters from DCPP containing the results of their investigations were included in the record.

In reply, petitioner argues that the ALJ correctly reversed the HIB determinations and rescinded any disciplinary action as a result of the HIB investigations; petitioner's due process rights were not protected, so any discipline as a result was arbitrary, capricious or unreasonable. Petitioner contends that this matter should not be remanded for a new Board hearing at this juncture because it would reward the Board for its continued misfeasance. Petitioner points out that it has been more than three years since any of the allegations, so petitioner would be unable to have a fair hearing now as many of the students have graduated and the notes from the investigation were lacking in dates, times, or locations. Accordingly, petitioner urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner finds that the Board did not comply with the Act in conducting its HIB investigations, and therefore, this matter should be remanded to the Board for a new Board hearing. *N.J.S.A.* 18A:37-15b(6)(d) provides:

> [P]arents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within 5 school days after the results of the investigation are reported to the board. A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request. The board shall meet in executive session for the hearing to protect the confidentiality of the students. At the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents[.]

The Commissioner has previously established that teachers and other staff members who are accused of HIB are entitled to the same due process protections that are provided to students

under the Act. *Melanie Sohl v. Board of Education of the Town of Boonton, Morris County*, Commissioner's Decision No. 106-21, decided May 18, 2021; *Ruth Young-Edri v. Board of Education of the City of Elizabeth, Union County,* Commissioner's Decision No. 174-19, decided July 8, 2019; *Stephen Gibble v. Board of Education of the Hunterdon Central Regional School District, Hunterdon County,* Commissioner's Decision No. 254-16, decided July 13, 2016.

Here, petitioner was not provided with "information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying", as required by the Act. Petitioner certainly did not receive it in writing within five school days after the results of the investigation were reported to the Board. The only evidence in the record of communications with petitioner regarding the HIB complaints were letters from the Superintendent dated June 25 and August 2, 2018. Those letters stated:

> I have reviewed the report submitted regarding the alleged incident of harassment/bullying/intimidation (HIB) that involved your child.
>
> I concur with the findings of the investigation conducted by the Anti-Bullying Specialist.
>
> If you have any questions, please feel free to contact me at the number below.

While petitioner claims that he did not receive these letters, regardless of whether the letters were sent, they fail to meet the requirements of *N.J.S.A.* 18A:37-15b(6)(d). The letters give no information as to the nature of the investigations. It is also unclear from the letters whether

HIB was found or not, or whether any discipline was being imposed. Thereafter, months later when petitioner's attorney sought further information as to the investigations, the Board attorney's email on February 28, 2019 simply indicated:

> . . . pursuant to N.J.S.A. 18A:37-15b(6)(d), I can share with you that Mr. Mosser was investigated during the 2017-18 School Year for alleged verbal and physical behavior which touches upon the protected categories of sexual orientation, gender, and "other distinguishing characteristics." HIB Specialist Jill Hall found that the incidents investigated met the criteria for "Harassment, Intimidation or Bullying" pursuant to the statute.

This email does not shed any light on the nature of the investigation; it is still unclear what petitioner was accused of doing. Petitioner does not appear to have heard the allegations against him until he attended the June 2019 Board hearing. Accordingly, the Commissioner finds that the Board failed to meet the procedural requirements of the Act by not providing petitioner with information regarding the investigation.

The Commissioner finds that the appropriate remedy in this matter is a remand to the Board for a hearing.[3] *See Ruth Young-Edri v. Board of Education of the City of Elizabeth, Union County,* Commissioner's Decision No. 174-19, decided July 8, 2019 (directing the Board to conduct further proceedings after it failed to comply with the due process provisions of the Act); *J.L., on behalf of minor child, A.L. v. Board of Education of the Bridgewater-Raritan Regional School District, Somerset County*, A-2022-16T1 (App Div. Oct. 16, 2018) (remanding the matter for a Board hearing after the petitioner was not informed about the HIB investigation until after the Board voted). Further, although the petitioner is now aware of the nature of the

[3] The Commissioner notes that while the Board hearing gives petitioner the opportunity to present evidence and arguments to refute the findings against him, it is not a trial-type adversarial hearing.

allegations against him and the Board's determination based on the proceedings at the OAL, it is still unclear whether discipline was imposed on the petitioner as a result of the HIB determination. As such, the Board must clearly inform petitioner as to any discipline that was imposed on him, as required by *N.J.S.A.* 18A:37-15b(6)(d), prior to providing a new Board hearing.

It is important to recognize that this matter is being remanded to the Board based upon the procedural deficiencies, and therefore the Commissioner reaches no decision as to whether the petitioner committed an act of HIB. Since the merits of the HIB investigation have not been determined in these proceedings, the Commissioner disagrees with the ALJ's decision to reverse the HIB determinations, rescind any disciplinary action, and direct petitioner to return to work if the leave was due to the HIB allegations.

Accordingly, the Initial Decision is adopted in part, and rejected in part, as the final decision in this matter. The Board is directed to conduct further proceedings consistent with this decision and the Act.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 2, 2021
Date of Mailing: December 3, 2021

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 09011-19
AGENCY DKT. NO. 80-4/19

JAMES MOSSER,
Petitioner,
v.
CITY OF UNION BOARD OF EDUCATION,
UNION COUNTY,
Respondent.

Paul W. Tyshchenko, Esq., for petitioner (Caruso Smith Picini, attorneys)

Caitlin Pletcher, Esq., for respondent (Florio, Perrucci, Steinhardt, Cappelli, Tipton & Taylor, attorneys)

Record Closed: June 11, 2021 Decided: September 2, 2021

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE

Petitioner James Mosser, a teacher, challenges the determination by his employer, the Union Board of Education (respondent or Board), that his conduct constituted

Harassment, Intimidation and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A: 37-13.1 to -32; and he asserts that the Board violated his due process rights.

PROCEDURAL HISTORY

Petitioner filed a Petition of Appeal with the Commissioner of Education on or around April 25, 2019, and the Commissioner transmitted the matter to the Office of Administrative Law, where it was filed as a contested case on July 2, 2019. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Telephone conferences with the undersigned were held in August 2019, during which hearing dates were scheduled for January 6, 17 and February 18, 2020. An Amended Petition for Relief was filed on or around September 2019.[1] Respondent filed a motion to dismiss the Petition in lieu of an Answer, which was denied on October 25, 2019.

Counsel for petitioner requested an adjournment of the January 6, 17 and February 18, 2020 hearing due to incomplete discovery. The hearing was rescheduled to October 14 and 19, 2020. In March 2020, respondent filed a motion challenging discovery demands; petitioner filed an opposition; and the Board filed a reply in April 2020. I issued Orders on May 26, 2020 and July 13, 2020 addressing the discovery issues.

The October 14 and 19, 2020 hearing dates were adjourned at the request of counsel for the Board, objecting to a Zoom hearing. On or around September 23, 2020, petitioner filed a motion for summary decision that was opposed by the Board. The petitioner's motion was subsequently amended on April 22, 2021, following a status conference and after the undersigned permitted both the petitioner and the Board an

[1] In the Amended Petition for Relief, petitioner requests that the Board be ordered to rescind or reverse any and all decisions made by the Board with respect to the HIB investigation(s); to rescind or reverse any disciplinary action, if any, the Board has taken against him pursuant to the HIB investigation; to destroy all records related to the Board's decision, if any, concerning the HIB allegation(s); to notify him of the nature of the HIB allegations against him, including what specific acts or infractions he was alleged to have committed; and any additional relief that may be deemed just and equitable.

opportunity to file the required Certifications in support of, and opposition to the motion for summary decision. Petitioner's motion included affidavits signed by Mosser and his counsel. On or around May 11, 2021, the Board opposed the petitioner's motion and filed a cross-motion for summary decision. The Board included certifications of Jill Hall and counsel. On May 28, 2021, the petitioner filed a reply to respondent's opposition, and opposition to the cross-motion for summary decision. The Board's reply to the petitioner's opposition was filed on or around June 11, 2021. The June 2021 hearing dates were adjourned in light of the pending motions for summary decision, and rescheduled to September 2, 2021 and September 3, 2021.[2]

FINDINGS OF FACT

Based on the submissions presented, and the uncontroverted background facts, I **FIND** the following:

Petitioner is a tenured teacher who has been employed by the respondent School District for over thirteen years. Petitioner had no prior disciplinary history with the Board. At a meeting in May 2018 with District officials, petitioner was informed that he was the subject of a Harassment, Intimidation, and Bullying (HIB) investigation. At around that time, petitioner was placed on administrative leave by the District.

The Board asserts that petitioner was placed on leave as a result of a referral by the District for an investigation by the New Jersey Department of Children and Families, Division of Child Protection and Permanency (DCPP). (See Cert. of Nishali Rose, Esq. at ¶ 2.) Ultimately, DCPP determined that the allegations made against Mosser were "Not Established." Petitioner, however, has remained on administrative leave since May 2018 despite the DCPP's determination.

At all relevant times, Jill Hall (Hall) was the Board's Student Assistance Counselor who conducted the HIB investigations at issue here. With respect to the HIB investigation

[2] This decision is filed in accordance with Governor Philip Murphy's Executive Order 127 issued April 14, 2020, created by the COVID-19 emergency.

that Mosser was informed about in May 2018, Hall interviewed the complainant student, G.R., and her parents. G.R.'s parents reportedly claimed that G.R. was feeling targeted by petitioner and they requested a formal HIB investigation on May 11, 2018. There is no evidence that Hall interviewed Mosser as part of her investigation. Hall completed her investigation on May 25, 2018 and provided the Superintendent with a copy of HIB Investigation Report No. 16 for the 2017–2018 school year in which she determined that petitioner's actions constituted HIB. Mosser asserts that he never received any notice from the Superintendent, nor from any other Board administrator, informing him of the investigation, the ultimate findings, and that the Superintendent agreed with Hall's HIB findings. The Board did not present any Certification, from either the Superintendent or any other District employee with direct knowledge, asserting that a letter, or any other form of notice, was sent to Mosser informing him that Hall had concluded her investigation and that the Superintendent agreed with her findings/determination.[3]

While Mosser was on administrative leave, he became the subject of a second HIB investigation by the Board. This investigation involved more than a dozen students. The Board asserts that this second HIB investigation was initiated on May 30, 2018 at the direction of the High School Principal in response to statements made by certain students who had attended a cast party that petitioner also attended prior to being placed on leave. (Rose Cert. at ¶¶¶ 14-16.) As part of Hall's HIB investigation, she interviewed several students regarding the allegations, and prepared approximately thirty-two pages of notes. Hall did not interview Mosser as part of her investigation, nor did she notify him of the investigation.

The Board asserts that on June 12, 2018, and again via addendum dated June 14, 2018, Hall finalized HIB Investigation Report No. 17 for 2017–2018, which concerned allegations of twelve Board students and three other students regarding Mosser. (Rose

[3] Hall's Certification states: "In a letter to Mr. Mosser dated June 25, 2018, Mr. Tatum indicated that he agreed with the findings set forth in the HIB investigation report. A true and correct copy of the letter dated June 25, 2018 is attached hereto . . . ." (Hall Cert. at ¶ 11.) Attached to the Certification is a letter dated June 25, 2018 directed to "the Parent/Guardian of James Mosser," with no address or proof of service. The Board did not present a Certification from the Superintendent or any other appropriate Board employee with knowledge asserting that a letter was sent to Mosser informing him of the Superintendent's concurrence or disagreement with the HIB report.

Cert. at ¶ 6.) Again, Hall found that the alleged behavior met the criteria for HIB and she provided the Superintendent with a copy of her report, HIB Investigation Report No. 17, on the day it was finalized.

The Superintendent agreed with Hall's findings in HIB Investigation Reports No. 16 and No. 17. In June 2018, the Superintendent notified the parents of these students that he had reviewed the report submitted regarding the alleged incident of HIB involving their child and that he concurred with the findings of the investigation. Mosser asserts that he was never informed of the investigation or of the Superintendent's decision concerning the HIB allegations. The Board did not present any Certification countering Mosser's assertion, and did not produce any Certification asserting that the District provided written notice to Petitioner regarding the second HIB report.[4] I **FIND** that the Board/District did not inform petitioner of the results of the two HIB investigations once the investigations were completed and the Superintendent reviewed and concurred with the HIB findings.

The Board held a meeting in August 2018 in which the HIB investigation, or investigations, concerning petitioner was addressed. Petitioner was never notified of the Board meeting. The Board asserts that a "hearing" did not occur at that time, and that no disciplinary action was taken, and no written decision was issued. There is no evidence that the Board took any action in August 2018 concerning the HIB investigations involving petitioner. About seven months after the August 2018 Board meeting, Board counsel informed petitioner in writing that he believed HIB findings "were only reported to the Board" at the meeting and that no determination had been made. I **FIND** that the Board did not provide petitioner with any information concerning the HIB investigations following the August 2018 meeting in which the HIB investigations and findings were reported to and addressed by the Board.

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[4] Hall's Certification states: "In a letter to Mr. Mosser dated August 2, 2018, Mr. Tatum indicated that he agreed with the findings set forth in the HIB investigation report. A true and correct copy of the letter dated August 2, 2018 is attached hereto . . . ." This letter is dated August 2, 2018, appears to be electronically signed by the Superintendent, and is addressed to "the Parent/Guardian of James Mosser." It contains no address, and there is no proof of service. No Certification was provided by the Board asserting that the letter was actually sent to Mosser. When petitioner asserts in his reply brief that he never received any letter from the Superintendent, the Board in its sur-reply did not certify that it was ever sent to Mosser by the Superintendent or his office.

On or around October 23, 2018, petitioner's counsel sent the District an Open Public Records Act (OPRA) request, seeking "any, and all, HIB Reports concerning Mr. Mosser." In its response to this request, the District denied possessing any such reports. Petitioner filed a second OPRA request in December 2018, seeking the same information. This time, the Board informed the petitioner that there were two HIB reports, however, the Board denied petitioner access to the reports. I **FIND** that months after the HIB investigation reports were completed and the District determined that Mosser committed acts of HIB, and even after the results of the investigations were reported to the Board, the District wrongly denied the existence of the HIB reports, and later improperly refused to provide them to petitioner.

Petitioner then filed a Petition for Relief in April 2019, and the Board then agreed to hold a HIB hearing concerning the petitioner. This hearing took place on June 11, 2019, and the petitioner attended the hearing with counsel.

Petitioner asserts in his Certification that prior to the June 2019 Board hearing, he was not given any evidentiary materials concerning the HIB allegations. It is undisputed that the Board did not provide petitioner with a copy of the HIB reports prior to the June 2019 hearing, however, respondent's counsel states in her brief that "sufficient information regarding the HIB investigations and findings" were provided prior to the hearing. In support of this assertion, with respect to the first HIB investigation, respondent states that petitioner was "involved in discussions" regarding G.R.'s complaints and "his conduct toward her" at least four months prior to the filing of the HIB complaint; and that a staff member arranged for petitioner's interview as part of the investigation. I **FIND**, however, that there is no evidence that petitioner was ever interviewed as part of the first HIB investigation, nor that he was provided with any information about the investigation or the basis for the District's HIB determination prior to the June 2019 hearing. In regard to the second HIB investigation, respondent asserts that petitioner was aware of the DCPP findings, and that petitioner also received information by email from counsel for

respondent, prior to the June 2019 Board meeting.[5] I **FIND** that prior to the June 2019 Board hearing, petitioner was not provided with any information concerning the second HIB investigation other than what was contained in the February 28, 2019 email to petitioner's counsel, which does not identify who the complainants were, what the alleged incidents of HIB were, nor any information about the investigation other than the fact that Hall found HIB and that the alleged verbal and physical behavior touched upon certain protected categories.

Petitioner asserts that at the June 2019 hearing he learned for the first time that there were two separate HIB complaints made against him that were investigated by the District, and that there were more than a dozen alleged complainants. The complainants were not identified at the hearing; none of the witnesses to the alleged incidents were identified; and the District did not inform petitioner when the alleged incidents of HIB occurred. Hall was not present at the hearing. Her supervisor appeared in her place. The petitioner maintains that at the June 2019 hearing, he was only read a summary of the allegations against him, without any specific dates on which any of the alleged incidents occurred and without identifying any of the persons allegedly involved or even where the alleged incidents occurred. Petitioner categorically denied the allegations against him, and requested that the Board dismiss the HIB complaints, at least in part because the Board hearing was being held more than one year after it was required to do so by statute and its own HIB policy. The Board denied the request to dismiss, and at its June 18, 2019 Board meeting, the Board affirmed the HIB findings with respect to both investigations and issued a written decision. The Board informed the petitioner of its decision affirming the HIB findings.

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[5] The February 28, 2019 email from respondent's counsel to petitioner's counsel simply states that petitioner "was investigated during the 2017-2018 School Year for alleged verbal and physical behavior which touches upon the protected categories of sexual orientation, gender, and 'other distinguishing characteristics' [and that] Hall found that the incidents investigated met the criteria for 'Harassment, Intimidation or Bullying' pursuant to statute." With regard to the DCPP findings that were reported to petitioner, the record is entirely unclear as to how those findings relate to the HIB complaints, and whether both matters even involve the same students and allegations.

LEGAL ANALYSIS AND CONCLUSION

In his motion, petitioner asserts that he is entitled to summary decision, and that the Board's determination that he committed acts that constitute HIB should be reversed, because the Board violated his due process rights. Petitioner asserts that his due process rights were violated because: the Board failed to adhere to the applicable timelines for holding a HIB hearing, and exceeded that timeline by at least a year; the Board failed to produce meaningful evidence in support of the allegations at the hearing; the Board failed to provide petitioner an opportunity to confront his accusers and the individual who investigated the HIB allegations; and the Board refused to provide petitioner with any information about the HIB investigation, including the evidence gathered during the course of the investigation and the HIB investigation reports, prior to the June 2019 hearing. Petitioner also maintains that due process was denied when the Board failed to put him on notice of the specific accusations made against him, as well as the specific acts that led to the determination that he committed HIB.

Relying largely on the Certification of Hall, the Board asserts that petitioner's due process rights were not violated and that respondent fully complied with the requirements of the Anti-Bullying Bill of Rights Act. Respondent asserts that the Board fulfilled its obligation to provide petitioner with a hearing consistent with the statutory requirements, and that if the Court determines that there were procedural errors in the HIB process, the appropriate remedy is to remand the matter back to the Board for a hearing, not to grant summary decision or reverse the HIB determination. The respondent asserts that petitioner never requested a hearing before the Board prior to the filing of the Petition in April 2019, and that the Board was not legally required to inform petitioner of his right to a hearing. The respondent also asserts generally that it complied with the requirements of the Act, and the legal requirements for conducting a hearing and providing petitioner with information concerning the investigations, and that the Act does not require a trial-type adversarial proceeding, despite petitioner's assertion that he was denied a right to confront his accusers and investigator.

Pursuant to N.J.A.C. 1:1-12.5(b), a summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that

there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary judgment rule embodied in the N.J. Court Rules, R. 4:46-2. See Judson v. Peoples bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In connection therewith, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Id. at 75. In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
>
> [Citation omitted.]

Having reviewed the parties' submissions in support of, and opposition to, the Petitioner's motion for summary decision, I **CONCLUDE** that this matter is ripe for summary decision. The Board presented no facts that would call into question Mosser's claim that the Board failed to provide him with the due process required under the Anti-Bullying law, and more specifically that Mosser was not provided with sufficient information concerning the investigations even in anticipation of the June 2019 hearing, and the Board did not comply with the procedures outlined in the Act.

Moreover, having reviewed and considered the respondent's submission in support of its cross-motion for summary decision, and opposition thereto, I **CONCLUDE** that the facts underlying the Board's HIB determination are unclear and disputed, and that this precludes disposing of this matter by summary decision in the Board's favor. Petitioner has denied that he committed any acts that may constitute HIB, and the record is not clear whether petitioner's actions, whatever they were, even met the criteria for HIB

pursuant to the Act. There could be no proper determination as to whether there were acts of HIB committed here given the record at this time.

Districts are required by law to adopt policies that prohibit HIB; that outline expectations for student behavior; that set forth consequences for inappropriate behavior; and that create procedures for reporting HIB-related concerns. N.J.S.A. 18A:37-14; N.J.S.A. 18A:37-15. In regard to the investigation of bullying charges, the law requires as follows:

> . . .
>
> (b) the results of the investigation shall be reported to the superintendent of schools within two school days of the completion of the investigation . . .;
>
> (c) the results of each investigation shall be reported to the board of education no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent;
>
> (d) parents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed, or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within 5 school days after the results of the investigation are reported to the board. A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request. The board shall meet in executive session for the hearing to protect the confidentiality of the students. At the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents;
>
> (e) at the next board of education meeting following its receipt of the report, the board shall issue a decision, in writing, to affirm, reject or modify the superintendent's decision. The board's decision may be appealed to the

> Commissioner of Education, in accordance with the procedures set forth in law and regulation, no later than 90 days after issuance of the board's decision . . .
>
> [N.J.S.A. 18A:37-15 (emphasis added).]

The Commissioner of Education has recognized that the due-process protections contained in the Anti-Bullying Act have equal applicability when a bullying charge is directed against a staff member. See K.T. on behalf of K.H. & T.D. v. Deerfield Bd. of Educ., OAL Dkt. No. EDU 00489-13, Initial Decision (June 19, 2013), rev'd and remanded, Comm'r (July 30, 2013), https://www.nj.gov/education/legal/ (where, in the context of a claim that a teacher bullied a kindergarten student, the Commissioner confirmed that the internal HIB investigation mandated by law is not discretionary); see also Gibble v. Hunterdon Central Bd. of Educ., EDU 02767-15, Final Decision (July 13, 2016), http://njlaw.rutgers.edu/collections/oal/; Sandlock v. Cedar Grove Bd. of Educ., EDU 00619-14, Initial Decision (March 26, 2015), http://njlaw.rutgers.edu/collections/oal/, aff'd, Comm'r (June 23, 2015), https://ww.nj.gov/education/legal/.

I **CONCLUDE** that the due-process protections contained in the Anti-Bullying Law were ignored by the Board. The Anti-bullying statute provides a timeline for the prompt investigation and disposition of HIB complaints. Here, Hall finalized the first HIB report on May 25, 2018 and the second on June 12, 2018, with an addendum on June 14, 2018. The results of the investigations were required to be reported to the Board by the next Board meeting, per N.J.S.A. 18A:37-15(c). While the results of the investigations were reported to the Board at its August 2018 Board meeting, the statute also requires that Mosser be provided with written information concerning the investigations within five school days following the Board meeting. That did not occur. Mosser received no information from the District/Board within five days after the August Board meeting, nor did he receive any written information prior. Had Mosser received information concerning the investigations and findings following the August Board meeting, he would have had an opportunity to request a hearing before the Board, which the Board would be required to hold within ten days, pursuant to N.J.S.A. 18A:37-15(d).

While respondent faults petitioner for not requesting a hearing sooner, Mosser could not have known to do so because he was provided with no information from the District/Board concerning the investigation and the findings. He was not made aware that the first HIB investigation had concluded, and he did not know that there was a second HIB investigation. Moreover, although the results of the investigations were reported to the Board at its August 2018 meeting, the Board did not issue a written decision affirming, rejecting, or modifying the Superintendent's decision concerning the HIB investigations, contrary to N.J.S.A. 18A:37-15(e). Had the Board issued a decision, the petitioner could have at least been put on notice of the allegations and findings against him at that time, and he could have appealed any Board decision in 2018, rather than in April 2019 once Mosser became aware through an OPRA request that there was a HIB finding against him.

The Board asserts that it fulfilled its legal obligation to provide petitioner with a hearing in June 2019, only after Mosser filed the Petition, and that it provided him with sufficient information concerning the investigations prior to that hearing. I disagree. While the Anti-Bullying Law does not require a full adversarial-type hearing, consisting of an opportunity to cross-examine every complainant and witness, it does require petitioner an opportunity to fully understand the evidence against him, including the identity of those complainants and specifically what the alleged acts of HIB were, and to present testimony and documents to the Board for its consideration.[6] What is required is a modicum of local due process required to guard against arbitrary, capricious, or ill-informed Board action. It is undisputed that the District refused to provide the petitioner with the HIB Investigation Reports prior to the June 2019 Board hearing. There is no evidence that the Board provided petitioner with any useful information concerning the allegations made against him. The Board refused to identify the complainants, did not inform Mosser when or where the alleged incident or incidents of HIB allegedly occurred, and did not provide any documentary evidence or available statements, prior to the 2019 Board hearing. How could the petitioner understand the evidence against him, and respond to those

[6] The opportunity for a full adversarial hearing is available when a HIB matter is appealed to the Commissioner of Education. In other contexts, law and regulations make it clear when an adversarial hearing is required at the board level. See, e.g., N.J.A.C. 6A:16-7.3(a)(10), which specifies that the right to cross-examination is available in a board-level appeal of a long-term student disciplinary suspension.

allegations, when he is provided no useful information concerning the investigation—not even the identity of the complainants–prior to the hearing? The June 2019 "hearing" was not the type of hearing contemplated in the Anti-Bullying statute. I **CONCLUDE** that because the Board so grossly failed to comply with the procedures contained in the Act, and failed to provide Mosser with information concerning the investigations that the statute requires, the Board's decision(s) concerning the investigations should be rescinded or reversed, and any disciplinary action imposed as a result of the HIB investigations or findings should also be rescinded. Mosser has remained on administrative leave since May 2018, and while the reason for this remains unclear, he should be permitted to return to work if the District has kept him on leave status due to the HIB allegations.

ORDER

It is hereby **ORDERED** that the motion for summary decision filed by the petitioner James Mosser is **GRANTED**, and that the Board rescind its decision with regard to the two HIB investigations involving James Mosser, and rescind any disciplinary action, if any, taken against him as a result of the HIB allegations.

It is further **ORDERED** that the cross-motion for summary decision filed by the respondent is **DENIED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 2, 2021
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: September 2, 2021

Date Mailed to Parties: September 2, 2021

jb

APPENDIX

EXHIBITS

For Petitioner:

Brief and reply brief

For Respondent:

Brief and reply brief

306-21

306-21

New Jersey Commissioner of Education

Final Decision

Neysa Etienne,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

Synopsis

Pro-se petitioner appealed the determination of the respondent New Jersey State Board of Examiners (SBE) that she had not met the requirements for issuance of a school social work endorsement. Specifically, the SBE determined that petitioner's alternative experience fails to serve as a one-to-one equivalent of the required three semester hours in advanced social casework which petitioner needs to fully meet the requirements for issuance of a school social worker endorsement pursuant to *N.J.A.C.* 6A:9B-14.5. Petitioner asserted that her job experience does fulfill the regulatory requirements. The SBE contended that petitioner's experience was piecemeal and did not include enough one-to-one experience specifically within a school setting to meet the required three semester hours in advanced level social casework.

The ALJ found, *inter alia*, that: the SBE determined that petitioner only lacks three semester hours of advanced social casework before she qualifies for the endorsement; petitioner's work experience as a mobile crisis school liaison, prevention specialist, and as a licensed associate marriage and family therapist meets the requirement of the three semester hours in advanced social casework; petitioner is therefore entitled to the school social work endorsement that she seeks; and the SBE's requirement that petitioner's experience must be unsupervised and in a school setting exceeds the requirements of *N.J.A.C.* 6A:9B-14.5. The ALJ concluded that the petitioner achieved the one-to-one equivalent of the required three semester hours in advanced social casework through her previous work experiences and is therefore entitled to the educational services certificate and endorsement as a school social worker.

Upon review, the Commissioner found, *inter alia,* that petitioner does not meet the requirements for a school social worker endorsement as she has not met the requirements of *N.J.A.C.* 6A:9B-14.5; the SBE acted within its discretionary authority when it found that petitioner's alternative experience fails to serve as a one-to-one equivalent of the advanced social casework requirement. Accordingly, the Initial Decision of the OAL was rejected and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

306-21

OAL Dkt. No. EDU 01947-20
Agency Dkt. No. 312-12/19

New Jersey Commissioner of Education

Final Decision

Neysa Etienne,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the New Jersey State Board of Examiners (Board), and the petitioner's reply thereto.

In this matter, petitioner challenges the Board's November 5, 2020 denial of her application for a school social worker endorsement[1] based on its determination that her experience was not equivalent to the advance level social casework requirement.[2] In denying her application, the Board found that petitioner had "not accumulated enough one-to-one case experience specifically within a school setting that completion of Advanced Level Social Case work requires." (Exhibit R7).

[1] A school social worker endorsement accompanies an educational services certificate.

[2] In a decision dated September 24, 2019, the Board considered petitioner's alternate experience during a credentials review, pursuant to *N.J.A.C.* 6A:9B-4.12, and found that petitioner's experience satisfied the introductory level social casework requirement but failed to meet the advanced social casework or medical information requirements. Following the filing of the petition, the Board agreed to reconsider petitioner's application and review additional materials. In its November 5, 2020 decision, the Board determined that the medical information requirement had been satisfied, but that petitioner was still deficient in the advanced social casework requirement.

Thereafter, in an email from the Board's counsel dated November 19, 2020, the Board provided clarification as to its decision:

> Essentially, the Board is looking for candidates whose experience with children is equivalent to what would be learned in an advanced Masters in Social Work course, i.e., the candidate would have the skills and knowledge to independently work on a child's case from start to finish. The candidate would need [to] show experience in which she had direct contact with children relating to topics that would generally be covered in [a] social work masters class, of which substance abuse is only one. Such experience would entail the following:
>
> - Determining proper interview methods for child;
> - Talking directly to child and learning about their life;
> - Figuring out and diagnosing what the child's issues are;
> - Reviewing with the child what those issues are;
> - Writing down what the case study was for the child;
> - Counseling them directly on how to correct those issues; and
> - Being the main person doing this and not under the supervision of someone else.
>
> The Board found that [petitioner's] experience in the above listed factors was piecemeal and too often with the support of other people, and therefore did not grant her the credits for advanced social work.
>
> [(Exhibit P3).]

Following a hearing on the merits, which included the testimony of petitioner, petitioner's former coworker, and the Director of the Office of Certification and Induction, the Administrative Law Judge (ALJ) found that petitioner's work experiences – specifically as a mobile crisis school liaison, prevention specialist, and as a licensed associate marriage and family therapist – met the requirement of three semester hours of advanced social casework, and she is therefore entitled to the educational services certificate and endorsement as a school social worker. The ALJ also found that the Board's requirement that her experience be unsupervised and in a school setting exceeded the requirements of *N.J.A.C.* 6A:9B-14.5.

In its exceptions, the Board argues that it acted within its discretionary authority when it determined that petitioner's alternative experiences "did not demonstrate a one-to-one equivalence of the independent casework diagnosis and interview skills attained by graduate level students in a [master's in social work (MSW)] program by completing advanced level social casework credits, which the school social worker certificate requires." (Board's exceptions at 18). The Board also maintains that it is within its discretionary authority to determine what type of experience constitutes a one-to-one equivalence, so the ALJ erred in finding that the Board could not require unsupervised experience that takes place in a school setting.

The Board takes exception to the ALJ's conclusion that petitioner's work experience qualified as school setting experience and that she therefore meets the requirements for certification. Specifically, the Board contends that the issues petitioner faced in her work were not those typically addressed in a school setting. The Board points out that petitioner admitted in her testimony that her mobile crisis response liaison experience was not long-term counseling and the services she provided as a prevention specialist were primarily done in group settings rather than individual counseling. As such, the Board argues that the Commissioner should reject the Initial Decision because petitioner did not meet the requirements for an endorsement as a school social worker.

In reply, petitioner argues that her experience was only supervised to the extent that she was obtaining a clinical license – which is not a requirement for the social worker endorsement – and that she was not being supervised with respect to the provision of social services. Petitioner also maintains that she worked in school settings and counseled students on school-related issues and completed assessments and diagnoses, provided referrals, and worked with parents and school staff. As such, petitioner agrees with the ALJ that her work experiences met the requirements for

certification and the Board erred by denying her application for a school social worker endorsement.

Upon review, the Commissioner finds that petitioner does not meet the requirements for a school social worker endorsement. *N.J.A.C.* 6A:9B-14.5(b) provides:

> To be eligible for the standard educational services certificate with a school social worker endorsement, the candidate shall hold a master's degree from a regionally accredited college or university and complete a total of 30 graduate-level semester-hour credits with a study in each area listed below:
>
> 1. Psychology, including general psychology, educational psychology, psychology of adolescence, and child growth and development;
> 2. Special education and/or learning disabilities;
> 3. Social problems, including study in dealing with delinquency, poverty, interracial, and intercultural problems;
> 4. A minimum of six semester-hour credits in introductory and advanced social casework, including principles and practices in social casework, interviewing, and methods and skills in diagnosis;
> 5. Mental hygiene and social psychiatry, including dynamics of human behavior and psychopathology;
> 6. Medical information, including the role of the social worker in health problems or fundamentals of substance abuse and dependency;
> 7. Community organizations, agencies and resources; and
> 8. Social policy and public welfare services, including the care and protection of at-risk children and families.

If a candidate is deficient in certain areas of an application, he or she may provide the Board with "evidence of alternative education and/or experience that he or she believes is equivalent to the area(s) of deficiency." *N.J.A.C.* 6A:9B-4.12(b). Thereafter, when considering evidence of alternative education, the Board may not "[p]ermit a candidate to substitute education and/or experience for any test, GPA, degree, or approved educator preparation program completion requirements." *N.J.A.C.* 6A:9B-4.12(c). Accordingly, a candidate may satisfy regulatory requirements by using alternative experience "if the petitioner demonstrates, by a preponderance of the credible evidence, that the alternative education is the one-to-one equivalent with the statutory

requirements." *Jenny Neuhoff v. New Jersey State Board of Examiners*, EDU 11780-17, Initial Decision (March 6, 2018), adopted, Commissioner Decision No. 118-18, decided April 13, 2018.

Here, the Board considered the petitioner's alternative experience and properly found that she lacked the equivalent of three semester hours in advanced social casework, as required by *N.J.A.C.* 6A:9B-14.5(b)(4). Rani Singh (Singh), Director of the Office of Certification and Induction and Secretary of the Board, explained in her testimony that, in contrast to the introductory level requirement, "the advanced level requires more one on one interactions between the social worker and students in a school-like setting in which the social case worker is the main person providing the services without the need of a supervisor so they're basically on their own in this type of setting." (Testimony of Rani Singh, T2 at 16, April 23, 2021). Singh also testified that the Board is looking for a specific set of skills to handle the wide range of issues that a school social worker deals with in the school setting, from making overall diagnoses to treatment for emotional and social issues and substance abuse problems, to counseling regarding academics and college plans. (*Id.* at 59). The Commissioner disagrees with the ALJ that the Board exceeded its authority in requiring that petitioner's alternative experience be unsupervised and in a school setting to be considered the equivalent of the advanced social casework requirement because such a determination as to what constitutes a one-to-one equivalent is a discretionary one.

Considering petitioner's alternative experience, the Board was not unreasonable in determining that such experience did not qualify as an equivalent of the advanced social casework requirement. First, from November 2017 to the present, petitioner has worked at Clara Maas Medical Center as a mental health screener and child specialist. As a mental health screener, petitioner assesses patients who arrive in the emergency room. She also works as a mobile crisis liaison for schools, going to schools when there is a crisis and assessing the child to determine

whether there is a need for hospitalization, in consultation with a psychiatrist. (Exhibit P-5). The Commissioner agrees with the Board that even though petitioner may physically enter schools, the position involves emergency or crisis situations which differ from the issues that are ordinarily addressed in the school environment. Additionally, such evaluations are short term, rather than the long-term counseling that school social workers provide.

Second, petitioner has worked at Wayne Counseling and Family Services (WCAFS) in several roles, starting with a clinical internship in 2014. Petitioner then served as a part time bilingual clinician from December 2015 through May 2015. In January 2019, petitioner returned to WCAFS as an intern working toward full licensure as an associate marriage and family therapist, which she obtained in 2020. In this job, petitioner conducts intake interviews and develops and implements treatment plans focusing on a variety of concerns, including marital/family issues, emotion management, mood disorders, parenting, anxiety, depression, grief, PTSD and personality disorders. (Exhibit P-8). While this position involves counseling over longer periods of time, the Commissioner agrees with the Board that it does not involve a school setting. Petitioner counsels both children and adults, including issues such as marital counseling and parenting issues that are not specific to do not pertain to children, and her position is supervised.

Finally, from April 2016 to September 2017, petitioner worked as a prevention specialist with RWJ Barnabas Health's Institute for Prevention. In that role, petitioner provided lessons on prevention in classrooms and small groups to minimize substance abuse by teaching proper coping skills, anger management, and decision making. (Testimony of Neysa Etienne, T1 at 34, 98-99, February 23, 2021). The Commissioner agrees with the Board that, although petitioner worked with students in school, the position did not involve interviewing, diagnosing and counseling of individuals. Petitioner worked in group settings to teach prevention, rather than counseling

students as a school social worker would. Accordingly, the Commissioner finds that petitioner's alternative experience fails to serve as a one-to-one equivalent of the required three semester hours in advanced social casework, such that petitioner does not fully meet the requirements for a school social worker endorsement pursuant to *N.J.A.C.* 6A:9B-14.5.

Accordingly, the Initial Decision of the OAL is rejected for the reasons expressed herein. The petition is hereby dismissed.

IT IS SO ORDERED.[3]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 2, 2021
Date of Mailing: December 3, 2021

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01947-2020
AGENCY DKT. NO. 312-12/19

NEYSA ETIENNE,

Petitioner,

v.

NEW JERSEY STATE BOARD OF EXAMINERS,

Respondent.

Neysa Etienne, pro se

David Kalisky, Deputy Attorney General, for State Board of Examiners (Andrew J. Bruck, Attorney General of New Jersey, attorney)

Record Closed: August 13, 2021 Decided: September 7, 2021

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

Petitioner Neysa Etienne applied for a School Social Worker endorsement presenting evidence of her education and work experience.[1] The State Board of

[1] The regulation uses "endorsement" but the Board's decision and materials often use "certificate" instead. A school social worker endorsement accompanies an educational services certificate.

Examiners (Board) determined that Etienne's experience was not equivalent to advanced level social casework, imposing requirements outside the regulation. Is Etienne entitled to the endorsement? Yes. If the Board's denial is not supported by the evidence or is arbitrary, capricious, or contrary to the law, the Commissioner may reject the Board's determination. N.J.A.C. 6A:4-4.1 N.J.A.C. 6A:9B-14.5(b)(6); N.J.A.C. 6A:9B-4.12(b).

PROCEDURAL HISTORY

On September 24, 2019, the Board denied Etienne's application for a School Social Worker certificate.

On November 26, 2019, Etienne appealed.

On February 3, 2020, the Board moved to dismiss and requested that I convert the motion to a motion for summary decision if the case was transmitted to the Office of Administrative Law.

On February 7, 2020, the Department of Education, Office of Controversies and Disputes, transmitted the case to the OAL as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On February 24, 2020, Etienne filed her opposition to the motion, and on March 12, 2020, the Board submitted its reply.

On April 24, 2020, I denied the Board's motion concluding that genuine factual issues existed.

The Board agreed to reconsider and review additional materials regarding Etienne's certification application.

On November 5, 2020, the Board accepted that Etienne's experience met the required medical-information coursework component, but still denied Etienne's application for school social worker.

I adjourned scheduled hearings due to witness illness and unavailability. On February 23, 2021, and April 23, 2021, I conducted hearings via Zoom because of continued COVID-19 restrictions precluding in-person proceedings. The Board requested transcripts, and the parties agreed to supply post-hearing submissions.

On May 28, 2021, Etienne submitted her post-hearing arguments.

On August 13, 2021, the Board filed its submission, and I closed the record.

FINDINGS OF FACT

The parties do not dispute many of the background facts in this case. I **FIND** the following **FACTS**:

On September 9, 2014, Etienne first requested a school social worker certification. This application included her Kean University transcripts indicating a Bachelor of Arts degree with a major of psychology, a Master of Arts in behavioral sciences and psychological services, and a professional diploma in marriage and family therapy.

On November 15, 2015, the Board denied her request noting deficiencies that included "a minimum of 6 semester-hour credits of introductory and advanced level social work" and the "medical information" component.

On February 25, 2016, in response to Etienne's request for reconsideration, the Board advised Etienne that she could use experience to demonstrate "one-to-one equivalence of your experience/coursework to the licensure deficiency." In particular, the Board instructed Etienne to address each deficiency area:

> Documentation of experience should include not only original letters by appropriate employers and those responsible for providing alternative study indicating dates of employment and job responsibilities, but should also include information relevant to the specific areas of deficiency. The material you submit for review must include the completed summary sheet and notarized statement that all documentation is true and accurate. It is recommended that in addition to documentation of employment and academic study, you include in your packet a narrative statement in which you clearly outline the one-to-one equivalency of your experience/coursework to the licensure deficiency.
> [Id.]

The Board initially denied Etienne's 2019 application because she did not have experience equivalent "for the advanced social case work or the medical information requirement. Specifically, the experience offered does not contain substance abuse/awareness content which is a content area that is covered by advanced level casework." However, Etienne now satisfied the three-hour semester credits for introductory social case work.

Etienne's appeal addressed her substance abuse experience noting she worked extensively "with patients that have intentionally or unintentionally overdosed on various drugs." Further, she served as a "school-based prevention specialist" through Robert Wood Johnson's Barnabas Behavioral Health Center (BHC) focusing on substance abuse prevention. Since November 2017, Etienne has worked as a mental health screener at RWJ Barnabas Clara Maas (Clara Maas) in the psychiatric emergency screening unit that provides, in part, assessment of substance abuse.

Etienne's application also noted that she was a certified trainer in Screening, Brief Intervention, and Referral to Treatment (SBIRT) through the Rutgers Center for Alcohol Studies. Further, Etienne attended multiple professional workshops related to substance abuse.

Lastly, Etienne is a licensed associate marriage and family therapist (LAMFT) working part-time at an out-patient family and marriage therapist at Wayne Counseling and Family Services (WCFS).

The Board agreed to reconsider Etienne's application materials and allow additional documentation addressing the deficiencies raised in the initial decision.

Before the Board's July 30, 2020, meeting, Etienne supplied supplemental records used in her jobs and explained why she believed her experience was equivalent to all regulatory requirements. Documentation included: the psychiatric screening form with Columbia suicide severity rating scale (CSSRS) completed by Etienne independently at Clara Maas; a 2015 letter from WCFS; small group attendance form and lesson plan supporting ongoing weekly sessions; and New Jersey Early Intervention System log evidencing weekly in-home therapeutic services to a child.

On November 5, 2020, the Board issued a subsequent decision concluding that Etienne's experience satisfied the medical information component of the regulation but still did not meet the advanced level social case work element. The Board explained that Etienne "has not accumulated enough one-to-one experience specifically within a school setting that completion of advanced level social case work requires."

On behalf of the Board, counsel provided additional clarification, and framed the issue in this case:

> Essentially, the Board is looking for candidates whose experience with children is equivalent to what would be learned in an advanced Masters in Social Work course, i.e., the candidate would have the skills and knowledge to independently work on a child's case from start to finish. The candidate would need [to] show experience in which she had direct contact with children relating to topics that would generally be covered in a social work master's class, of which substance abuse is only one. Such experience would entail the following:
>
> - Determining proper interview methods for child;
> - Talking directly to child and learning about their life;
> - Figuring out and diagnosing what the child's issues are;
> - Reviewing with the child what those issues are;
> - Writing down what the case study was for the child;
> - Counseling them directly on how to correct those issues; and

- Being the main person doing this and not under the supervision of someone else.

The Board found that Ms. [Etienne's] experience in the above listed factors was piecemeal and too often with the support of other people, and therefore did not grant her the credits for advanced social casework.

Petitioner's Case

Nyesa Etienne

Etienne testified that she initially focused her appeal on her extensive training in substance abuse and awareness as the Board's decision, in her opinion, focused only on the lack of this content area within the advanced level social casework requirement. She considers the Board's subsequent November 2020 decision a change in the alleged insufficiency. Etienne maintains that she assessed and worked with clients and children independently rather than primarily supervised, diagnosed children, and worked with children "long-term."

In 2014, Etienne completed a 500-hour clinical internship at WCFS, working with children, adults, and families. After receiving her professional diploma in marriage and family therapy, Etienne held a part-time clinical position from December 2014 until May 2015. In January 2019, Etienne returned as an LAMFT under supervision until she obtains her full licensure. Etienne provides ongoing counseling for marital and family issues, emotion management, mood disorders, parenting, anxiety, depression, grief, PTSD, and personality disorders. Etienne is assigned a caseload with a variety of consumer populations. WCFS's executive director's May 2019 letter, supplied with her application, explains Eitienne's responsibilities to include:

- Complete biopsychosocial intakes while utilizing therapeutic interviewing skills
- Develop and implement individualized treatment plans with clients
- Utilize her expertise for DS and diagnosis and treatment services
- Direct weekly therapeutic sessions for assigned caseload
- Provide crisis intervention and advocacy services via providing information and referrals

- Outreach and coordination with other social service agencies
- Progress notes and other reports as needed
- Discharge planning
- Principals (sic) practiced include ethical concepts such as confidentiality and disclosing requirements

From April 2016 until September 2017, Etienne worked as a prevention specialist through BHC's Institute for Prevention and Recovery, running ongoing programs for Essex County schools. She provided classroom and small group instruction using recognized substance abuse prevention and family strengthening programs in this role. This involved courses to students, small groups, parents, and school staff members focusing on intervention and referral services in the school and community. The twenty-four session program to students provided lessons on decision-making, empathy, emotion management, problem-solving, assertiveness, and refusal skills. Etienne's identified discussion topics promoted school success, school correctness, and promoting a safe, respectful school environment while addressing problem behaviors, peer rejection, impulsivity, anti-social behavior, and low academic achievement. Etienne also ran a seven-week parent training program to identify and address problematic youth behaviors and improve family functioning. Etienne developed and ran these programs independently.

At the time of her application, she possessed a temporary mental health screener certification following training at Rutgers University Behavioral Healthcare Center (Rutgers). Her training through Rutgers involved education, a competency assessment in the field, and an exam that she passed. Etienne became a fully licensed screener after passing the exam in May 2019.

Etienne performs clinical assessment, patient interviews, diagnoses, counseling, service delivery coordinating, and recommends appropriate disposition as a screener. The New Jersey screening form requires documentation in multiple areas of concern, including family, mental health and medical history, substance abuse, and education. In addition, Etienne completes a CSSRS to address any suicidal behavior. As Etienne performs mental health screening in a medical setting, medical professionals also perform medical evaluations. Before receiving the full screener certification, she would complete all tasks but could not sign off on the legal form to recommend admission or discharge of a patient. Yet, she would perform all assessment responsibilities independently and make the

recommendation. The order to admit or discharge a patient is a medical task that the psychiatrist can only perform. Still, the psychiatrist does not revise or change the clinician assessment or recommendation, even if they disagree with the recommended admission or discharge. Further, the psychiatrist would not dictate interviewing methods or what information to include in the assessment report.

Etienne also acts as the Essex County liaison for mobile crisis response to schools and their students in this position. Etienne testified that she serves in that role three times a week and physically goes to the school. COVID-19 made such in-person meetings less, but still acts as the child specialist and is the person assigned to addressing school-based referrals. Etienne testified that she performs this task at the request of the school social worker, administrator, or guidance counselor that has identified a child in crisis. Etienne also involves family members in the interview process and requires family consent to evaluate the child. The school staff or family members would provide collateral information such as the attendance record or mental health history. Legally, schools may require another person in the room during her interview process, but they serve only as observers or provide collateral information. Like the hospital setting, a psychiatrist would still need to order admission to the hospital as this is a medical decision. Thus, Etienne would report her findings to the psychiatrist to accomplish such an admission. Etienne acknowledges that in an emergency setting, many of her patient interactions would be short-term.

Etienne believes the Board misunderstands supervision in the context of her positions and suggests focusing on "supervision" is not appropriate in denying the endorsement. She notes that an MSW may serve as a school social worker. Yet, Etienne asserts that the holder of a master's degree in Social Work (MSW) or licensed social worker (LSW) cannot provide clinical therapeutic services without supervision. Etienne possesses a license as an associate marriage and family therapist (LAMFT) similar to that of a licensed social worker (LSW). Etienne still works under a supervisor when providing clinical therapy services, as would an LSW.

Jackelin Alerte

Since 2015 Alerte has worked as a full-time school social worker and is a Licensed Clinical Social Worker. Alerte is also a certified mental health screener since 2010 and works

at Clara Maas as the supervisor of the psychiatric emergency room, where she worked with Etienne since 2018. Alerte also performs outpatient counseling in addition to hospital-based mental health screening.

Alerte explained what a school social worker does, and the credentials needed to become a licensed social worker. In New Jersey, an LSW works under the supervision of an LCSW. However, a school social worker is not required to be either an LSW or LCSW. Thus, a school social worker may possess an MSW, and may even be an LSW, but both holders would be under supervision of an LCSW. Alerte currently supervises a school social worker that is not fully licensed. Regardless, a MSW cannot provide clinical social worker services without an LSW or LCSW designation. Clinical social worker services include assessing, diagnosing, treating, and preventing mental illness, emotional, and other behavioral problems. Individual, group, and family therapy are common treatment modalities. Alerte explained that introductory social casework is more theoretical, while advanced casework involves practice with children and families and potential for substance use and abuse specialization.

Through working with Etienne, Alerte observed many of the skills the Board asserts Etienne lacks. Alerte's supervisory role is not of the clinicians such as Etienne but of the unit itself. Alerte testified that Etienne has extensive experience determining the appropriate interview methods, speaking, interacting with children and their families, preparing case studies, diagnosing issues, and developing counseling plans.

A screener would also contact a child's school as part of their assessment. Although the emergency room psychiatric unit sees both adults and children, Etienne handles most child cases given her experience. While most cases are short-term, some patients have ongoing issues, and the screening unit sees them regularly.

Moreover, while Alerte did not directly observe Etienne in her outpatient therapist role, certain aspects of that position are routine. They would be part of any outpatient therapist's job, including long-term therapy services. Alerte also confirmed that Etienne's duties described by the WCFS director are like her outpatient therapist responsibilities. As an LAMFT, Etienne's coursework and experience are similar to that of Alerte. Further, family involvement is critical in providing social work services in school.

Alerte highlights that crisis intervention is a growing aspect of a school social worker's job. Alerte helped her school district hire school social workers and believes that Etienne's crisis response training and knowledge would be an asset to any school. Alerte believes that Etienne far exceeds the requirements of a school social worker.

Respondent's Case

Rani Singh

Singh currently serves as the Director of the Office of Certification and Induction (OCI) and the Board Secretary. Previously, Singh was the chief OCI examiner beginning in 2005.

Singh oversees the certification, induction, and mentoring of all educator candidates. As the Board Secretary, she also manages the Board's appeal and legal section. As to the school social worker certificate, Singh highlighted that "applicants must meet our regulations, our state regulations for certification for school social worker and all other certificate areas."

Singh was familiar with Etienne's numerous applications and explained that a social worker position is not the equivalent of a school social worker position. Moreover, unlike the introductory social casework requirement, "the advanced level [casework] requires more one-on-one interactions between the social worker and students in a school-like setting in which the social case worker is the main person providing the services [on their own] without the need of a supervisor."

Singh explained that Etienne's submitted work experience with children failed to show a one-to-one correspondence to experience that completion of the three graduate-level semester-hour credits in advanced-level social casework requires. Etienne's work experience in hospitals and counseling centers cannot be considered experience the Board finds equivalent to the advanced social casework requirement because the experience is "not in a school setting." Singh testified that the Board regarded such experience as essential "because a majority of the [school social worker's] experience

deals with [the] same children on a long term basis." Indeed, school social workers counsel children on typical issues arising in school. including "making case studies with them, long term case studies . . . [ranging from] mental health stress, to going to high school, college, drug, substance abuse, all of those issues that kids face in a [preschool through grade twelve] setting."

Singh acknowledges that she lacks knowledge about the day-to-day responsibilities of a school social worker and has no background or experience in either the mental health or social work fields.

ADDITIONAL FINDINGS OF FACT

Having had the opportunity to observe the witnesses' testimony and demeanor, together with the documentary evidence, and my assessment of their sufficiency, I **FIND**, by the preponderance of credible evidence, the following additional **FACTS**:

Etienne provides long-term counseling services to children, adults, and families at WCFS, under supervision because she is an LAMFT. Yet, an MSW employed as a school social worker would also need such supervision. In this regard, Etienne's LAMFT is more akin to an LSW. Indeed, an MSW that applies for and obtains a LSW can provide clinical social work services under supervision as Etienne provides clinical therapeutic services to families with a LAMFT under supervision.

Moreover, Etienne's out-patient therapist duties include interviewing and diagnosing a diverse client population that includes children, developing, and implementing a treatment plan, and preparation of notes and reports. Indeed, this job entails a multitude of topics and issues outside of substance abuse, including family difficulties and emotional problems.

Further, Etienne worked with Essex county to provide in-school instructional and counseling sessions to students and small groups, parent training, and staff development. While the twenty-four week program focused on substance abuse prevention, Etienne

assessed students and covered many social and emotional skills attempting to create an improved home and school environment.

Etienne worked independently in performing tasks as a mental health screener. Specifically, Etienne completes a clinical assessment, interviews, and diagnoses patients, provides counseling, and recommends appropriate disposition. While Etienne makes the admission or discharge recommendation, she could not sign a form presented to the psychiatrist for admission until receiving her full screener certification. Although a physician makes a medical determination as to admission, her assessment remains, and the psychiatrist is not involved in the way Etienne performs her assessment.

Moreover, Etienne acts as the mobile response liaison to schools for the emergency room psychiatric unit at Clara Maas. This role places her in a school setting with children in crisis and any involvement of school personnel does not detract from the independence of the student evaluation she conducts.

In issuing a school social worker endorsement based on alternate experience, the Board essentially certifies that the applicant completed the approved program of study by gaining the core skills required by the regulation.

DISCUSSION AND CONCLUSIONS OF LAW

Here, Etienne "carries the burden of demonstrating by a preponderance of the credible evidence that she is entitled to the endorsement she seeks." McQuilken v. N.J. St. Bd. of Exam'rs, OAL Dkt. No. EDU 8374-11, Initial Decision (Dec. 13, 2011), adopted Comm'r (January 27, 2012). http://njlaw.rutgers.edu/collections/oal/search.html.

In evaluating determinations by the Board of Examiners, "the Commissioner . . . shall not disturb the decision if the "decision is supported by sufficient credible evidence in the record" unless the appellant has demonstrated that the Board . . . acted in a manner that was arbitrary, capricious or contrary to law." N.J.A.C. 6A:4-4.1 The Department of

Education intended the standard of review for Commissioner determinations under Chapter Six to be "appellate in nature." 40 N.J.R. 4606(a).[2]

The arbitrary, capricious, or unreasonable standard consists of three inquiries:

> (1) whether the agency action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings upon which the agency based application of legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.
>
> [Public Serv. Elec. and Gas Co. v. New Jersey Dep't. of Envtl. Protect., 101 N.J. 95, 103 (1985).]

However, where there is room for two opinions the action is not arbitrary or capricious when exercised honestly and upon due consideration even though court may believe that an erroneous conclusion has been reached." Bayshore Sewerage Co. v. Department of Environmental Protection, 122 N.J. Super. 184, 199 (App. Div. 1973) (Internal citations omitted). Significantly, a "court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling." Ibid.

All teaching staff members in the state's public schools must hold a valid certificate before serving in any role in which they "teach, administer, direct or supervise the teaching, instruction, or educational guidance" of students. N.J.S.A. 18A:26-2. Under N.J.S.A. 18A:6-38 and N.J.S.A. 18A:26-2.7, the Board promulgated regulations for the required certification of persons employed in a public school district. Under those regulations, the Board issues three categories of educational certificates: instructional, administrative, and educational services. N.J.A.C. 6A:9-5.2(a). Endorsements for an educational services certificate include staff members such as a school psychologist or a school social worker. See N.J.A.C. 6A:9B-14.5, -14.9. These endorsements "coincide with the educational subjects or positions that share common attributes and thus are grouped under a particular certificate." Dennery v. Bd. of Educ., 131 N.J. 626, 633 (1993).

[2] In 2016, the Department of Education re-adopted the standard of review and amended N.J.A.C. 6A:4-4.1 to include the same standard of review for decisions by the School Ethics Commission. 48 N.J.R. 2782(a).

Accordingly, a person can work in the particular field based upon the endorsement(s) enumerated on the certificate.

Under N.J.A.C. 6A:9B-14.5(a), the school social worker endorsement allows the holder to act a school social worker within New Jersey in preschool through grade twelve. N.J.A.C. 6A:9B-14.5(c) advises that persons holding "a master's degree in social work from a regionally accredited college or university will be issued a standard educational services certificate with a school social worker endorsement." Notably, experience in a "school setting" is not required of an MSW before issuing a school social worker endorsement.

This significantly contrasts with other school staff member endorsements. For example, the Board will issue a school psychologist certificate to holders of a currently valid Nationally Certified School Psychologist[3] (NCSP) license under N.J.A.C. 6A:9B-14.9(e). Even alternate route master's degree applicants, must complete an externship of 1,200 hours, consisting of a "minimum of 600 clock hours . . . completed in a school setting with school-age children." N.J.A.C. 6A:9B-14.9(b)3. Moreover, the Board can issue a school psychologist certificate to the holder of a master's degree in clinical psychology [who] "presents official documentation of 600 clock hours of experience as a psychologist working with children in a clinical setting [and meets] the school psychology externship and practicum requirements by completing a 900-clock-hour school psychology externship in a New Jersey school, with school-age children, under [an] emergency certificate." N.J.A.C. 6A:9B-14.9(b)4.

Relevant to Etienne's application, N.J.A.C. 6A:9B-14.5(b) provides that other master's degree holders like Etienne can obtain the school social worker endorsement after completion of thirty graduate-level semester-hour credits with study in the following areas:

> 1. Psychology, including general psychology, educational psychology, psychology of adolescence, and child growth and development;

[3] Requiring successful completion of a 1,200-hour internship in school psychology, of which at least 600 hours must be in a school setting.

> 2. Special education and/or learning disabilities;
> 3. Social problems, including study in dealing with delinquency, poverty, interracial, and intercultural problems;
> 4. A minimum of six semester-hour credits in introductory and advanced social casework, including principles and practices in social casework, interviewing, and methods and skills in diagnosis;
> 5. Mental hygiene and social psychiatry, including dynamics of human behavior and psychopathology;
> 6. Medical information, including the role of the social worker in health problems or fundamentals of substance abuse and dependency;
> 7. Community organizations, agencies, and resources; and
> 8. Social policy and public welfare services, including the care and protection of at-risk children and families.
>
> [Ibid.]

The Board determined that Etienne only lacks three semester hours of advanced social casework. Under N.J.A.C. 6A:9B-4.12(b), if an applicant is deficient on certification requirements, they may present "evidence of alternative education and/or experience that he or she believes is equivalent to the area(s) of deficiency." However, the Board cannot waive or permit substitute experience for any test, GPA, degree completion, or approved educator preparation program completion requirement. N.J.A.C. 6A:9B-4.12 (c).

While the Board cannot waive the requirements, it can consider alternative education or experience if Etienne demonstrates, by a preponderance of the credible evidence, that the alternative education or experience is the one-to-one equivalent with the statutory requirements. Hutchinson v. New Jersey State Board of Examiners, EDU16373-12, Initial Decision (April 5, 2013), aff'd, Commissioner (May 15, 2013).

The Board of Social Worker Examiners addresses licensing and defines tasks permitted under social work certifications and licenses. "Clinical social work" means the professional application of social work methods and values in the assessment and psychotherapeutic counseling of individuals, families, or psychotherapy groups. N.J.A.C. 13:44G-1.2. Clinical assessment considers accepted diagnostic classifications. Id. Psychotherapeutic counseling is "an ongoing interaction between a social worker and an individual, family, or psychotherapy group for the purpose of helping to resolve symptoms

of mental disorder, psychosocial stress, relationship problems, or difficulties in coping with the social environment." Id. "Clinical social work services" can be performed only by an LCSW or an LSW under supervision [of an LCSW] under N.J.A.C. 13:44G-8. Id. (Emphasis added). In other words, without being an LCSW, an MSW cannot provide clinical social work services unless supervised.

The Board's November 5, 2020, decision requires experience within a school setting. Yet, unlike other endorsements, the regulation does not require experience in a school setting for the endorsement. Indeed, an MSW may have a degree and fieldwork but not necessarily within a school setting and can still qualify for the endorsement. Still, I found that Etienne has school setting experience as the mobile crisis school liaison in her mental screener position and as a prevention specialist completing a program with students and families addressing school-related, inter-personal, and substance abuse issues.

Further, Etienne's clinical work as a LAMFT involves long-term services to children, and she employs the skills expected by the Board. Specifically, I found that Etienne interviews, diagnoses, counsels, develops a case study or treatment plan, and prepares progress notes and reports.

Moreover, a MSW would require supervision to provide any clinical social work services. The one-to-one equivalence is directed to the three semester hours of advanced social work. A graduate student in an MSW program is just that; a student performing "advanced social casework" in a supervised educational program obtaining a grade or satisfactory completion. The Board is not required to issue a school social work endorsement only to a LCSW authorized to provide clinical social work services without supervision.

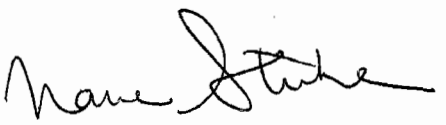
Therefore, I **CONCLUDE** that the Board's imposition of school setting prerequisites, even if preferred, is not within the regulation and beyond the regulation's requirements. I similarly **CONCLUDE** that the Board's insistence that Etienne have unsupervised job experience to have one-to-one equivalence to a supervised educational program exceeds the regulation's requirements. Moreover, given my findings of fact and

this discussion, I **CONCLUDE** that a preponderance of the evidence exists that Etienne achieved one-to-one equivalence to the three semester hours of advanced social casework through her previous work experiences. Thus, I **CONCLUDE** that the Board's decision is insufficiently supported, and Etienne is entitled to the educational services certificate and endorsement as a school social worker.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the Board of Examiner's denial be and is hereby **REVERSED,** and that Etienne be given an educational certification with a school social worker endorsement.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** upon interlocutory review under N.J.A.C. 1:1-14.10 or at the end of the contested case under N.J.A.C. 1:1-18.6.



September 7, 2021

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: September 7, 2021

Date Mailed to Parties: September 7, 2021

Lb

APPENDIX

Witnesses

For Petitioner:

Neysa Etienne

Jackelin Alerte

For Respondent:

Rani Singh

Exhibits

Joint:

J-1 State Board of Examiner's decision dated September 24, 2019

For Petitioner:

P-1 (J-1)

P-2 Petition of Appeal

P-3 Board Counsel's email

P-4 Petitioner's resume

P-5 RWJ Clara Maas Psychiatric Emergent Unit employer letter and job description

P-6 New Jersey Mental Health Screener Certification

P-7 Clara Maas assessment form and safety plan (see also R4)

P-8 Wayne Counseling and Family Services employer letter and job description

P-9 Wayne Counseling and Family Services progress note forms

P-10 RWJ, Barnabas Behavioral Health, Institute for Prevention employer letter and job description

P-11 School Social Worker endorsement 3200

P-12 not in evidence

P-13 Associate License in Marriage and Family Therapy

P-14 Jackelin Santiaga Alerte's letter of support

For Respondent

R-1 Certification Application dated September 9, 2014

R-2 Department of Education, Office of Licensing and Credentials' letter regarding Board's denial decision dated November 5, 2015

R-3 Department of Education, Office of Licensing and Credentials' letter dated February 25, 2016

R-4 Petitioner's documents in support of application review dated May 11, 2019

R-5 (J-1)

R-6 Petitioner's letter and supplemental documentation

R-7 State Board of Examiner's decision dated November 5, 2020

R-8 Petitioner's letter dated November 20, 2020, enclosing her Mental Health Screener Certification

307-21

New Jersey Commissioner of Education

Final Decision

Board of Education of the Borough of Kinnelon, Morris County,

Petitioner,

v.

Karen D'Amico,

Respondent.

Synopsis

The petitioning Board contended that respondent – a member of the Kinnelon Board of Education – violated *N.J.S.A.* 18A:12-2, which mandates that no one may serve on a board of education if they have a direct or indirect interest in a claim against the board on which he/she sits. The Board argued that respondent is disqualified from serving as a member because of a special education due process petition that her husband filed against the Board, asserting that their child was being denied educational services for the 2020-2021 school year and seeking reimbursement for the cost of the child's attendance at a private school. Also at issue is a letter sent by respondent to the Board on August 13, 2021, notifying the Board of her intent to unilaterally place her child in a private school and reserving the right to seek reimbursement for the costs of that placement if the dispute between the parties over the child's services was not resolved amicably within 10 days. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there is no genuine issue as to any material fact here, and the matter is ripe for summary decision; the pivotal issue in this case is whether respondent, who is indisputably a Board member, is in violation of *N.J.S.A.* 18A:12-2 through her interest either directly or indirectly in a claim against the Board; when the instant due process petition was filed, respondent was in violation of *N.J.S.A.* 18A:12-2, as even without her name on the petition, respondent nevertheless had an interest in a claim against the Board; however, one hour after electronically filing the petition in February 2021, the respondent and her husband requested that their petition be disregarded, without additional explanation. The ALJ concluded that respondent was in violation of *N.J.S.A.* 18A:12-2 when the due process petition involving her child was filed against the Board, but the withdrawal of that petition one hour after filing remedied the violation; further, the 10-day letter did not violate *N.J.S.A.* 18A:12-2. Accordingly, the ALJ granted respondent's motion for summary decision and denied the Board's motion for summary decision.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ that respondent violated *N.J.S.A.* 18A:12-2 by filing the due process petition, but that the violation was remedied when the petition was later withdrawn. However, the Commissioner found that by sending the 10 day letter, respondent asserted a claim against the Board that has the potential to disqualify her from serving as a Board member. Being unable to conclude on the present record whether there is currently a substantial conflict between the parties, the Commissioner remanded the matter to the OAL for additional fact finding.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

307-21

OAL Dkt. No. EDU 04830-21
Agency Dkt. No. 43-3/21

New Jersey Commissioner of Education

Final Decision

Board of Education of the Borough of Kinnelon, Morris County,

Petitioner,

v.

Karen D'Amico,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the Board pursuant to *N.J.A.C.* 1:1-18.4, and respondent's reply thereto, have been reviewed and considered.

In this matter, the Board contends that respondent, who is a member of the Board, has a direct or indirect interest in a substantial financial claim against the Board in violation of *N.J.S.A.* 18A:12-2 and is therefore disqualified from serving as a member of the Board. The Board's claim arises from a special education due process petition that respondent[1] filed against the Board, in which respondent asserted that her child was being denied educational services by the Board for the 2020-2021 school year and sought reimbursement of costs of the child's attendance at a private school. Also at issue is a letter sent by respondent to the Board

[1] The due process petition omitted respondent's name and was ostensibly filed solely by her spouse. However, as respondent's interests – both parental and financial – would also be served by the relief sought in the petition, the Commissioner concludes that it is appropriate to treat the petition as if it was also filed by respondent.

on August 13, 2021, in which respondent notified the Board of her intent to unilaterally place her child in a private school and reserved the right to seek reimbursement for the costs of that placement if the dispute between the parties over the child's services was not resolved amicably within 10 days (10-day letter). Following cross-motions for summary decision, the Administrative Law Judge (ALJ) concluded that respondent was in violation of *N.J.S.A.* 18A:12-2 when the due process petition involving her child was filed against the Board, but the withdrawal of that petition one hour after filing remedied the violation. The ALJ further concluded that the 10-day letter did not violate *N.J.S.A.* 18A:12-2. Accordingly, the ALJ granted respondent's motion for summary decision and denied the Board's motion for summary decision.

In its exceptions, the Board argues that *N.J.S.A.* 18A:12-2 does not require a board member to file or participate in pending litigation to have a conflict, but only that there is a likelihood of litigation, particularly when a claim includes a request for specific monetary relief. The Board contends that respondent's withdrawal of the due process petition is immaterial and cannot cure her conflict of interest. The Board further points to a history of petitions filed by respondent as demonstrating a likelihood of litigation, as well as her actual interest in a claim against the Board. [2]

In reply, respondent argues that she does not have a disqualifying conflict of interest because she does not have a pending claim against the Board, which distinguishes her

[2] These other petitions were filed prior to respondent's election to the Board and resolved by respondent's withdrawal with prejudice at the OAL, and therefore they do not create a conflict in violation of *N.J.S.A.* 18A:12-2. The Commissioner does not find the Board's argument that a history of filings demonstrates a likelihood of future litigation to be persuasive. Whether a conflict between a board member and a board is substantial enough to warrant removal must be considered on a case-by-case basis, with an analysis of the dispute at issue at the time.

circumstances from those at issue in the cases cited by the Board. Respondent contends that her withdrawal of the due process petition demonstrates that litigation between the parties is unlikely.

Upon review, the Commissioner concurs with the ALJ that by filing a due process petition seeking monetary relief from the Board, respondent violated *N.J.S.A.* 18A:12-2, and that the violation was remedied when the petition was withdrawn one hour later.[3]

However, the Commissioner disagrees that the 10-day letter cannot be a "claim" against the Board because no due process petition was filed relative to the letter. The Commissioner has previously held that a Notice of Tort Claim filed against a board of education constitutes a claim. *Bd. of Educ. of the Borough of Berlin, Camden Cty. v. Charlotte Lee*, Commissioner Decision No. 238-02 (June 14, 2002). In that matter, the Commissioner affirmed the Initial Decision, in which the ALJ noted that a "notice of tort claim is not merely an inchoate claim that may be pursued at some future date, but represents an actual claim against a public entity which may be subject to settlement and, failing that, may be the subject of a future court action against the public entity." *Bd. of Educ. of the Borough of Berlin, Camden Cty. v. Charlotte Lee*, EDU 6050-01 (Apr. 29, 2002). Just as the law requires a Notice of Tort Claim to be filed prior to commencing legal action against a public entity, the law also requires parents seeking reimbursement from a board of education for a unilateral placement to send a 10-day letter. *N.J.A.C.* 6A:14-2.10. Such reimbursement is obtainable through litigation at the OAL. *Ibid.* By sending the letter, respondent has asserted a claim against the Board that has the potential to disqualify her from serving as a Board member.

[3] Given the fact-specific nature of the type of conflict analysis at issue in this matter, the Commissioner finds the extremely short time frame significant.

However, the Commissioner is mindful of the findings of the New Jersey Supreme Court concerning disputes about special education services for the children of board of education members. In *Bd. of Educ. of City of Sea Isle City v. Kennedy*, 196 *N.J.* 1 (2008), the Court concluded that a board member should not be removed from office merely because she advanced a claim against the board involving her or her immediate family member's interest. *Id.* at 17-18. The Court recognized that disagreements between parents of special education students and the board of education may require effort to resolve, and multiple meetings or even mediation following the filing of a due process hearing request may not always be the type of conflict that requires removal. *Id.* at 21-22. The Court instructed the Commissioner to examine the nature of the dispute to determine "when a conflict over a child's educational program becomes so substantial that removal from office is required." *Id.* at 22. Finally, the Court concluded that when a due process claim includes a specific request for monetary relief, a substantial conflict has occurred, and removal is appropriate. *Ibid.*

The Commissioner is unable to conclude, based on the current record, whether there is currently a substantial conflict between the parties. The 10-day letter indicates that respondent will unilaterally place her child in a private school if the matter is not resolved, but there is no further information regarding whether a resolution occurred. If a resolution did occur, then the dispute may not be substantial enough to warrant respondent's removal from the board. If a resolution did not occur, and respondent followed through with the unilateral placement, respondent has a claim for monetary relief against the Board that precludes her continued service as a board member.

Accordingly, this matter is remanded for further fact-finding regarding the current state of the dispute between the parties identified in the August 13, 2021 10-day letter sent by respondent to the Board.

IT IS SO ORDERED.[4]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 2, 2021
Date of Mailing: December 3, 2021

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 04830-21
AGENCY DKT. NO. 43-3/21

BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,
Petitioner,
v.
KAREN D'AMICO,
Respondent.

Jarrid H. Kantor, Esq., for petitioner (Antonelli Kantor, attorneys)

Hillary D. Freeman, Esq., for respondent (Freeman Law Offices, attorneys)

Record Closed: August 26, 2021 Decided: October 19, 2021

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

Petitioner, Kinnelon Board of Education (Board or KBOE) requests, inter alia, that the Commissioner of Education construe the provisions of N.J.S.A. 18A:12-2 and determine and declare that Board Member Karen D'Amico has "a direct or indirect interest

in a substantial financial claim" against the Board and is disqualified from serving as a member of the Board as a result of said financial claims, pursuant to N.J.S.A. 18A:12-2.

PROCEDURAL HISTORY

On or about April 13, 2021, the Board filed with the New Jersey Department of Education an amended Verified Petition for a Declaratory Ruling Pursuant to N.J.A.C. 6A:3-2.1 (Verified Petition).[1] On or about May 4, 2021, respondent filed an answer to the Verified Petition, which includes an affirmative defense that the Verified Petition "fails to state a claim upon which relief may be granted against Respondent."

By letter dated June 1, 2021, the Acting Commissioner of Education notified the parties as follows:

> I have reviewed the petition for declaratory ruling in the above-captioned matter, together with the respondent's answer. Upon such review I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq.*
>
> Accordingly, petitioner's request for a declaratory ruling is declined and this matter shall be transmitted to the Office of Administrative Law.

The Department of Education (Department) transmitted the case to the Office of Administrative Law (OAL) where it was filed on June 11, 2021. The transmittal noted that "Petitioner filed motion for summary decision following filing of answer (hard copy to follow due to size)," but the hard copy of the motion was not transmitted. On June 30, 2021, petitioner submitted a copy of the motion directly to the OAL, consisting of a statement of material facts and brief. On July 29, 2021, respondent filed a response/cross-motion for summary decision, consisting of a brief. Petitioner filed a reply letter brief on August 20,

[1] Per Mr. Kantor's April 12, 2021, letter to the Department of Education, it was amended to incorporate additional redactions and to remove the Board's request for attorneys' fees.

2021. On August 25, 2021, petitioner supplemented its filing with a letter and attachment. On August 26, 2021, respondent replied thereto by way of an email.

DECLARATORY RULING

The Verified Petition identifies the parties and contains a statement of facts reflecting "Actual and Threatened Litigation filed by D'Amicos *Prior* to D'Amico Being Sworn In as a Member of the KBOE" and "Actual and Threatened Litigation filed by D'Amicos *Subsequent* to D'Amico Being Sworn In as a Member of the KBOE," and two counts. Count One is as follows:

> 24. Petitioner Kinnelon Board of Education repeats and re-alleges each of the forgoing paragraphs of this Verified Petition as if set forth at length herein.
> 25. N.J.S.A. 18A:12-2 mandates that no board member may serve who has a direct or indirect interest in a claim against the board of education on which he/she sits.
> 26. Each of the Due Process Petitions filed by the D'Amicos requested the following monetary relief: 1) an order finding the D'Amicos are entitled to tuition reimbursement for D.D.'s private school education; 2) an Order directing the District to reimburse the D'Amicos for all costs and expenses incurred as the result of required educational services for D.D., including but not limited transportation [sic] and tutoring services; and 3) reserved the right to seek reimbursement of attorneys' and expert fees and costs, as well as other relief.
> 27. Each of the D'Amicos' 10-Day letters sent to the KBOE further place the KBOE on notice that the D'Amicos intended to see reimbursement of all costs associated with D.D.'s placement in a private school for the 2018-19, 2019-20, and 2020-21 school years.
> 28. Karen D'Amico has previously and continues to have a direct or indirect substantial financial interest in her claims against the KBOE for reimbursement of the costs paid by the D'Amicos for D.D.'s attendance at a private school for the stated school years, anticipated to exceed $30,000 per school year.
> 29. The D'Amico's [sic] have given no indication that they are abandoning their 2020-2021 claims with prejudice and the KBOE has been placed on statutory notice of said claims.

WHEREFORE, the Petitioner, Kinnelon Board of Education, respectfully prays that the Commissioner shall construe the provisions of N.J.S.A. 18A:12-2 and determine and declare the following: (a) Respondent Karen D'Amico has a direct or indirect interest in a substantial financial claim against the Kinnelon Board of Education; (b) Respondent is disqualified from serving as a member of the Kinnelon Board of Education, as a result of said financial claims, pursuant to N.J.S.A. 18A:12-2; (c) Awarding Petitioner any other relief as may be just, proper and equitable.

Count Two is as follows:

30. Petitioner Kinnelon Board of Education repeats and re-alleges each of the forgoing paragraphs of this Verified Petition as if set forth at length herein.
31. The D'Amicos have filed three separate Due Process Petitions against the Kinnelon Board of Education since August of 2019.
32. The D'Amicos' claims arising out of the 2020-21 school year on behalf of D.D. currently remain unresolved.
33. The D'Amicos' [sic] continue to pursue the claim that D.D. is being denied required educational services for the 2020-21 school year.
34. No agreement between the Kinnelon Board of Education and the D'Amicos has been reached with respect to the claims asserted on behalf of D.D. in connection with the provision of educational services since D.D.'s removal from the District in 2018.
35. As of this date, Respondent has not abandoned any of the previously noticed claims for the 2020-21 school year, with prejudice.
36. It is likely that resolution of said claims will require protracted litigation.
37. Pursuant to N.J.S.A. 18A:12-2, Karen D'Amico's direct or indirect interest in said unresolved claims constitute a substantial interest in claims against the Kinnelon Board of Education.
38. Said interest disqualifies Respondent from serving as a member of the Kinnelon Board of Education.

WHEREFORE, the Petitioner, Kinnelon Board of Education, respectfully prays that the Commissioner shall construe the provisions of N.J.S.A. 18A:12-2 and determine and declare the following: (a) Respondent Karen D'Amico has a direct or

> indirect interest in a substantial financial claim against the Kinnelon Board of Education; (b) Respondent is disqualified from serving as a member of the Kinnelon Board of Education, as a result of said financial claims, pursuant to N.J.S.A. 18A:12-2; (c) Awarding Petitioner any other relief as may be just, proper and equitable.

As set forth above, both counts seek "that the Commissioner shall construe the provisions of N.J.S.A. 18A:12-2 and determine and declare" that D'Amico has a direct or indirect interest "in a substantial financial claim" against the Board and that she is disqualified from serving as a member of the Board.

N.J.A.C. 6A:3-2.1 governs petitions for a declaratory ruling as follows:

> (a) Pursuant to N.J.S.A. 52:14B-8[2], any interested person(s) may petition the Commissioner for a declaratory ruling with respect to rights, responsibilities, and status arising from any statute or rule within the jurisdiction of the Commissioner. The determination to entertain such petitions for declaratory ruling shall be within the sole discretion of the Commissioner. If such request is granted, the matter shall proceed in accordance with this chapter as they pertain to petitions. A declaratory ruling shall be binding upon the Commissioner and all parties to the proceedings on the specific statement of facts set forth therein.
>
> > 1. A request for a declaratory ruling shall reflect adverse positions on the statute or rule in question by the parties in interest, may not seek consequential relief beyond a declaration as to the meaning of the statute or rule, and may not be based on underlying facts that are future, contingent, uncertain, or disputed.
>
> (b) Except that the format of the petition shall be as set forth in this subchapter, the rules pertaining to filing, service

[2] Subject to the provisions of section 4(b) and 4(e) of chapter 20, laws of 1944, as amended and supplemented (C. 52:17A-4b and 4e), an agency upon the request of any interested person may in its discretion make a declaratory ruling with respect to the applicability to any person, property or state of facts of any statute or rule enforced or administered by that agency. A declaratory ruling shall bind the agency and all parties to the proceedings on the state of facts alleged. Full opportunity for hearing shall be afforded to the interested parties. Such ruling shall be deemed a final decision or action subject to review in the Appellate Division of the Superior Court. Nothing herein shall affect the right or practice of every agency in its sole discretion to render advisory opinions. N.J.S.A. 52:14B-8.

> and answer of petitions as set forth in this chapter shall apply to petitions for declaratory ruling.

The Verified Petition does not "reflect adverse positions on the statute or rule in question by the parties in interest," and it seeks "consequential relief beyond a declaration as to the meaning of the statute or rule" in contravention of N.J.A.C. 6A:3-2.1. Accordingly, I **CONCLUDE** that the Verified Petition was not properly filed as a request for a declaratory ruling. Further, the transmittal reflects that the "Commissioner declined petitioner's request for a declaratory ruling and is transmitting as a contested case." Specifically, the Acting Commissioner stated that she determined to "decline the request pursuant to N.J.S.A. 52:14B-8 and N.J.A.C. 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to N.J.A.C. 6A:3-1.1 et seq. Issuance of a declaratory ruling by an agency is discretionary. N.J.A.C. 6A:3-2.1(a). N.J.S.A. 52:14B-8. See also United Sav. Bank v. State, 360 N.J. Super. 520, 524 (App. Div. 2003). Although Petitioner relies upon Board of Educ. of City of Sea Isle City v. Kennedy, 196 N.J. 1 (2008), it is noted that the opinion states that the "Commissioner transferred the Board's request for declaratory relief," and Footnote 3 reflects "[a]t the request of the Board, the ALJ agreed to issue first a decision on the declaratory relief petition." Board of Educ. of City of Sea Isle City v. Kennedy, 196 N.J. 1, 9-10 (2008).

In view of the foregoing, I **CONCLUDE** that the request for a declaratory ruling is **DENIED** and that this matter is limited to the merits of the contested case.

MOTION FOR SUMMARY DECISION

Per the Verified Petition, petitioner seeks a determination that D'Amico "has a direct or indirect interest in a substantial financial claim" against the Board and that she be disqualified from serving as a member of the Board pursuant to N.J.S.A. 18A:12-2. However, the Preliminary Statement in petitioner's Brief states:

> The issue before the Commissioner is straightforward: the undisputed facts establish that Respondent, Karen D'Amico ("Respondent" or "D'Amico") filed and threatened to file

> multiple Due Process Petitions, seeking monetary relief, thereby creating a disqualifying conflict of interest under the School Ethics Act ("SEA"), N.J.S.A. 18A:12-2. The Respondent clearly has an interest in a claim against the Kinnelon Board or [sic] Education ("Petitioner" or "KBOE") and demonstrated a likelihood of 'protracted and intractable litigation' between the Respondent and the Petitioner, which constitutes a disqualifying conflict of interest under the SEA. As a result of said statutory conflict and pursuant to the School Ethics Act, it is necessary that Respondent resign her position at the KBOE. Accordingly, the KBOE's Motion for Summary Decision should be granted as there are no issues of material fact in dispute and the Petitioner is entitled to summary decision as a matter of law.

Additionally, the Procedural History in petitioner's Brief states: "Petitioner filed a verified petition seeking a declaratory ruling for the removal of Respondent from the KBOE based on a conflict of interest."

Although petitioner argues "a disqualifying conflict of interest under the School Ethics Act ("SEA"), N.J.S.A. 18A:12-2," this statute does not fall under the School Ethics Act, N.J.S.A. 18A:12-21 to -34, and the matter was transmitted to the OAL by the Department of Education Office of Controversies and Disputes, not the School Ethics Commission.

N.J.S.A. 18A:12-2 states:

> No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor, in the case of local and regional school districts, shall he hold office as mayor or as a member of the governing body of a municipality, nor, in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county.

Thus, the pivotal issue is whether D'Amico, indisputably a Board member, is in violation of N.J.S.A. 18A:12-2 by being interested directly or indirectly in any claim against the Board. The Board argues that respondent's interest in multiple claims against the

Board seeking monetary relief constitutes a disqualifying conflict of interest. Respondent denies that there exists a disqualifying conflict of interest and argues that the Verified Petition should be dismissed because D'Amico has no pending claim against the Board.

D'Amico was sworn in as a member of the Board in January 2021. Unlike the D'Amicos' prior due process petitions, the caption of the due process petition filed after January 2021 reflected only the name of respondent's husband as petitioner. A board member may not have an interest, directly or indirectly, in any claim against the board. A due process petition – a claim against the board – would require D'Amico's removal from the Board pursuant to N.J.S.A. 18A:12-2. Accordingly, I **CONCLUDE** that when the due process petition was filed, she was in violation of N.J.S.A. 18A:12-2, as even without her name on the due process petition, respondent nevertheless had an interest in a claim against the Board. That said, the Verified Petition reflects that "one (1) hour after electronically filing the February 2021, Petition, the D'Amicos requested their Petition be disregard[ed] without explanation." Since this Petition alleges only violation of N.J.S.A. 18:12-2 and not any conflict of interest or code of conduct violations under the School Ethics Act, I **CONCLUDE** that withdrawal of the due process petition remedied the violation.

Notwithstanding the foregoing, it is observed that similar to the allegations in the Verified Petition, on August 13, 2021, the D'Amicos again gave a "10-day letter," referencing the applicable regulation[3]. Having reviewed the "10-day letter" regulation, I **CONCLUDE** that the 10-day letter" is a "notice" that relates to reimbursement, and is not a "claim," as no due process petition has been filed relative to the letter. Accordingly, I further **CONCLUDE** that the 10-day letter is not a violation of N.J.S.A. 18A:12-2.

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision may be "rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Further, "when a motion for summary decision is made and

[3] Mindful of the redactions to the Petition, the regulation cited in the August 13, 2021, letter is not included herein.

supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Id. This standard is substantially similar to that governing a civil motion under New Jersey Court Rule 4:46-2 for summary judgment. E.S. v. Division of Medical Assistance & Health Services, 412 N.J. Super. 340, 350 (App. Div. 2010); Contini v. Board of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995). In Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995), the New Jersey Supreme Court set forth the standard governing a motion for summary judgment:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.
>
> [Brill, 142 N.J. at 540 (citations omitted).]

A contested case before the Office of Administrative Law "can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts, as developed on motion or otherwise, indicate that a particular disposition is required as a matter of law." In re Robros Recycling Corp., 226 N.J. Super. 343, 350 (App. Div.), certif. denied, 113 N.J. 638 (1988).

Here, there is no genuine issue as to any material fact, as the parties do not dispute that respondent filed, but thereafter withdrew a due process petition or that respondent gave a "10-day letter." Thus, I **CONCLUDE** that this matter is appropriate for summary decision. Since there exists no violation of N.J.S.A. 18A:12-2, I further **CONCLUDE** that the petitioner's motion should be denied, respondent's cross-motion should be granted, and the Verified Petition should be dismissed.

ORDER

It is hereby **ORDERED** that the petitioner's motion for summary decision is **DENIED**, the respondent's cross-motion for summary decision is **GRANTED**, and the Verified Petition is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Kelly J Kirk

October 19, 2021

DATE

KELLY J. KIRK, ALJ

Date Received at Agency: October 19, 2021

Date Mailed to Parties: October 19, 2021

db

306-21

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

December 3, 2021

VIA EMAIL ONLY
Stephen R. Fogarty, Esq.
Fogarty & Hara
21-00 Route 208 South
Fair Lawn, NJ 07410

Jaclyn M. Frey, DAG
Office of the Attorney General
Division of Law
25 Market Street, P.O. Box 112
Trenton, NJ 08625

Re: *In the Matter of Letizia Pantoliano, Cliffside Park Board of Education, Bergen County, Agency Dkt. No. 143-8/21, Commissioner Decision No. 225-21SEC.*

Dear Counsel:

I have reviewed the materials filed in connection with respondent's motion for reconsideration of the Commissioner's October 13, 2021 decision, reprimanding respondent for failure to timely complete board member training required by the School Ethics Act.

Pursuant to *N.J.A.C.* 6A:3-1.15(b)(2), a motion for reconsideration shall be determined based upon the following:

i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
iii. newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

Upon review and consideration of the submissions, I find that the respondent has failed to satisfy any of the requisites for granting such relief specified in *N.J.A.C.* 6A:3-1.15(b)2. In her papers, respondent argues that due to her ongoing technical issues with the New Jersey School Board Association (NJSBA) website, as well as the discovery of email communications that were not previously disclosed, this matter should be reconsidered, and the penalty of reprimand should be vacated. Respondent submitted email communications between the Business Administrator for Cliffside Park Board of Education and staff of the New Jersey Department of Education's Office of School Ethics and Compliance that alerted the School Ethics Commission (SEC) to respondent's technical problems. Despite respondent's arguments, the SEC had record of the email communications – which occurred in August 2021, after the issuance of the Order to Show Cause – since its staff member was a party to the emails. Additionally, the SEC was aware of respondent's difficulty accessing the NJSBA website as it acknowledged that fact in its decision. As such, respondent's submission does not include newly discovered evidence and fails to meet the standard for reconsideration. Further, respondent does not dispute that she failed to timely complete her training by the deadline of March 31, 2021, so she has not demonstrated that a penalty of reprimand is not warranted.

Accordingly, the motion for reconsideration is hereby DENIED.

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner of Education

c: State Law Library
Board Secretary, Cliffside Park Board of Education
School Ethics Commission

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PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

December 3, 2021

VIA EMAIL ONLY
Adrienne Doyle
River Edge Board of Education
410 Bogert Road
River Edge, NJ 07661

Jaclyn M. Frey, DAG
Office of the Attorney General
Division of Law
25 Market Street, P.O. Box 112
Trenton, NJ 08625

Re: *In the Matter of Adrienne Doyle, River Edge Board of Education, Bergen County, Agency Dkt. No. 145-8/21, Commissioner Decision No. 227-21SEC.*

Dear Parties:

I have reviewed the materials filed in connection with respondent's motion for reconsideration of the Commissioner's October 14, 2021 decision, removing respondent as a member of the River Edge Board of Education for failure to timely complete board member training required by the School Ethics Act.

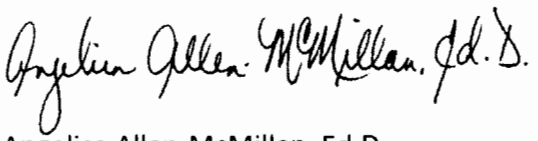
Pursuant to *N.J.A.C.* 6A:3-1.15(b)(2), a motion for reconsideration shall be determined based upon the following:

i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
iii. newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

Upon review and consideration of the submissions, I have determined to grant respondent's request for reconsideration of the Commissioner's decision. In her papers, respondent indicates that notifications from the School Ethics Commission were sent to an email address that respondent previously used for Board of Education business, but which she has not used since she was provided an email address in the district's network. In the absence of any explanation for or opposition to respondent's statement in the response to the motion filed by counsel for the SEC, the Commissioner accepts respondent's representation that she did not receive the notifications. As respondent did not receive notice of the Order to Show Cause or the SEC's decision, and accordingly did not have the opportunity to respond, the Commissioner finds that the standard for reconsideration has been met. Accordingly, the motion for reconsideration is hereby granted.

Respondent further states that she is scheduled to complete the required training on November 17, 2021. Respondent is directed to submit proof of completion to the Office of Controversies and Disputes on or before December 31, 2021. Following respondent's submission, or her failure to do so by December 31, 2021, an amended decision will be issued. Until the amended decision is issued, my October 14, 2021 decision remains in effect.

Sincerely,



Angelica Allen-McMillan, Ed.D.
Acting Commissioner of Education

c: State Law Library
Board Secretary, River Edge Board of Education
School Ethics Commission

309-21SEC

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310-21

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

December 3, 2021

VIA EMAIL ONLY
Thomas O. Johnston, Esq.
Johnston Law Firm, LLC
151 Forest Street, Suite A
Montclair, NJ 07042

Jaclyn M. Frey, DAG
Office of the Attorney General
Division of Law
25 Market Street, P.O. Box 112
Trenton, NJ 08625

Re: *In the Matter of Elizabeth Rainey-Goka, University Heights Charter School, Essex County, Agency Dkt. No. 165-8/21, Commissioner Decision No. 246-21SEC.*

Dear Parties:

I have reviewed the materials filed in connection with respondent's motion for reconsideration of the Commissioner's October 14, 2021 decision, removing respondent as a member of the University Heights Charter School Board of Trustees for failure to timely complete board member training required by the School Ethics Act.

Pursuant to *N.J.A.C.* 6A:3-1.15(b)(2), a motion for reconsideration shall be determined based upon the following:

i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
iii. newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

Upon review and consideration of the submissions, I have determined to grant respondent's request for reconsideration of the Commissioner's decision. In her papers, respondent indicates that she did not receive emails from the School Ethics Commission. In the absence of any explanation for or opposition to respondent's statement in the response to the motion filed by counsel for the SEC, the Commissioner accepts respondent's representation that she did not receive the emails. As respondent did not receive notice of the Order to Show Cause or the SEC's decision, and accordingly did not have the opportunity to respond, the Commissioner finds that the standard for reconsideration has been met. Accordingly, the motion for reconsideration is hereby granted.

Respondent further states that she is willing to complete the required training as soon as possible. Respondent is directed to submit proof of completion to the Office of Controversies and Disputes on or before December 31, 2021. Following respondent's submission, or her failure to do so by December 31, 2021, an amended decision will be issued. Until the amended decision is issued, my October 14, 2021 decision remains in effect.

Sincerely,



Angelica Allen-McMillan, Ed.D.
Acting Commissioner of Education

c: State Law Library
Board Secretary, University Heights Charter School Board of Trustees
School Ethics Commission

310-21SEC

311-21

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

December 6, 2021

VIA EMAIL
Maryann Moretti
12 Meadow Ridge Lane
Lafayette, NJ 07932

Marc H. Zitomer, Esq.
Schenck, Price, Smith & King, LLP
115 West Century Road, Suite 100
Paramus, NJ 07652

Re: *M.M., on behalf of minor child v. Board of Education of the Township of Lafayette, Sussex County, Agency Dkt. No. 94-5/20.*

Dear Parties:

I have reviewed the papers filed in connection with petitioner's motion to strike portions of the October 21, 2021 opposition to petitioner's motion for stay filed by respondent before Administrative Law Judge Jude-Anthony Tiscornia. Petitioner's motion to strike was previously denied by Judge Tiscornia. Accordingly, the Commissioner considers the motion pending before her to be a request for interlocutory review of Judge Tiscornia's Order. Upon full consideration of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10. Accordingly, petitioner's request for interlocutory review is hereby denied.

Petitioner also moves to strike portions of respondent's November 23, 2021 letter brief to the Commissioner in opposition to petitioner's motion for stay. There is no provision in the applicable statues or regulations for a motion to strike filings or portions of filings pending before the Commissioner. Accordingly, petitioner's motion has not been considered.

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

c: Jude-Anthony Tiscornia, Administrative Law Judge
Clerk, Office of Administrative Law

311-21L

312-21
OAL Dkt. No. EDU 11437-20
Agency Dkt. No. 221-10/20

New Jersey Commissioner of Education

Final Decision

H.S., on behalf of minor child, K.S.,

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 7, 2021
Date of Mailing: December 7, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11437-20
AGENCY DKT. NO. 221-10/20

H.S. ON BEHALF OF MINOR CHILD K.S.,
Petitioner,
v.
CITY OF JERSEY CITY BOARD OF EDUCATION, HUDSON COUNTY,
Respondent.

Corinne Mullen, Esq., for petitioner (The Mullen Law Firm, attorneys)

Jessika Kleen, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: November 10, 2021 Decided: November 18, 2021

BEFORE **SUSANA E. GUERRERO**, ALJ:

Petitioner H.S. on behalf of K.S. filed a Petition of Appeal with the Commissioner of Education challenging the imposed suspension by the respondent City of Jersey City Board of Education. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed as a contested case. After numerous telephone conferences, the parties reached an amicable resolution and counsel for

respondent submitted the attached Settlement Agreement, along with correspondence from the Board approving the settlement.

I have reviewed the record and the terms of the consent order and I **FIND**:

1. The parties have voluntarily agreed to the consent order as evidenced by their signatures or their representatives' signatures.

2. The consent order fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

11/18/21
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: 11-22-21

Date Mailed to Parties: 11-22-21

jb

Jessika Kleen, Esq.
MACHADO LAW GROUP
1 Cleveland Place
Springfield, New Jersey 07081
Phone: 973-232-5291
FAX: 973-232-6261
Attorneys for Respondent
Jersey City Board of Education

H.S. o/b/o K.S.,	:	DEPARTMENT OF EDUCATION OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
	:	OAL Dkt. No.: EDU 11437-2020 N
v.	:	Agency Dkt. No.: 221-10/20
	:	
Jersey City Board of Education,	:	SETTLEMENT AGREEMENT
	:	
Respondent.	:	
	:	

THIS SETTLEMENT AGREEMENT (the "Agreement") made by and between the Jersey City Board of Education, with its principal office located in Jersey City, New Jersey (hereinafter referred to as the "Board" or "District") and H.S. (hereinafter referred to as "Parent") on behalf of student K.S., a minor (hereinafter referred to as "K.S.").

NOW THEREFORE, in consideration of the mutual premises and promises the parties hereto agree as follows:

1. The District is in receipt of the attached letter from parent. Attached hereto as **Exhibit A.** As such, the District shall not produce pursuant to any document request from any college or institution of higher education any discipline record regarding K.S. resulting from the incident which occurred in May of 2019 and was reported to the District in or around June of 2020 (hereinafter "HIB incident").
2. The parent, on behalf of K.S., hereby agrees to sign a Stipulation of Dismissal withdrawing, with prejudice, the above captioned petition of appeal and further agrees not to pursue any further proceeding or complaint before the Jersey City Board of Education, other agency, or court, including Federal or Superior Court, as it relates to the HIB incident, or the discipline which the District imposed in relation to same.
3. As further consideration for the Agreement, the parties agree that, following the full execution of this Agreement, they will keep all terms of this Agreement completely confidential. Notwithstanding anything to the contrary contained herein, it is expressly understood and agreed that, following the full execution of this Agreement, neither the parent nor her attorney will take any action to publicize the terms or nature of this Agreement except that disclosure is permitted: (1) as necessary with regard to any proceeding for the enforcement of this Agreement; (2) to the

student's immediate family, treating physicians/therapists and attorneys, who shall agree not to disclose the fact of or any of the terms of this Agreement as if they were a party to this Agreement; (3) as may be required by any court or agency of competent jurisdiction; and (4) as may be required by law. To the extent that K.S. is asked about this matter, K.S. may indicate that the matter is "resolved," but will make no other disclosure regarding this matter. Violation of this confidentiality clause by Parent and/or K.S. shall result in the termination of all of the District's obligations under this Settlement Agreement, and will result in the District providing K.S.'s discipline record in connection with the HIB incident to any college or institution of higher education requesting same.

4. This Agreement shall not constitute, be interpreted, construed or used as evidence of any admission of fact, law, responsibility, wrongdoing or liability on the part of the District or the petitioner and shall not be referred to in any subsequent proceeding by any party other than to enforce the terms of the Agreement. If this Agreement is not fully executed and approved by all parties hereto, this Agreement shall become null and void and shall neither constitute an admission of any party nor be referred to by any party in any subsequent legal proceeding for any purpose whatsoever.
5. The parent acknowledges that she has reviewed the Agreement in detail and that she fully understands its requirements and limitations.
6. The Petitioner hereby states that she is signing this Agreement voluntarily of her own free will and not under duress or coercion of any kind.
7. This Agreement shall be construed fairly according to the plain language of its terms and not for or against any party hereto. If, during the term of this Agreement, it is found that a specific clause(s) of the Agreement is/are illegal under Federal or State Law, then the remainder of the Agreement is not affected by such a ruling shall remain in full force and effect.
8. All parties are bound by this Agreement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns, are also bound. This Agreement is made for the benefit of all the parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors, and assigns.
9. This Agreement constitutes the full and complete agreement of the parties hereto with respect to its subject matter, that it supersedes any prior or contemporaneous representations, whether oral or written, and that it may not be modified or amended except by a written instrument signed by all parties hereto.
10. In consideration for the above, the parent herewith releases the Board of Education, its officers, employees, and agents from any and all claims, rights, liability, including but not limited to any claims or costs for attorney's fees, civil liability, or any other equitable or legal relief at all relevant times, whether known or unknown as of the date of this Agreement, as it relates to the above-captioned consolidated matters, or the events surrounding same.
11. This Agreement is specifically subject to the approval of the Respondent Jersey City Board of Education.
12. The parties acknowledge that they have been represented by and have had the opportunity to consult with their legal counsel throughout the negotiations of this Agreement, that they reviewed this Agreement with their counsel and that they fully understand its requirements and limitations.

The parties further expressly state that they are fully satisfied with the representation provided by their legal counsel.

IN WITNESS WHEREOF, the parties have executed this Settlement on the dates set forth below

FOR THE BOARD:

By: _____

Print Name

Dated: 11.4.2024

FOR THE PARENT

By: _____

Print Name: ASHWIN SHAH

Dated: 09-23-2021

Hiteshree Shah
142 Grace Street
Jersey City, New Jersey, 07307

September 23, 2021

To Whom It May Concern

By this letter, executed this day of September, 2021, I hereby refuse to consent to release of any of Krish Shah's school records relating to investigation or any disciplinary action resulting from a matter arising in McNair High School in May and June 2020. Such records cannot be produced pursuant to a document request from any college or higher education institution.

This letter is attached as Exhibit A to the Settlement Agreement executed contemporaneous with this Letter.

H. A Shah

Hiteshree Shah

Sworn and subscribed to before me
this 24 of September, 2021
Corinne M. Mullen
Corinne M. Mullen, Esq.
Attorney at Law- State of New Jersey

Krish Shah
142 Grace Street
Jersey City, New Jersey. 07307

September 23, 2021

To Whom It May Concern

By this letter, executed this day of September, 2021, I hereby refuse to consent to release of any of my school records relating to investigation or any disciplinary action resulting from a matter arising in McNair High School in May and June 2020. Such records cannot be produced pursuant to a document request from any college or higher education institution.

This letter is attached as Exhibit A to the Settlement Agreement executed contemporaneous with this Letter.

Krish Shah

Sworn and subscribed to before me
this 24 of September, 2021
Corinne M. Mullen
Corinne M. Mullen, Esq.
Attorney at Law- State of New Jersey

Agenda Item Details

Meeting	Oct 28, 2021 - Regular Meeting, 6:00 p.m.
Category	12. Legal
Subject	12.03 Approval of Settlement and Release H.S. o/b/o K.S. v. JCBOE
Access	Public
Type	Action (Consent)

Public Content

BE IT RESOLVED, the Jersey City Board of Education upon the recommendation of the Superintendent and the School Business Administrator, hereby accepts the terms and conditions of the Settlement Agreement and Release related to H.S. o/b/o K.S. v. JCBOE. (Settlement Agreement and Release on File in the Business Office).

Originator: Robert J. Pruchnik, General Counsel

Executive Content

THIS IS TO CERTIFY THAT THE FOREGOING
IS A TRUE COPY OF A RESOLUTION
ADOPTED BY THE BOARD OF EDUCATION
OF JERSEY CITY AT A MEETING
HELD ON 10/28/21

BOARD SECRETARY

11.9.21
DATE

DATE: 10/28/21 Bd. Mtg #11

VOTE SHEET

1ST Shaw	RESO# -12.03
2ND Lyons	

NAME	YES	NO	ABSTAIN
Trustee Verdibello	✓		
Trustee Roman	✓		
Trustee Richardson			✓
Trustee Velazquez	✓		
Trustee Hamilton	✓		
Trustee Lyons	✓		
Trustee Terrell-Paige	✓		
VP Shaw	✓		
President Ali	✓		

NOTES:

motion passed

5.10.21 dm

313-21

313-21

New Jersey Commissioner of Education

Final Decision

C.O., on behalf of minor child, J.S.,

Petitioner,

v.

Board of Education of Lenape Regional High School District, Burlington County,

Respondent.

Synopsis

In this matter on remand, *pro se* petitioner, a resident of Medford, New Jersey, challenged the determination of the respondent Board that his nephew, J.S., a non-resident student, is not eligible to attend school within the Lenape Regional High School District (LRHSD). Petitioner C.O. and his sister, M.L. – a resident of Sioux City, Iowa – filed affidavits in support of J.S.'s application for enrollment in the LRHSD as a non-resident student. Prior to February 2021, J.S. resided in Iowa with his mother, M.L. The Board filed a motion for summary decision, contending that, pursuant to *N.J.S.A.* 18A:38-1 and *N.J.A.C.* 6A:1-1 et. seq., J.S. did not meet the eligibility criteria to attend the LRHSD as an affidavit student; further, the Board sought tuition reimbursement for the period of J.S.'s ineligible attendance. In a decision issued September 7, 2021, the Commissioner concurred with the ALJ that petitioner failed to establish that his nephew, J.S., was a domiciliary within the LRHSD and that J.S. met the criteria to be enrolled as an affidavit student. However, the record lacked specific information regarding the number of days that J.S. attended school in the LRHSD during the 2020-2021 school year. Accordingly, the Commissioner remanded the matter to the OAL for calculation of tuition due to the district for the period of J.S.'s ineligible attendance.

On remand, the ALJ found that: J.S. attended school in LRHSD for seventy-two days, from March 1, 2021 through the end of the 2020-2021 school year; the cost of tuition was $99.44 per day; therefore, the Board is entitled to tuition reimbursement in the amount of $7,159.68 for the time petitioner's nephew, J.S., was ineligible to attend school in the District.

Upon review, the Commissioner concurred with the ALJ's findings and adopted the Initial Decision of the OAL as the final decision in this matter. Petitioner was directed to reimburse the Board in the amount of $7,159.68 for tuition costs incurred during the time period in which J.S. was ineligible to attend school in the District, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

313-21
OAL Dkt. No. EDU 02698-21, EDU 07802-21 (on remand)
Agency Dkt. No. 31-3/21

New Jersey Commissioner of Education

Final Decision

C.O., on behalf of minor child, J.S.,

Petitioner,

v.

Board of Education of Lenape Regional High School District, Burlington County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

On September 7, 2021, the Commissioner issued a decision finding that petitioner failed to sustain his burden of establishing that his nephew, J.S., was a domiciliary of a municipality in the Lenape Regional High School District (District), and that J.S. did not meet the criteria to be enrolled as an affidavit student. The Commissioner further concluded that J.S. was, therefore, not entitled to a free public education in the District's schools during that time. The Commissioner found that the record lacked evidence regarding the number of days of ineligible attendance and remanded the matter to the OAL for further fact-finding on this issue, so that the total tuition owed to the Board could be calculated.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in the district.

Following remand, the record reflects that J.S. attended school in the district for seventy-two school days from March 1, 2021 until the end of the 2020-2021 school year, and the Commissioner concurs with the findings of the Administrative Law Judge regarding these dates. The cost of tuition was $99.44 per day. Therefore, the Board is entitled to tuition reimbursement in the amount of $7,159.68 for the time petitioner's nephew, J.S., was ineligible to attend school in the District.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $7,159.68 for tuition costs incurred during the time period in which J.S. was ineligible to attend school in the District. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 6, 2021
Date of Mailing: December 7, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 07802-21
AGENCY DKT. NO. 31-3/21
(ON REMAND OAL DKT. NO. EDU 02698-21)

C.O. on behalf of minor child J.S.,
Petitioner,
v.
LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, BURLINGTON COUNTY,
Respondent.

C.O. on behalf of minor child **J.S.,** petitioner, pro se

R. Taylor Ruilova, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: October 12, 2021 Decided: October 20, 2021

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF CASE

Petitioner C.O. on behalf of J.S. challenges the decision of respondent, Lenape Regional High School (LRHS) Board of Education, Burlington County (Board) that minor child J.S., a non-resident student, is not eligible to attend school within the LRHS District (District), pursuant to N.J.S.A. 18A:38-1, and its accompanying regulations, N.J.A.C. 6A:1-1 et. seq.

PROCEDURAL HISTORY

On January 29, 2021, petitioner filed a petition with the Commissioner of the New Jersey Department of Education pursuant to N.J.S.A 18A:6-9. On March 12, 2021, respondent filed a motion to dismiss in lieu of an answer. This motion was not decided by the Commissioner and was transmitted with the petition on March 16, 2021, to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

By letter dated April 30, 2021, a briefing schedule was issued and on May 28, 2021, petitioner responded to the motion to summary decision. On June 8, 2021, respondent submitted a reply brief. On July 21, 2021, an initial decision granting the motion for summary decision was rendered.

As set forth in his Decision of September 7, 2021, the Acting Commissioner of Education adopted the findings of fact and conclusions of law of the initial decision and ordered that the matter be remanded to the OAL for the calculation of the total amount of tuition that petitioner is responsible to pay for J.S.'s attendance in a District school. On September 30, 2021, respondent submitted the Affidavit of Matthew Webb in Support of Tuition Assessment. Petitioner was provided ten days to respond, but declined to do so, and the record closed on October 12, 2021.

FACTUAL DISCUSSION AND FINDINGS

The material facts in this matter are not in dispute. To properly address the remand order, it is necessary to clarify the dates on which J.S. attended high school in the District; that information is found below. Based on the statements made by C.O and M.L. in their affidavits supporting J.S.'s application to attend LRHS District as a non-resident student, the statements of C.O. in the petition he filed to appeal the Board's decision to deny J.S.'s application, C.O.'s May 28, 2021 letter, and the certifications of Matthew Webb, I **FIND** the following **FACTS:**

1. LRHS District is a regional public school district serving eight towns in Burlington County, New Jersey. The District operates four high schools, including Shawnee High School, Medford Township (Shawnee HS).

2. C.O. is a resident of the District, residing in Medford Township.

3. J.S. is C.O.'s fifteen-year-old nephew. Prior to February 3, 2021, J.S. resided with his mother, M.L., in Sioux City, Iowa.

4. On February 4, 2021, C.O. applied to respondent for J.S. to attend Shawnee HS in LRHS District as a non-resident pupil ("affidavit student"). Br. In Support of Respondent's Motion for Summary Disposition (March 15, 2021), Ex. A [LRHS District Affidavit Application of C.O. on behalf of J.S. (January 28, 2021)]. In this application, C.O. stated that J.S. would reside with him in the District for the duration of the calendar year and "indefinitely [sic]." Id., Ex. A at 2, 4.

5. M.L. submitted an affidavit in support of J.S.'s application in which she stated that J.S. would remain in C.O.'s home "until completion of high school," and would return to her home upon graduation. Id., Ex. B [LRHS District Affidavit of M.L., Non-Resident Parent, on behalf of J.S. (January 29, 2021), at 1, 3].

6. In her affidavit, M.L. states that J.S. is not residing with her due to "schooling, behavior, counseling." Id., Ex. B at 1, 2. Further, she states that she is able to support her son economically. Id., Ex. B at 2.

7. On February 9, 2021, during a telephone conversation with District Assistant Superintendent Matthew Webb (Webb), C.O. stated that in school in Iowa, J.S. was "falling through the cracks"; that school in Iowa was still all-remote [due to COVID-19 emergency measures]; J.S.'s Iowa teachers had not kept him up-to-date, he had fallen behind in school and was at risk of repeating ninth grade; and C.O. wanted J.S. to have a good education in New Jersey. Certification of

Matthew Webb in Support of Respondent's Motion for Summary Decision (March 12, 2021), at ¶¶ 12, 13.

8. In a letter to the undersigned, C.O. elaborated on the reasons J.S. left his mother's home in Iowa to live with C.O. and his family in New Jersey, stating that J.S. "is not here for an education, [rather J.S.] is here to be held accountable to get an education." Ltr. of Petitioner in Opposition to Respondent's Motion to Dismiss (May 27, 2021) (by electronic mail only).[1] Further, by living with C.O., J.S. will get "the discipline he needs to thrive." Ibid.

9. During the February 9, 2021 telephone conversation, Webb informed C.O. that he would not recommend approval of J.S.'s application as he did not meet the legal requirements for eligibility as an affidavit student. Webb Cert., at ¶ 15. In response, C.O. asked Webb to ignore relevant law. Id. at ¶ 16.

10. C.O. requested and was provided a phone conference with District Superintendent Dr. Carol Birnbohm (Dr. Birnbohm). During a telephone conversation on February 10, 2021, Dr. Birnbohm stated that her administration would recommend that J.S. was not eligible as an affidavit student and explained to C.O. the process for appealing the Board's final decision on the matter. Id. at ¶ 25.

11. To date, C.O. has not provided respondent (or this tribunal) proof that he and/or his wife, L.O., have been named temporary or permanent guardian(s) for J.S. by court order.[2] Id. at ¶ 28. C.O. stated that it is his intention to assume full legal custody of J.S. and that he would meet with an attorney on June 1, 2021, to begin the legal process. Ltr. of Pet'r, at 1.

---

[1] It is noted here that the regulations require an affidavit in response to a motion for summary decision, N.J.A.C. 1:1-12.5(b), and that the regulations permit the judge latitude to take "actions as are necessary for the . . . fair conduct of the . . . proceeding." N.J.A.C. 1:1-14.6(p). C.O.'s undated, unsigned letter in lieu of an affidavit does not prejudice respondent here as the non-corroborated hearsay statements in C.O.'s letter do not raise issues of material fact that must be determined in an evidentiary proceeding.

[2] After his telephone call with Dr. Birnbohm, C.O. submitted to respondent a temporary guardianship agreement signed by M.L. on February 12, 2021. Webb Cert., ¶ 26; Br. of Resp't, Ex. C.

12. On February 17, 2021, the Board adopted the recommendation of the District administration and denied C.O.'s application for J.S. to attend Shawnee HS as an affidavit student and on February 18, 2021, formal written notice of this decision was sent to C.O. Webb. Certif., Ex. E.

13. The Board's February 18, 2021, notice included the statement that C.O. is responsible to pay tuition for J.S. for any period of ineligible attendance, including the duration of an appeal of the Board's decision. Ibid. Further, C.O. was notified that the approximate rate of tuition at the District's schools for the 2020-2021 school year was $99.44/day. Ibid.

14. On February 23, 2021, C.O. filed an appeal with the Commissioner of Education. Pursuant to N.J.S.A. 18A:38-1, this appeal was filed within twenty-one days of the Board's decision and therefore, J.S. began attending Shawnee HS.

15. J.S. attended Shawnee HS from March 1, 2021, through the last day of the 2020-2021 school year, June 18, 2021, which totals seventy-two school days. Affidavit of Matthew Webb in Support of Tuition Assessment (September 30, 2021), ¶¶ 6, 7.

16. In this matter, C.O. asks the Commissioner to permit J.S. to attend Shawnee HS as an affidavit student. In his petition, he acknowledged the statements of his sister, M.L., and in his letter to the undersigned, C.O. states his understanding that M.L. "may have worded the affidavit for the school incorrectly." Ltr. of Pet'r., at 1.

LEGAL ANALYSIS AND CONCLUSION

Respondent's Motion to Dismiss Treated as Motion for Summary Decision

Respondent's motion was filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a motion to dismiss in lieu of an answer. Respondent argued that the "Board is entitled to summary disposition as a matter of law," and then presented arguments for an order

granting summary decision under N.J.A.C 1:1-12.5(b). Br. in Support of Respondent's Motion for Summary Disposition (March 12, 2021), at 6. Therefore, respondent's motion to dismiss was treated as a motion for summary decision under N.J.A.C. 1-12.5(b), and petitioner was provided references to the OAL website for guidelines on preparing a response.

Standard for Deciding the Motion for Summary Decision

It is well-established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Brill guides as follows:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Id. at 540.]

In explaining the standard to be applied in summary motion practice, the Brill Court explained:

> The same standard applies to determine whether a prima facie case has been established by the party bearing the burden of proof in a trial. . . . If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party.
>
> [Id. at 536-3.7.]

As discussed above, I **CONCLUDE** that the parties raise no dispute with respect to material facts and the following issues can be decided as a matter of law:

1. Whether J.S. is eligible to attend Shawnee HS as a non-resident affidavit student, pursuant to N.J.S.A. 18A:38-1.

2. Whether the District is entitled to tuition reimbursement from C.O. for the costs of J.S. attending school in the District and if so, the amount due.

The parent, or in this case, petitioner C.O., has the burden of proving by a preponderance of the evidence that the minor, here J.S., is eligible for a free education in the District schools. N.J.S.A. 18A:38-1(b)(2).

C.O. contends that J.S. is entitled to a free education in the District under N.J.S.A. 18A:38-1, which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See, V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom., Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education). J.S. is fifteen years old and, therefore, I **CONCLUDE** he meets the age requirements to be entitled to a free public education.

A person who meets age requirements and is domiciled within a school district may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). A person may have many residences but only one domicile, and a child's domicile is normally that of his or her parents. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051 (1999). The acts, statements and conduct of the individual, as viewed in the light of all the circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959).

Here, the evidence as to J.S. being domiciled in the District is mixed. J.S. has moved, physically, from Iowa to Medford, and is currently attending Shawnee HS. J.S.'s mother and C.O. took steps to register J.S. in the District, including the completion of registration documents and affidavits to support J.S.'s enrollment in the District. C.O. is adamant that he and his wife always intended for J.S. to completely transfer his domicile to New Jersey and from the beginning, C.O. has taken that position. But, prior to June 1, 2021, C.O. did not start the process required to obtain legal temporary or permanent custody of his nephew (even though he had notice of this requirement since February 2021).

Evidence that J.S. is not domiciled in the District includes that J.S.'s mother does not appear to intend for her son to stay in New Jersey indefinitely. In her sworn affidavit, M.L. stated that she was sending her son to New Jersey to complete his education, that he would return to Iowa upon graduation, and that she has the economic means to support him in Iowa. Even in the temporary guardianship document M.L. signed after learning of the deficiencies in her original affidavit, M.L. states that she is giving legal custody of J.S. to C.O. both "from December 31, 2020 to graduation" and "for as long as necessary." Br. of Resp't., Ex. C (emphasis added).

In this regard, N.J.A.C. 6A:22-3.2, provides in pertinent part as follows:

> (a) A student is eligible to attend the school district pursuant to N.J.S.A. 18A:38-1.b if he or she is kept in the home of a person other than the student's parent or guardian, and the person is domiciled in the school district and is supporting the student without remuneration as if the student were his or her own child.
>
> 1. A student is not eligible to attend a school district pursuant to this provision unless:
>
> i. The student's parent or guardian has filed, together with documentation to support its validity, a sworn statement that he or she is not capable of supporting or providing care for the student due to family or economic hardship and the student is not residing with the other person solely for the purpose of receiving a free public education; and
>
> ii. The person keeping the student has filed, if so required by the district board of education:

> (1) A sworn statement that he or she is domiciled within the school district, is supporting the child without remuneration and intends to do so for a time longer than the school term, and will assume all personal obligations for the student pertaining to school requirements[.]

M.L. gave a sworn statement that she is capable of supporting J.S. and noted no economic or family hardship that keeps her from caring for him. While she did not call the education J.S. would receive "free," M.L. essentially swore that she was sending J.S. to New Jersey for the education he would receive. While C.O.'s intention to care for his nephew is clear, including offering J.S. a permanent home, to date C.O. has failed to provide sufficient proof that J.S. is domiciled in the District and/or was so domiciled at the time he was first registered in the District. Petitioner failed to establish that M.L. is incapable of supporting or providing care for J.S. due to family or economic hardship, notwithstanding C.O.'s criticism of M.L.'s parenting. Petitioner failed to establish that Iowa is not J.S.'s permanent home, the place where his mother resides and where he intends (and she expects him) to return.

Accordingly, in light of all of the facts and circumstances, I **CONCLUDE** that J.S. is not entitled to a free public education in the LRHS District. I **CONCLUDE** petitioner failed to satisfy the burden of proving that J.S. is domiciled with petitioner at his address in the LRHS District. I **CONCLUDE** that summary decision in favor of respondent is appropriate.

N.J.S.A. 18A:38-1(b)(1) provides that when the evidence does not support the claim of the resident, the resident shall be assessed tuition:

> [F]or the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.

The record reflects that the actual cost of J.S.'s attendance in-District was $99.44 per day for the 2020-2021 school year, and that J.S. enrolled at Shawnee HS on March 1, 2021. The last

day of the 2020-2021 school year was June 18, 2021. J.S. attended Shawnee HS for seventy-two school days.

N.J.A.C. 6A:22-6.3(a) provides that,

> Tuition assessed pursuant to this section shall be calculated on a per-student basis for the period of a student's ineligible enrollment, up to one year, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23A-17.1. The individual student's record of daily attendance shall not affect the calculation.

Therefore, I **CONCLUDE** that petitioner is responsible to pay tuition for J.S.'s attendance at Shawnee HS in the amount of $99.44/day from the date on which such attendance began, March 1, 2021, for each day school was in session without regard for days on which J.S. may have been absent, through the end of the 2020-2021 school year, June 21, 2021. Petitioner is responsible to pay respondent $7,159.68.

ORDER

I **ORDER** that the motion of respondent **Lenape Regional High School Board of Education** for summary decision in its favor is **GRANTED** and the pro se residency appeal of petitioner **C.O. on behalf of J.S.** is **DISMISSED.**

Further, I **ORDER** that petitioner **C.O.** shall pay respondent **Lenape Regional High School Board of Education** tuition in the amount of $7,159.68, the total owed for seventy-two school days at $99.44/day for each day during the 2020-2021 school year on which J.S. was enrolled in the Lenape Regional High School District.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make

a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this initial decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



October 20, 2021
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: October 20, 2021

Date Mailed to Parties: October 20, 2021

TMC/mph

314-21
OAL Dkt. No. EDU 05321-21
Agency Dkt. No. 86-6/21

New Jersey Commissioner of Education

Final Decision

Yarixa Gomez,

Petitioner,

v.

Board of Education of the City of Passaic,
Passaic County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that Part 2 of the Agreement references actions that were to take place in a time frame that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 7, 2021
Date of Mailing: December 7, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05321-21
AGENCY DOCKET NO. 86-6/21

YARIXA GOMEZ,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,

Respondent.

Alfred F. Maurice, Esq. appearing on behalf of petitioner (Springstead & Maurice)

Yaacov Brisman, Esq., appearing on behalf of respondent (Brisman Law Firm, P.C.)

Record Closed: October 15, 2021 Decided: October 22, 2021

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on June 22, 2021, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted on July 19, 2021, wherein the parties engaged in extensive settlement discussions. A telephone conference was scheduled for September 23, 2021. Neither party appeared for the conference.

However, on September 24, 2021, petitioner's counsel advised that the matter is settled. On October 15, 2021, the parties submitted the fully executed Settlement Agreement and Release, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

1. The parties have voluntarily agreed to the global settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement meets the requirements of N.J.A.C. 1:1-19.1 and that the stipulation should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 22, 2021

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: October 22, 2021

Date Mailed to Parties: October 22, 2021

ljb

SPRINGSTEAD & MAURICE, ESQS. (#251631971)
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HACKENSACK, NEW JERSEY 07601
TEL: (201) 343-0003
ATTORNEYS FOR PETITIONER
YARIXA GOMEZ

YARIXA GOMEZ

Petitioner,

vs.

PASSAIC BOARD OF EDUCATION

Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

OAL Docket. No.: EDU 05321-2021 N
Agency Ref. No.: 86-6/21

STIPULATION OF SETTLEMENT WITH PREJUDICE

The matter in difference in the above-entitled action having been amicably resolved by and between the parties, it is hereby stipulated and agreed that the same be and hereby is dismissed, with prejudice, and without costs against either party.

SPRINGSTEAD & MAURICE, ESQS.
Attorneys for Petitioner Yarixa Gomez
By: _____
ALFRED F. MAURICE

_____
YAACOV BRISMAN, ESQ.
Attorney for Respondent
Passaic Board of Education

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release, dated AUGUST _____ 2021, is given **BY** the Releasor, Employee **YARIXA GOMEZ**, referred to as "I", "**GOMEZ**", or "my", And the **PASSAIC BOARD OF EDUCATION** and its members, officers, employees, administrators, agents and servants, referred to as "Employer", "Releasee", "You" or the "**Board**", collectively "we", "us" or "the parties".

WHEREAS, GOMEZ has filed a Petition of Appeal with the Commissioner of Education under OAL Docket. No.: EDU 05321-2021 N, Agency Ref. No.: 86-6/21, asserting tenure status in the district; and

WHEREAS, the BOARD has filed an answer to said petition challenging GOMEZ's tenure statue; and

WHEREAS, GOMEZ and the BOARD have had discussions respecting the settlement of the referenced dispute in the best interest of GOMEZ the BOARD and the public;

NOW, THEREFORE be it resolved, that the BOARD and GOMEZ agree to settle the issues between them by the execution of this Settlement Agreement and Release under the terms set forth below:

1. **Mutual Release.** Except as to claims that cannot be released under applicable law, we waive, release, and give up any and all claims and rights which we may have against each other through the date of this Release. This releases all claims, including those of which we are not aware and those not mentioned in this Release through the date of this Release. This Release applies to claims resulting from anything which has happened up to now. Except as to claims that cannot be released under applicable law, we waive and release the following claims:

   More particularly, GOMEZ knowingly and voluntarily releases, waives, acquits, disclaims and forever discharges the Board from any and all claims to tenured employment that have been or might be raised against the Board.

   The Board and Gomez likewise agree to release each other from any and all lawsuits, charges, claims, complaints, demands, judgments, obligations, causes of action, controversies or any other proceedings with any administrative agency, or court or any other forum, under

any federal, state or local laws or regulations arising out of Gomez's employment with the Board. In the case of the Board, this Release shall not include any future information which legally requires disclosure.

This paragraph is not intended and shall not preclude GOMEZ or the BOARD from instituting proceedings seeking to enforce the terms of this Settlement Agreement and Release.

2. **Consideration.**

a. **In consideration for the dismissal, with prejudice, of the referenced Petition of Appeal before the Commissioner of Education under OAL Docket. No.: EDU 05321-2021 N, Agency Ref. No.: 86-6/21, and the release of claims set forth herein, the Board will pay the sum of $15,000.00 to GOMEZ upon the execution of this Agreement and Release. As said sum is not in lieu of wages, but the settlement of a tenure dispute, no deductions will be withheld from that sum.**

b. **GOMEZ will continue to receive health insurance coverage through the Board, less any required employee contributions, through August 31, 2021.**

c. **The Board will provide GOMEZ with a formal Notice of Non-Renewal of employment for the 2021-2022 school year that may be used to support any claim for unemployment benefits.**

d. **The Board will not contest any application for unemployment that GOMEZ may make following June 30, 2021, and confirm solely, to the Department of Labor that her non-tenured employment contract was not renewed. No other information respecting her employment, other than statistical data, will be provided.**

e. **The Board will provide GOMEZ with a neutral letter of reference that may be submitted in any application for future employment.**

f. **In the event the Board receives a questionnaire from a prospective employer under N.J.S.A. 18A: 6-8 et seq., the Board will complete the questionnaire. In its response the Board will indicate that GOMEZ was an employee in good standing at the time she left employment and that she was not the subject of a child abuse or sexual misconduct investigation or determination at the time of her departure.**

3. **Who is Bound.** GOMEZ and the Board are bound by this Settlement Agreement and Release. Anyone who succeeds to the rights and responsibilities of the parties, such as a party's heirs or the executor of their estate. Future boards and administrators are also bound. This Settlement Agreement and Release is made for the benefit of the parties and all who succeed to their rights and responsibilities. This settlement is in the public interest to defray the costs of litigation, the use of administrative and personnel time, and to resolve a dispute with an uncertain result.

4. **Signatures.** We understand and agree to the terms of this Settlement Agreement and Release. The Board will affix the signature of its authorized corporate officer (s) hereto, who will have full authority to execute the same.

IN WITNESS WHEREOF, the Parties Hereunder set their hands and seals to this Agreement effective on this _____ day of August, 2021.

Yarixa Gomez
YARIXA GOMEZ

Dated: 8-27-21

_____ ,witness

STATE OF NEW JERSEY)

COUNTY OF BERGEN)

I certify that on August _____, 2021, **YARIXA GOMEZ,** having presented me with evidence of her identity, personally came before me and acknowledged under oath, to my satisfaction, that he is the person:

(a) named in and personally signed this Separation of Employment Agreement;
(b) Signed, sealed, and delivered said agreement as her act and deed; and
(c) acknowledged that he executed said agreement freely and voluntarily for the purposes recited therein..

_____
Notary, State of NJ

THE PASSAIC BOARD EDUCATION ASSOCIATION

By: _____

On Behalf of the Board:

Dated:_____

R. Aaron Bowman

~~President~~, Passaic Board of Education

Business Administrator
/Board Secretary

315-21

315-21SEC
SEC Dkt. No. D02-21
Agency Dkt. No. 133-8/21

New Jersey Commissioner of Education

Final Decision

In the Matter of Phoenix Moore,
Lawnside Board of Education,
Camden County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent ultimately filed the Disclosure Statements after the issuance of its Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. Accordingly, respondent is hereby reprimanded for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 7, 2021
Date of Mailing: December 7, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D02-21
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Phoenix Moore,
Lawnside Board of Education, Camden County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on July 27, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised Respondent that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when the material facts, as here, are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

If a school official fails to file the required Disclosure Statements, the Commission is authorized, pursuant to *N.J.A.C.* 6A:28-3.3(b), to issue an Order to Show Cause. Moreover,

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission (e-mail) only.

failure to timely file the required Disclosure Statements "shall constitute a violation of the ... Act and may result in the reprimand, censure, suspension or removal of a school official pursuant to the recommendation of the Commission as acted upon by the Commissioner [of Education]." *N.J.A.C.* 6A:28-3.3(a).

With the above in mind, Respondent is a returning school official and, therefore, was required to file Disclosure Statements by April 30, 2021. Despite this fact, and even though Respondent received reminders as further detailed below, Respondent failed to file Disclosure Statements within the statutorily required timeframe.

More specifically, throughout the months of June and early July, the Commission's staff sent repeated messages to the Board Secretary advising that Respondent had not yet filed Disclosure Statements. The electronic correspondence to the Board Secretary further advised that if Respondent failed to file Disclosure Statements, the Commission had the authority to issue an OTSC, find Respondent in violation of the Act, and recommend a penalty up to and including removal for non-compliance.

In addition, by electronic correspondence dated July 19, 2021, July 21, and July 23, 2021, Respondent was reminded that his Disclosure Statements had not yet been filed. Respondent was further advised that continued failure to file Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on July 27, 2021. After having been served with the OTSC, Respondent still failed to file Disclosure Statements, or to otherwise respond to the OTSC.

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because he did not timely file Disclosure Statements. Following the special meeting on August 30, 2021, the Commission received correspondence from Respondent on September 9, 2021 that included Respondent's completed Disclosure Statements in hard copy format. At its meeting on October 19, 2021, the Commission reviewed the aforementioned correspondence in determining the penalty as set forth below.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that Disclosure Statements are filed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to nine (9) school officials throughout the State for failure to comply with the statutory obligation to file Disclosure Statements. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-10.12. At its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of removal. However, if Respondent filed Disclosure Statements before the Commissioner of Education adopted a final decision, then the Commission recommended that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education. In light of the September 9, 2021 correspondence from Respondent, the Commission agreed to reconsider the recommended penalty at its meeting on October 19, 2021. At its October 19, 2021 meeting, the Commission amended the penalty and recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W Bender

Robert W. Bender, Chairperson

Mailing Date: October 25, 2021

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D02-21

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2021; and

Whereas, Respondent failed to file Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why he failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent failed to file his Disclosure Statements following issuance of the OTSC, and failed to otherwise respond to the OTSC; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file Disclosure Statements; and

Whereas, at its meeting on October 19, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand; and

Whereas, at its meeting on October 19, 2021, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a meeting on October 19, 2021.

Salma T. Chand

Salma T. Chand, Executive Director

316-21

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

December 7, 2021

Maryann Moretti
12 Meadow Ridge Lane
Lafayette, NJ 07932

Marc H. Zitomer, Esq.
Schenck, Price, Smith & King, LLP
115 West Century Road, Suite 100
Paramus, NJ 07652

Re: *M.M., on behalf of minor child v. Board of Education of the Township of Lafayette, Sussex County, Agency Dkt. No. 94-5/20.*

Dear Parties:

I have reviewed the materials filed in connection with petitioner's motion to stay proceedings at the Office of Administrative Law (OAL) pending the outcome of proceedings in the New Jersey Supreme Court.[1]

By way of background, in her May 2020 petition of appeal, petitioner sought access to a video maintained by her child's school, alleging that it was a student record to which she was entitled pursuant to the Family Educational Rights and Privacy Act (FERPA). According to petitioner, the video is relevant to a harassment, intimidation, and bullying (HIB) claim made on behalf of her child. During

[1] Petitioner's motion to the Commissioner failed to note that she had filed a motion for a stay of the OAL proceedings with Administrative Law Judge Anthony-Jude Tiscornia, which was denied. This information was only provided later by respondent, in opposition to the motion to stay. Petitioner's omission prevented the Commissioner from recognizing the instant motion as what it really is – a request for interlocutory relief. Moreover, that request is clearly untimely pursuant to *N.J.A.C.* 1:1-14.10(b), as it was filed more than five days after Judge Tiscornia's order. The failure to timely file is sufficient grounds to deny the request for interlocutory relief, but, because the Commissioner was unaware of the procedural posture and directed a briefing schedule consistent with a motion for a stay rather than a request for interlocutory relief, the Commissioner has determined that it is appropriate to also address the motion to stay based on the standards applicable to such motions. Additionally, the Commissioner notes that petitioner's motion seeks a stay "pending decision on petition for certification to the supreme court." However, at the time petitioner filed her motion to stay with the Commissioner, there were no proceedings pending in the Supreme Court. Once again, this information only came to light in respondent's opposition to the motion, which demonstrated that petitioner had not filed a petition for certification, but only a motion for leave to appeal, which was denied by the Supreme Court. Following service of respondent's opposition, petitioner filed a petition for certification in the Supreme Court. Notwithstanding the significant flaws in petitioner's motion, the Commissioner is issuing this decision based on the status of the filings in the Supreme Court as they currently exist.

the course of the proceedings, petitioner's filings suggested that she was challenging the underlying HIB investigation as well.[2] Accordingly, in order to thoroughly address all potential issues, the Commissioner issued a decision on November 5, 2020 that reached conclusions about both the HIB claim and petitioner's right to access to the video.

Regarding the HIB claim, the Commissioner determined that it was not ripe for review because the Board had not issued a decision, and the applicable HIB statute provides for a right of appeal to the Commissioner only after a board of education issues a decision. Regarding petitioner's right to the video, the Commissioner determined that petitioner did not have a right to the video as discovery for the hearing she had requested before the Board, because the HIB statute does not require trial-type adversarial proceedings or provide for procedures that are judicial in nature when a board of education is reviewing the findings of the HIB investigation conducted by district staff. Furthermore, the Commissioner determined that she did not have jurisdiction to adjudicate claims under FERPA, which is a federal law. However, giving petitioner leeway as a *pro se* petitioner, the Commissioner reviewed her claim to the video under New Jersey's Pupil Records Act, and determined that the law does not require the Board to provide a copy of the video, but only access to it, which the Board had already provided.

On appeal, petitioner sought to supplement the record with documents that were not a part of the record before the Commissioner when she issued her decision, which petitioner alleged demonstrated that the Board had made a decision regarding the HIB claim. Upon receiving these documents, counsel for the Department of Education filed a cross-motion to remand the matter for further fact-finding to determine whether a decision was issued, to ensure that the issue of ripeness was decided based on accurate facts. The Appellate Division granted the motion for remand. In transmitting the remanded matter to the OAL, the issue was defined as determining whether the Board had made a decision regarding the HIB claim, consistent with the representations that had been made to the Appellate Division by counsel for the Department in the motion for remand. The transmittal form noted that if the Board had issued a decision, the matter could proceed for a merits determination regarding whether that decision was arbitrary, capricious, or unreasonable. The form further indicated that while petitioner's right to access the video under FERPA and/or the New Jersey Pupil Records Act were not included in the remand because those conclusions were not affected by the ripeness issue, petitioner could assert a right to the video as discovery at the OAL if the matter proceeded to a merits determination on the underlying HIB claim, with any discovery disputes to be resolved in the normal course by the ALJ.

Petitioner's briefs in support of her motion to stay indicate that she is asking the Supreme Court to reverse the Appellate Division's decision granting a remand.

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[2] In the time since this matter was first filed in May 2020, the massive volume of motions and other documents filed by petitioner at all levels – petitioner currently has submissions before the OAL, the Commissioner, the Appellate Division, and the Supreme Court – has made it increasingly difficult to ascertain the relief that she is seeking. At times, she has indicated that her sole issue is access to the video and that she is not challenging the underlying HIB investigation. At other times, she has alleged that the Board violated the HIB statutes and regulations and that the HIB investigation reached the wrong conclusion. Petitioner's prior Appellate Division motion to supplement the record with documents that she alleges demonstrates that the Board issued a HIB decision, and that therefore the merits of that decision are ripe for review, also suggests that she seeks to pursue the underlying HIB claim.

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that the movant has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

Upon review of the parties' submissions, I find that petitioner has failed to meet the standard required for a stay of the OAL proceedings.[3] First, petitioner has failed to demonstrate that a stay is necessary to prevent irreparable harm. While petitioner disagrees with the Appellate Division's decision granting the motion for remand, the only consequence of that decision is that further fact-finding proceedings regarding whether the Board issued a HIB decision are occurring. Petitioner has failed to make any showing that participating in those proceedings will lead to irreparable harm. In granting the motion for remand, the Appellate Division has clearly determined that those proceedings are appropriate, and the Commissioner finds no basis to disagree with that determination. The proceedings are unlikely to be protracted,[4] as the question of whether the Board issued a decision is a relatively simple one that should be able to be resolved based on the submission of documentary evidence, or testimony or certifications from witnesses with knowledge of the Board's actions.

Furthermore, to the extent that petitioner's argument to the Supreme Court is based on her claim to access to the video, petitioner has failed to show a likelihood of success on the merits of that argument. The Commissioner's November 5, 2020 decision correctly determined that petitioner does not have a right to a copy of the video under the New Jersey Pupil Records Act. The Commissioner also correctly determined that Board hearings regarding HIB matters are not required to be trial-type adversary proceedings and that there is no provision in the HIB statute for judicial procedures such as discovery.[5] Petitioner provides no legal basis to overturn those decisions.

---

[3] Petitioner previously made a motion to the Appellate Division to stay the OAL proceedings pending the Supreme Court proceedings, which was denied by the Appellate Division. Respondent contends that the Commissioner is without jurisdiction to reverse the Appellate Division's order. However, as the Appellate Division's order was not accompanied by a written decision, the Commissioner is unable to determine whether the Appellate Division entered the order on the grounds that the *Crowe* standards had not been met, or for some other reason, such as petitioner's failure to first make the motion to the Commissioner. Accordingly, the Commissioner will not presume that she lacks jurisdiction to decide the instant motion. Moreover, to the extent that the Appellate Division did decide the motion on the merits, the Commissioner's decision herein to deny the motion is consistent with the Appellate Division's order.

[4] Except perhaps to the extent that petitioner continues to file multiple motions and other submissions that must be reviewed and addressed and that are therefore delaying resolution of the ultimate issue.

[5] Furthermore, as described above, neither the Commissioner's decision nor the remand transmittal precludes petitioner from seeking the video as part of discovery at the OAL, if it is determined that the Board issued a HIB decision and petitioner's challenge to that decision is ripe for review.

In light of the fact that all of the *Crowe* prongs must be met in order for a stay to be granted, it is not necessary to analyze the remaining factors. Accordingly, respondent's request for a stay of the September 16, 2021 decision is hereby DENIED.[6]

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

AAM/JKH
c: State Law Library

316-21L

[6] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

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317-21

317-21

New Jersey Commissioner of Education

Final Decision

Adrian McConney,

Petitioner,

v.

Board of Education of the Township of Piscataway, Middlesex County,

Respondent.

Synopsis

In this case on remand, petitioner – formerly employed as a tenured physical education teacher – sought an order requiring the respondent Board to reimburse him for salary that was withheld between September 1, 2013 and March 1, 2014, a period corresponding to the time between when petitioner was suspended following a criminal indictment and the date upon which he was reinstated to the payroll after the indictment was dismissed. The indictment involved allegations that petitioner had engaged in sexual relations with an 18-year-old student who attended Piscataway High School. The Commissioner previously remanded this matter to the OAL for determination of whether petitioner was entitled to back pay from September 1, 2013 through March 1, 2014 and whether such determination should include "weighing of the equities" and consideration of "fundamental fairness."

On remand, the ALJ, *inter alia*, denied petitioner's request for back pay, finding that given the negative inference placed on petitioner as a result of his invocation of the Fifth Amendment in this proceeding and his refusal to answer interrogatories and requests for admission during discovery, the Board had presented sufficient evidence that petitioner was guilty of misconduct by a public school teacher. Accordingly, the ALJ found that the equities side with the Board and fundamental fairness leads to the conclusion that the Board should not have to pay petitioner for the period of time he was suspended without pay.

Upon review the Commissioner agreed with the ALJ that fundamental fairness and equity dictate that petitioner is not entitled to back pay for the period that the indictment was pending, September 1, 2013 through February 4, 2014. However, for the period after the indictment was dismissed until the Board reinstated petitioner to the payroll – February 4, 2014 through March 1, 2014 – the Commissioner determined that he was entitled to back pay since no indictment was pending and no tenure charges had been filed, so there was no basis for the Board to withhold petitioner's salary. *N.J.S.A.* 18A:6-8.3. Accordingly, the Board was directed to reimburse petitioner for compensation withheld during that period.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

317-21
OAL Dkt. No. EDU 13422-17
(EDU 05769-14 ON REMAND)
Agency Dkt. No. 111-5/14

New Jersey Commissioner of Education

Decision on Remand

Adrian McConney,

Petitioner,

v.

Board of Education of the Township of Piscataway, Middlesex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner. The Board did not file reply exceptions, but rather indicated that it would rely on its arguments presented in briefs at the OAL.

In this matter, petitioner – a tenured physical education teacher – seeks back pay from September 1, 2013 (the date he was suspended without pay following his indictment) to March 1, 2014 (the date he was reinstated to payroll following the dismissal of his indictment). By way of background, petitioner was indicted in August 2013 on charges relating to allegations that he had engaged in sexual relations with an 18-year-old student who attended Piscataway High School. The Board suspended petitioner without pay pursuant to *N.J.S.A.* 18A:6-8.3 on September 1, 2013. Thereafter, the indictment was dismissed by a Superior Court judge on February 4, 2014, and the Board reinstated petitioner to the payroll on March 1, 2014.

Petitioner then resigned from his position on April 13, 2014. On February 9, 2015, the indictment was reinstated by the Appellate Division. Following a trial, a jury returned a verdict of not guilty on February 21, 2017. In a decision dated August 21, 2017, the Commissioner remanded this matter to the OAL for a determination on whether petitioner is entitled to back pay from September 1, 2013 to March 1, 2014, and whether such determination should include "weighing of the equities" and consideration of "fundamental fairness."

On remand, the Administrative Law Judge (ALJ) denied petitioner's request for back pay. The ALJ found that, given the negative inference placed on petitioner as a result of his invocation of the Fifth Amendment in this proceeding and his refusal to answer interrogatories and requests for admission during discovery, the Board had presented sufficient evidence that petitioner was guilty of misconduct by a public school teacher. As such, the ALJ found that the equities side with the Board and fundamental fairness leads to the conclusion that the Board should not have to pay petitioner for the period of time he was suspended without pay.

In his exceptions, petitioner argues that he was entitled to back pay from February 4, 2014 through March 1, 2014 because the indictment had been dismissed during this period and he was not the subject of tenure charges because they were never filed against him. Petitioner also contends that he is entitled to back pay for the period of September 1, 2013 through February 4, 2014 because the balance of the equities does not favor the Board as it never filed tenure charges. Petitioner maintains that he should not have been denied reimbursement because of a negative inference of conduct unbecoming, given that the Board failed to present any residuum of evidence to support its argument.

Accordingly, petitioner urges the Commissioner to reject the Initial Decision and order that petitioner is entitled to his full claim of back pay.

Upon review, the Commissioner agrees with the ALJ that petitioner is not entitled to back pay for the period when he was under indictment, September 1, 2013 through February 4, 2014, due to fundamental fairness and the weighing of the equities. The Commissioner has found that based on fundamental fairness and equity, where a tenured employee seeks to recover salary that was withheld during an indictment in which the employee later obtained a favorable outcome, but where in tenure proceedings the employee has subsequently been found to have committed the same conduct that was the subject of the criminal charges, the employee should not recover the salary that was withheld while the indictment was pending. *Board of Education of the City of Camden, Camden County v. John Hovington*, EDU 6675-97, Initial Decision (February 9, 1998), adopted by Commissioner's Decision No. 147-98R, decided March 30, 1998; *In the Matter of the Tenure Hearing of Brian Yatauro, School District of the Township of Lacey, Ocean County*, EDU 00793-99, Initial Decision (July 12, 1999), adopted as modified by Commissioner's Decision No. 322-99R, decided October 13, 1999.

While tenure charges were not filed in this matter, a negative inference was imposed on petitioner arising from his invocation of the Fifth Amendment in this administrative proceeding. Specifically, petitioner refused to answer the following interrogatories:

1. State whether you engaged in sexual relations with a student enrolled at Piscataway High School, as alleged in the criminal indictment that was the subject of this action.
2. If so, set forth the following information: a) student's name; b) when and where sexual relations occurred; c) your understanding of the student's age at the time sexual

> relations occurred; d) your understanding with respect to whether sexual relations with said student were a violation of your professional responsibilities as employee of the Piscataway Township School District.

Petitioner also did not answer the following requests for admissions:

1. you engaged in sexual relations with a female student enrolled in Piscataway High School.
2. you repeatedly engaged in sexual relations with a female student enrolled in Piscataway High School.
3. you engaged in sexual relations with a female student enrolled in Piscataway High School on Piscataway High School or other Piscataway School District property.

The record demonstrates that petitioner has stipulated that the board remains entitled to an adverse interest regarding his conduct due to his refusal to respond to discovery requests. The petitioner had the opportunity to deny the allegations against him, but he chose not to answer discovery. As such, in this proceeding, the Commissioner agrees with the ALJ that, considering the negative inference, it is presumed in this matter that petitioner engaged in the conduct alleged. While the conduct did not amount to criminal conduct, presumably due to the age of the student, such conduct nevertheless violates the behavioral standards expected of a teacher. Accordingly, the Commissioner agrees with the ALJ for the reasons thoroughly stated in the Initial Decision that fundamental fairness and equity lead to the conclusion that petitioner is not entitled to back pay for the period that the indictment was pending, September 1, 2013 through February 4, 2014.

The Commissioner does not find petitioner's exceptions on this issue to be persuasive. Although no tenure charges were filed, the conduct is deemed to have been committed due to the adverse inference applied against petitioner. As such, this matter is analogous to *Hovington*

and *Yatauro*, *supra*, and fundamental fairness and equity support the denial of back pay for the time that the indictment was pending.

However, with respect to the period after the indictment was dismissed until the Board reinstated petitioner to the payroll – February 4, 2014 through March 1, 2014 – the Commissioner agrees with the petitioner that he is entitled to back pay. During that time, no indictment was pending and no tenure charges had been filed, so there is no basis for the Board to withhold petitioner's salary. *N.J.S.A.* 18A:6-8.3; *see Slater v. Board of Education of the Ramapo-Indian Hills Regional School District*, 237 *N.J. Super.* 424, 426 (App. Div. 1989) (stating that "a tenured employee may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education. In all other circumstances, a suspension must be with pay.").

Accordingly, the Initial Decision of the OAL is adopted, as modified herein, as the final decision in this matter. The Board is directed to reimburse petitioner for compensation withheld between February 4, 2014 and March 1, 2014.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 9, 2021
Date of Mailing: December 9, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 13422-17
ON REMAND OAL DKT. NO. EDU 05769-14
AGENCY DKT. NO. 111-5/14

ADRIAN MC CONNEY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,
Respondent.

Steven J. Kaflowitz, Esq., for petitioner (Caruso, Smith & Picini, attorneys)

David Rubin, Esq., for respondent

Record Closed: August 2, 2021 Decided: September 13, 2021

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

The Commissioner of Education remanded this matter to the Office of Administrative Law after a review of an Initial Decision rendered by Honorable Leland McGee, ALJ, dated July 6, 2017. The Commissioner determined that there were issues that had not been addressed in the decision and thus, further OAL proceedings were

necessary. The matter was assigned to a judge, but upon her appointment to the Superior Court the matter was transferred to this judge on August 2, 2021. The parties had cross-moved for summary decision before the previously assigned judge.

The parties produced a Joint Stipulation of Facts. These provide the background for the current dispute, which deals with whether Mr. McConney should receive back pay for the period when he was suspended from employment without pay. Based upon the Stipulated Facts, I make the following **FINDINGS** relevant to this remand.

1) McConney was employed as a tenured physical education teacher at Piscataway High School.
2) On August 13, 2013, he was indicted by the Middlesex County Grand Jury on a charge of "Official Misconduct," relating to allegations that he had engaged in sexual relations with an eighteen-year-old student who attended that school. He plead not guilty to the charge.
3) He was suspended from employment without pay, effective September 1, 2013, the start of the school year. McConney was a ten-month employee.
4) McConney filed a motion to dismiss the indictment.
5) On February 4, 2014, Honorable Bradley J. Ferencz J.S.C., granted the motion and dismissed the indictment. He concluded that even if the factual allegations stated in the indictment were true, they did not establish a basis for the charge of Official Misconduct.
6) Following Judge Ferencz's decision, the Board of Education reinstated Mr. McConney on the payroll, effective March 1, 2014.
7) McConney then resigned his position with the Board, effective April 13, 2014.
8) The Board never filed any tenure charges against McConney.
9) On May 2, 2014, McConney filed a Petition for Relief with the Commissioner of Education, seeking back pay for the period from February 4, 2014, the date of Judge Ferencz's Order dismissing the indictment, to April 13, 2014, the date of his resignation.

10) On June 4, 2014, McConney filed a motion seeking leave to amend the Petition to request back pay from September 1, 2013, the effective date of the Board's suspension of his pay, to April 13, 2014, the date of his resignation. This motion was subsequently granted by Judge McGee.

11) On February 9, 2015, the Appellate Division overturned Judge Ferencz's Order dismissing the indictment, thereby reinstating the indictment and remanded the matter to the Superior Court for disposition.

12) Following a trial, on February 21, 2017, the jury returned a verdict of "not guilty" to all charges against McConney.

13) In response to certain interrogatories and requests for admission filed by the Board in discovery in this matter, then pending before Judge McGee, Mr. McConney advised that if called to testify as a witness he would invoke his privilege against self-incrimination under the Fifth Amendment. He also declined to answer the interrogatories or the requests for admission on the same basis. In the Stipulation of Facts dated by his counsel on March 23, 2017, McConney acknowledges that in light of his invocation of the privilege, "the Board remains entitled to the adverse inference regarding his conduct that was granted to the Board in the Court's [Judge McGee's] January 5, 2015 Order."

In remanding the matter, the Commissioner noted that in his decision Judge McGee determined that as of the date of Judge Ferencz's Order dismissing the indictment, there was then neither an indictment nor a tenure charge pending against McConney and that under N.J.S.A. 18A:6-8.3, a tenured employee was entitled to back pay when no longer under indictment and before the filing of any subsequent tenure charges. Judge McGee further found that the negative inferences arising from McConney's invocation of the Fifth Amendment in this civil administrative proceeding did not factor into this analysis of his right to back pay for that period. Additionally, McConney was not seeking back pay for the period when he had been under indictment, and therefore consideration of the fundamental fairness question regarding the issuance of back pay to one who had not actually performed services was not dispositive. The

Commissioner noted that on remand, the judge was to determine whether McConney was "entitled to back pay from September 1, 2013 through March 1, 2014 and whether such determination should include 'weighing of the equities' and considerations of 'fundamental fairness.'"

The parties have filed briefs and exhibits relating to their cross-motions for summary decision. In his brief, Mr. McConney relies upon the language of N.J.S.A. 18A:6-8.3, which states

> Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.

In Slater v. Board of Education, 237 N.J. Super. 424 (App. Div. 1989), the court noted that

> Thus, a tenured employee may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education. In all other circumstances, a suspension must be with pay.

As this language and court pronouncement only relate here to the period after the dismissal of the indictment on Judge Ferencz's order, this only speaks to McConney's right to receive back pay for the period from February 4, 2014, until his reinstatement to the payroll on March 1, 2014. However, McConney also argues that as the jury eventually returned a verdict of not guilty on the charge of Official Misconduct, the sole charge of the reinstated indictment, fundamental fairness and a weighing of the equities demand that he recover the back pay withheld during the pendency of the indictment from September 1, 2013, until its dismissal by Judge Ferencz on February 4, 2014. He cites prior administrative decisions by the Commissioner in support, Beatty v. Newton Board of Education, 1991 S.L.D. 1001; Lopez v. Bridgeton Board of Education,

http://unlawful.Rutgers,edu/collections/oal, and Griffin v. Paterson Board of Education, 93 N.J.A.R. 2d (EDU) 882.

In Beatty, the teacher was suspended without pay after an indictment. The criminal trial resulted in a jury verdict of not guilty. The Commissioner determined that "fundamental fairness" entitled Beatty to back pay for all salary lost while under indictment. Equity demanded this result as the indictment had been the sole basis for the suspension without pay. Although tenure charges had been filed and were pending, this fact "did not alter the equities in the matter." Beatty, at 1009-1010. Griffin similarly involved a suspension due to an indictment. Griffin was found not guilty after a jury trial and no tenure charges were filed. In Lopez, a trial judge dismissed an indictment for child endangerment. As the dismissal of the indictment exonerated Lopez, back pay for the period of suspension due to the pendency of the indictment was awarded.

McConney differentiates these cases from other cases in which the Commissioner determined that back pay for a period of suspension was not warranted, despite not guilty findings in a criminal case, or the entry of the teacher into a pre-trial intervention program, Camden Board of Education v. Hovington, (Hovington II) http://unlawful Rutgers.edu/collections/oal/, adopted by Comm. of Ed. (March 30, 1998)(not guilty verdict); Busler v. Board of Education of the City of East Orange, http://njlaw.Rutgers.edu/collections/oal/, adopted by Comm. of Educ. (February 6, 2002)(pre-trial intervention). In each instance, tenure charges were filed and resulted in findings of misconduct by the teacher and the loss of tenure; In the Matter of the Tenure Hearing of John Hovington, Board of Education of the City of Camden (Hovington I), (Final Commissioner's Decision on Remand from State Board of Education., August 5, 1997). He contends that the facts in this case are dissimilar to Hovington II and Busler.

As for the negative inference arising against Mr. McConney due to his invocation of his Fifth Amendment privilege, he argues that the issue before the Commissioner is simply whether, in light of the dismissal of the indictment by a jury verdict of not guilty and the absence of any tenure charge pending at the time of the suspension without pay, the

statute directs that he is entitled to receive full back pay for that period of suspension. He contends that the clear language supports his right to such back pay. This is not the forum to adjudicate his alleged culpability for unbecoming conduct. As such, any evidence that purports to address that issue is irrelevant to the present proceedings. Additionally, the negative inference alone is insufficient to prove McConney's guilt for unbecoming conduct.

In response to McConney's arguments and in support of its own motion for summary decision, the Board notes that in cases such as Griffin and Beatty, the employee had been adjudged completely innocent of any wrongdoing. As such, for the employee to have continued to suffer the loss of pay withheld due to a suspension founded upon the existence of an indictment that was later adjudged to have charged an innocent person would "shock the conscience" and thus principles of equity and fundamental fairness demanded that the lost pay be restored. In Lopez, the ALJ noted that the employee had been totally exonerated of the charge of child endangerment by the criminal court judge's dismissal of the indictment because it was unsupported by credible evidence and had been improperly obtained. The judge then added that

> [t]he record is barren of any evidence that petitioner acted wrongfully or was a risk to students. In essence, petitioner did nothing wrong if measured by a criminal or civil standard. The allegation of any wrongdoing was dismissed as baseless.

Counsel for the Board points out that these cases contrast with other cases, such as Hovington II and Lacey Township Board of Education v. Yatauro, http://unlawful Rutgers.edu/collections/oal/. Hovington had been indicted for charges relating to sexual misconduct with a student he coached. He was acquitted of the criminal charges. He sought back pay for the period of suspension without pay which had been suspended due to the pendency of the indictment. However, after the acquittal, tenure charges were filed for the same conduct that had led to the indictment and after an administrative hearing, Hovington was found to have engaged in misconduct and his tenure was removed. Hovington I. The Commissioner agreed with this judge that as

Hovington had been shown to have "so flagrantly violated his trust as a professional educator," he did not stand before the Commissioner on the same ground as had Beatty and Griffin. Hovington II. They, having been exonerated by jury verdicts, were to be presumed innocent of the charges that had been the basis for the indictment that supported the suspension of pay. Hovington could not claim to stand in the same position, as he had instead been found to have actually engaged in improper conduct, even if the proofs had not been determined to rise to the level of criminality. Yatauro also was acquitted of criminal charges arising from alleged sexual improprieties with a student. However, the Board was able to sustain tenure charges against him; charges that were not filed until after the acquittal occurred.

Counsel contends that the present case is unlike Beatty, Griffin or Lopez and is instead more akin to Hovington II and Yatauro. The reason for this distinction arises from Mr. McConney's invocation of the Fifth Amendment privilege in response to interrogatories that specifically asked

> 1. State whether you engaged in sexual relations with a student enrolled at Piscataway High School, as alleged in the criminal indictment that was the subject of this action.
> 2. If so, set forth the following information: a) student's name; b) when and where sexual relations occurred; c your understanding of the student's age at the time sexual relations occurred; d) your understanding with respect to whether sexual relations with said student were a violation of your professional responsibilities as employee of the Piscataway Township School District,

and requests for admissions that stated that while employed by the School District as physical education teacher and/or girls soccer coach at Piscataway High School,

> 1. you engaged in sexual relations with a female student enrolled in Piscataway High School.
> 2. you repeatedly engaged in sexual relations with a female student enrolled in Piscataway High School.
> 3. you engaged in sexual relations with a female student enrolled in Piscataway High School on Piscataway High School or other Piscataway School District property.

McConney's refusal to answer these very specific questions and his refusal to admit or deny the statements and his use of the privilege against self-incrimination led Judge McGee to issue his Order II, dated January 5, 2015, wherein he considered the impact of McConney's refusal to provide the requested answers as part of discovery and noted that in Mahne v. Mahne, 66 N.J. 53 (1974), the New Jersey Supreme Court had concluded that where the privilege was invoked by the plaintiff in the course of civil discovery, its "sole purpose . . . is to shield a witness against the incriminating effects of the testimony." As such, the Court "will not permit its use as a weapon to unfairly prejudice an adversary." As such, where the privilege is invoked in a civil litigation, the action may be dismissed or a lesser non-criminal sanction may be imposed. Judge McGee concluded that the Board could still proceed in the case without the answers to its interrogatories and requests for admission. However, he concluded that, in line with Mahne, the sanction "best designed to protect the pertinent public and private interests without impairing the historic designs of the privilege," Mahne, at 61, was to permit "an adverse inference to be drawn from petitioner's invocation of his privilege against self-incrimination."

Counsel for the Board asserts that while here no tenure charges were filed and there has thus been no prior determination of misconduct, unlike in both Hovington II and Yatauro, nevertheless, given the fact that McConney resigned his position "promptly after dismissal of the indictment" and given the negative inferences that arise from his refusal to answer the pointed questions and statements in discovery, the equities do not lie in McConney's favor and "fundamental fairness" does not support his receiving back pay for the period of his suspension without pay from September 1, 2013, until his reinstatement to pay status on March 1, 2014.

Discussion

A motion for summary decision is permitted by N.J.A.C. 1:1-12.5. The standard for judging such a motion is the same as for the motion for summary judgment in the

Superior Court. The New Jersey Supreme Court defined this standard in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). The Court elaborated upon the standards first established in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J 67, 74-75 (1954). Under the Brill standard, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The substantive law governing a dispute determines which facts are material. Only disputes regarding "those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Dungee v. Northeast Foods, Inc., 940 F. Supp 682, 685 (D.N.J. 1996), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202, 211 (1986)(Anderson).

In Judson, at 75, the Supreme Court stated that the material facts allegedly in dispute upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ,"(citations omitted). Brill focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill, at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.'" Id. at 536, quoting Anderson, at 477 U.S. 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed 2d 214. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the preponderance

of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed material facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied, and a full evidentiary hearing held.

Mr. McConney was indicted for Official Misconduct, and after the indictment was reinstated by the Appellate Division, he was acquitted of that criminal charge. He resigned his position with Piscataway School District shortly after he was restored to pay status following the trial judge's ruling, which the Appellate Division found, had incorrectly dismissed the indictment. The Board did not file a tenure charge, which it must be noted they could have done even before the criminal charge was initially dismissed. I **FIND** that there is no dispute as to both the dismissal of the indictment and the lack of any tenure charges.

Once the indictment was dismissed by Judge Ferencz, with no pending tenure charge, the Board reinstated his pay as of March 1, 2014. The Board still did not choose to file a tenure charge between the date of the Judge's Order and McConney's resignation, which latter action they may well not have had any advance indication was to occur when it did. Given these undisputed facts, if one looks at the wording of N.J.S.A. 18A:6-3, it is apparent that there being no tenure charge and a dismissed indictment, as of the time of McConney's resignation, it would have seemed unfair for the Board to be able to deny back pay for the period during which there was neither a tenure charge or, as Judge Ferencz's ruling held, no grounds for the indictment that had served as the basis for the suspension of pay. At that time, it might well have seemed that the equities would have been on McConney's side, that "fundamental fairness" would require that he be made whole for the pay he lost while under the cloud of what the trial judge determined was a flawed and unsustainable indictment. At that point in time, if one looked at prior cases such as Beatty, Lopez and Griffin, one might well have ruled that the Board should

pay McConney that which had been withheld. Thus, were these the only relevant material facts, summary decision in McConney's favor would seem appropriate. However, as Hovington II and Yatauro explain, while at one point in time the fact of the jury's verdict finding a lack of criminal conduct and the absence of tenure charges would favor restoration of the suspended pay, at another point in time, where tenure charges have been filed and the employee found to have engaged in misconduct arising from the same factual base as the indictment arose from, the positions of the employee and the school board vis a vis the equities can be seen to have changed. Judge McGee kindly quoted heavily from the initial decision in Hovington II, and I will not repeat much of that material here. Hovington had been acquitted in the criminal trial, but "the charges that were not proven beyond a reasonable doubt . . . were amply proven in the tenure hearing

> Therefore, Hovington's position as a supplicant seeking equity . . . is far different than the presumptively innocent claimants in Beatty and Griffin. "Fundamental fairness," the touchstone of the commissioner's reasoning in Beatty, hardly demands that this Board be required to pay this petitioner for six years in which he did not work for the Board, when in fact he was guilty of serious tenure violations committed before his suspension. If anything, "fundamental fairness" to the citizens and taxpayers of the City of Camden demands that he not be paid where he so flagrantly violated his trust as a professional educator.
>
> [Hovington II, (initial decision)]

The question presented here is whether the facts as developed for the record as it now stands present a situation akin to those cases where there is neither a criminal conviction nor a tenure finding to support a Board's opposition to paying the monies withheld, or, instead, to those cases where the evidence of a tenure violation exists to such a degree that it would be an injustice to pay an employee for time in which he did not work and where his proven conduct shows that he did in fact act in a manner that warrants sanction. Here, there is no tenure determination made subsequent to the acquittal or dismissal of criminal charges. Instead, the Board contends that as McConney chose, as was his undeniable Constitutional right, to refuse to answer specific interrogatories or reply to specific requests for admission which directly addressed the question of whether he had sexual relations with a student enrolled in the District while he was a teacher and coach

in the District, he should be seen as one who, in effect, has admitted that he did such acts and therefore, engaged in what is undeniably improper conduct for a teacher. As the Court in Mahne noted, "the sole purpose of the privilege is to shield a witness against the incriminating effects of the testimony." Mahne, at 58. Clearly, if Mr. McConney had chosen to answer the discovery, he could have denied that he had sexual relations with a student. Since he did not deny that, the only remaining alternative is that he did. And as has been noted elsewhere, even if the student was over the age of eighteen and thus an adult, that does not mean that McConney's conduct was not a serious violation of what is expected of a teacher. Thus, to the Board, McConney's guilt of a violation of his responsibilities as a teacher is sufficiently established to move the case into the class of Hovington II and Yatauro, and away from Beatty, Griffin and Lopez. As such, with regard to its own motion for summary decision, while McConney is entitled to all reasonable inferences arising from the evidence, given the negative inference against his interests to which the Board is entitled under Judge McGee's ruling, the Board has met its burden to demonstrate that no reasonable finder of fact could conclude that he is entitled to back pay for the period of the suspension while under indictment.

The standard of proof in this proceeding requires a party seeking a favorable result to prove their case by a preponderance of the credible evidence. Despite arguments to the contrary, given the Commissioner's acceptance of the Hovington II and Yatauro analyses that sufficient proof of misconduct is properly weighed in considering the equities, the negative inference arising from McConney's refusal to answer whether he had sex with a district student while a district teacher and coach is highly relevant evidence. And as the negative inference must be that he did have such relations, I **FIND** that in the context of this specific issue regarding back pay, the Board has presented sufficient evidence to support the conclusion that McConney was guilty of misconduct by a public school teacher. Given that finding, the equities come down on the side of the Board. Considerations of fundamental fairness lead to the conclusion that Mr. McConney has failed to justify why the Board should have to pay him for the period of time he was suspended without pay. While he was not found guilty of criminal conduct for having sex

with a student who was over eighteen, that same conduct, established by a preponderance of the credible evidence, violated the accepted standards for a teacher.[1]

ORDER

Mr. McConney's motion for summary decision is **DENIED** and the Board's motion seeking dismissal of the petition for relief on substantive grounds is **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

[1]Counsel for petitioner has included as Exhibit B an arbitration decision in a tenure proceeding, In re: Lydia Wilson, Agency Dkt. No. 174-6/16 (February 1, 2017). In his brief counsel merely states that in regard to the negative inference arising from Mr. McConney's invocation of the Fifth Amendment in this administrative proceeding, that the inference is not enough to prove McConney guilty of unbecoming conduct. Without specifying what portion of the Wilson decision he believes relevant to the present matter, he merely points this judge to the "elaborate discussion on this point." It is noted that the Wilson case did not include any invocation of a privilege against self-incrimination and no negative inference issue. If counsel thought that there was some particular portion of this forty-five-page arbitration decision that should be focused upon, he should have made that clear. If instead, the point is only that in Wilson the arbitrator found that the presentation by the Board failed to present sufficient credible evidence to prove Wilson's alleged misconduct, such a general conclusion of insufficiency of evidence does not address itself to the particular nature of the present case, in which the negative inference arises directly from the refusal of McConney to answer the direct question of whether he had sexual relations with a student in the school district in which he was both a teacher and coach. His failure to deny such obviously serious conduct, which, under Mahne allows a fact finder to conclude that if he had truthfully answered the question he would have had to admit that he did engage in that conduct, constitutes sufficient evidence to determine that in a balancing of equities and a determination of fundamental fairness with respect to pay for services that were not actually rendered, the Board is entitled to prevail.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 13, 2021
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: 9/13/2021

Date Mailed to Parties: 9/13/2021

mph

EXHIBITS

For petitioner:

Exhibit A	Joint Stipulation of Facts, dated March 23, 2017
Exhibit B	Final Decision of Arbitrator in In re: Lydia Wilson, Agency Dkt. No. 174-6/16 (February 1, 2017)

For respondent:

Exhibit A	Joint Stipulation of Facts
Exhibit B	Letter dated September 11, 2014 with attached Interrogatories and Requests for Admission
Exhibit C	Letter dated September 16, 2014
Exhibit D	Order II, dated January 5, 2015, Adrian McConney v. Township of Piscataway Board of Education, Middlesex County, EDU 05769-14
Exhibit E	Decision of Appellate Division entered in State of New Jersey v. Adrian A. McConney, Docket No. A-2655-13T3, dated July 31, 2015

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We are hereby forwarding to you our complete file jacket(s) for the matter(s) listed via D C Express Inc.

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EDU

08716-21	C.F. O/B/O J.C. VS. BOE OF THE TWP. OF MONTCLAIR, ESSEX CO.
04420-21	M.M. O/B/O A.D. VS. BOE OF THE BOROUGH OF CRESSKILL, BERGEN CO.
06603-20	M.M. O/B/O A.D. VS. BOE OF THE BOROUGH OF CRESSKILL, BERGEN CO.
02731-21	NEW HORIZONS EMPLOYEE ASSOCIATION VS. BD. OF TRUSTEES OF THE NEW HORIZONS COMMUNITY CHARTER SCHOOL, ESSEX CO.

December 7, 2021 — S. WILSON (DR)
DATE — SANDRA A. WILSON, *OFFICE SUPERVISOR*
OFFICE OF ADMINISTRATIVE LAW
sandra.wilson@oal.nj.gov

12/9/21 — K. Mosher
DATE — AGENCY RECEIPT

318-21

New Jersey Commissioner of Education

Final Decision

L.K. and T.K., on behalf of minor child, A.K.,

Petitioner,

v.

Board of Education of the Township of Mansfield, Burlington County,

Respondent.

Synopsis

This matter on remand from the Appellate Division concerns an alleged act of harassment, intimidation, and bullying (HIB) by A.K. The respondent Board found that A.K. had committed an act of HIB by questioning another student (N.V.) about dressing in clothing that is typically associated with females, when N.V. had previously been known to other students as a boy. The Administrative Law Judge (ALJ) overturned the Board's finding that A.K. had committed an act of HIB; however, the Commissioner reversed the ALJ's determination, concluding that the Board's decision was not arbitrary, capricious, or unreasonable. The petitioners subsequently appealed. The Appellate Division found that the Commissioner's decision had not addressed credibility findings made by the ALJ and remanded the matter to the Commissioner. On remand the Commissioner was directed to "make explicit findings as to whether the ALJ's assessment of the testimony regarding A.K.'s allegedly persistent conduct was arbitrary, capricious, or unreasonable, or was not supported by sufficient, competent, and credible evidence in the record."

Upon a comprehensive review of the record on remand, the Commissioner affirmed the Board's determination that A.K. committed an act of HIB. In so doing, the Commissioner concluded, *inter alia*, that: the distinguishing characteristic of gender identity is present when a student who was previously known as male begins to wear clothing and use a name typically associated with females; the Board was not arbitrary, capricious, or unreasonable in determining that A.K. questioned N.V. about her choice of clothing and commented on the toys that N.V. liked; nor was it arbitrary, capricious, or unreasonable for the Board to find that A.K.'s questioning and comments interfered with N.V.'s rights because they made her feel bad; further, it was not arbitrary, capricious, or unreasonable for the Board to find that questions about a student's chosen clothing or comments about the toys that she likes are insulting or demeaning; and the fact that N.V. was upset by A.K.'s actions demonstrates that A.K. created a hostile educational environment. Accordingly, the Commissioner upheld the Board's determination that A.K. committed an act of HIB.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

318-21
OAL Dkt. No. EDU 07067-16
Agency Dkt. No. 82-3/16

New Jersey Commissioner of Education

Decision

L.K. and T.K., on behalf of minor child, A.K.,

Petitioners,

v.

Board of Education of the Township of Mansfield, Burlington County,

Respondent.

This matter concerns an alleged act of harassment, intimidation, and bullying (HIB) by A.K. The Board found that A.K. had committed an act of HIB by questioning another student (N.V.) about dressing in clothing that is typically associated with females, when N.V. had previously been known to other students as a boy. The Administrative Law Judge (ALJ) overturned the Board's finding that A.K. had committed an act of HIB. The Commissioner reversed the ALJ's determination, concluding that the Board's decision was not arbitrary, capricious, or unreasonable. Petitioners appealed, and the Appellate Division remanded the matter to the Commissioner, finding that the Commissioner's decision did not address credibility findings made by the ALJ. Specifically, the Appellate Division found that the Commissioner's decision was predicated on the finding that A.K. persisted in questioning N.V. about her gender identity after being counseled to stop, when the ALJ had discounted the credibility of the testimony on that topic. The Appellate Division directed the Commissioner, on remand, to "make explicit findings as to whether the ALJ's assessment of the testimony

regarding A.K.'s allegedly persistent conduct was arbitrary, capricious, or unreasonable, or was not supported by sufficient, competent, and credible evidence in the record.[1] *L.K. v. Bd. of Educ. of Mansfield*, 2020 *N.J. Super.* Unpub. LEXIS 2082, *3 (App. Div. Nov. 2, 2020).

The ALJ made two credibility findings regarding A.K.'s allegedly persistent conduct. First, the ALJ found that "the Board's witnesses often contradicted each other," and while she "attribute[d] this mostly to the length of time that had passed between the incidents in question and the hearing," she nonetheless found that "the administrators could not agree on the most important fact presented to the Board, which is that the HIB continued after September 29, 2015." Initial Decision at 22. The Commissioner's review of the testimony demonstrates that while the details in the administrators' accounts of the second incident between the students were not entirely consistent – likely attributable to the passage of time, as the ALJ noted – all three administrators were clear that a second incident did occur.

The ALJ summarized the testimony of the school's principal, Stacey Cullari, as follows: "On September 30, 2015, other students brought to her attention that A.K. was continuing to bother [N.V.] in the cafeteria. They said that A.K. was threatening that if [N.V.] told on her, she would get her parents on [N.V.]. [N.V.] confirmed that she said that. A.K. denied that it happened. [N.V.]'s mother also reported that [N.V.] told her it happened." Initial Decision at 14. The ALJ's summary of the testimony of the school's anti-bullying specialist, Cheryl Strickland, included the following: "The next day there was another incident, where

[1] In its decision, the Appellate Division upheld the Commissioner's determination that the procedures used by the Board in adjudicating the HIB allegations met constitutional requirements. Petitioners filed a petition for a writ of certiorari with the New Jersey Supreme Court, which was denied on May 18, 2021.

[N.V.] said A.K. was harassing [her][2] at lunch, and [N.V.] was upset. A.K. was still bothering [her], when she had agreed not to do so anymore. A.K. also accused [N.V.] of tattling on her and told other students." Initial Decision at 16. The ALJ also noted, "[Strickland] disagrees that A.K. did not continue to bother [N.V.] after they talked on September 29. She bothered [N.V.] and teased [her]. Students reported to the teacher that A.K. was bothering [N.V.] at lunch." Initial Decision at 17. Regarding the testimony of Superintendent Tiffany Moutis, the ALJ summarized: "A.K. exhibited HIB on the bus and on the playground. It continued after administrators told her to stop." Initial Decision at 20.

The Commissioner's review of the transcripts demonstrates that the ALJ accurately summarized this testimony – in other words, that the ALJ did not misrepresent or misattribute any of these statements.[3] Yet despite noting that each of the administrators testified that a second incident occurred, the ALJ somehow found that they had disagreed with each other about whether such had occurred. The ALJ did not find that any of the three administrators was not credible in her own testimony about the second incident – only that there was disagreement among them. As the Commissioner's review finds that there was no disagreement about the occurrence of a second incident, the Commissioner rejects any credibility finding based on that disagreement. Accordingly, the Commissioner finds that a second incident did occur.

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[2] N.V. used masculine pronouns at the time of the incidents and is often referred to throughout the record in that manner. However, according to one of the district's witnesses, by the time of the OAL hearings, N.V. used feminine pronouns. Accordingly, the Commissioner has used feminine pronouns herein.

[3] *See, e.g.*, Tr. September 26, 2017, 45:9-53:20, 127:10-128:9 (testimony of Stacey Cullari); Tr. September 26, 2017, 211:25-214:5, 254:10-256:6 (testimony of Cheryl Strickland); and Tr. November 15, 2017 (testimony of Tiffany Moutis).

Nor does the record support the ALJ's finding that the continuation of the HIB was "the most important fact presented to the Board." Initial Decision at 22. Despite the ALJ's credibility finding that "Ms. Perrone seemed to have the best recollection," *ibid.*, the ALJ failed to acknowledge critical elements of Ms. Perrone's testimony. Ms. Perrone, who was a member of the Board at the time the HIB decision was made, and who participated in all of the executive sessions in which the decision was discussed, stated, "I believe the incident that was brought to the Board to consider was the incident on the bus, but the additional information was given to us to understand the entirety of what was going on and that it was continuing and that A.K. was persisting." Tr. October 11, 2017, 73:13-17. In reviewing the elements of the Act, Ms. Perrone described the conduct at issue as the "incidents that occurred on the school bus on September 29th," *ibid.*, 103:15-16, "[t]he comments that A.K. made to [N.V.] regarding her gender, regarding her name, her dressing in clothing that was associated with a girl," *ibid.*, 103:18-20, and "telling [N.V.] that [N.V.] should not wear a dress because dresses were for girls." *Ibid.* 104:7-8. It is clear from these statements that, contrary to the ALJ's conclusions, the "most important facts" presented to the Board were those about the incident on the bus, and not about A.K.'s behavior afterwards. These statements are further supported by the ABS Report presented to the Board, which contains two detailed paragraphs about the bus incident, and only one sentence at the end of the report regarding the continued behavior at lunch the following day. Accordingly, the Commissioner rejects the finding that the continued harassment was the most important fact presented to the Board, because it is not supported by sufficient, competent, and credible evidence in the record.

In the second credibility finding, the ALJ found that the principal and ABS "confused information that they received from [N.V.]'s mother with information they received from

students," Initial Decision at 22, including that A.K. teased N.V. by saying that N.V. could not wear a dress to picture day, and that A.K. threatened N.V. The Commissioner concludes that the ALJ's assessment of this testimony was arbitrary, capricious, and unreasonable because it improperly evaluated the procedures used by district staff during the investigation based on procedural requirements that do not appear in the Act, conflated the purported procedural failing with the substance of the allegations, and failed to recognize that the burden of proof is on petitioners to demonstrate that the Board's decision was arbitrary, capricious, or unreasonable. Specifically, the ALJ concluded that the information provided by N.V.'s mother was not corroborated and that it was therefore insufficient to sustain the superintendent's recommendation of HIB, and it was arbitrary, capricious, and unreasonable for the Board to rely on it. However, the Act does not define acceptable sources of information regarding HIB allegations, nor does the Act contain any requirements related to hearsay or corroboration. During the course of the investigation, district staff gathered information from multiple sources – N.V., N.V's mother, A.K., T.K., and other students. Making their best judgments based on their knowledge of the students, the principal and ABS determined that the evidence was sufficient to substantiate a finding that A.K. had committed an act of HIB, including by engaging in repetitive conduct. By concluding that the district's procedures were flawed, the ALJ wrote requirements into the Act that the Legislature did not include. Moreover, the ALJ allowed her incorrect conclusion regarding the procedures to influence her conclusion about the merits of the allegations.

Furthermore, the Commissioner finds the ALJ's credibility finding regarding corroboration unreasonable to the extent that it was based on her decision to disregard any information provided by the district's witnesses that was not incorporated into their interview

notes. Again, the ALJ has written a requirement into the Act that does not exist. The individuals completing an HIB investigation are not required to take verbatim notes of their interviews – which would be extremely difficult[4] – and the Commissioner finds it entirely reasonable that they might include information in their reports that is not reflected in their notes.

When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration[,]" and the Commissioner will not substitute his judgment for that of the board. *Bayshore Sewerage Co. v. Dep't. of Envtl. Prot.*, 122 *N.J. Super.* 184, 199 (Ch. Div. 1973), *aff'd*, 131 *N.J. Super.* 37 (App. Div. 1974). Regarding HIB determinations, this standard has been explained as requiring a petitioner to "demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." *G.H. and E.H. o/b/o K.H. v. Bd. of Educ. of the Borough of Franklin Lakes, Bergen Cty.*, EDU 13204-13, (Initial Decision February 24, 2014), *adopted* Commissioner Decision No. 157-14 (Apr. 10, 2014). Based on the evidence in the record, the Commissioner finds that petitioners did not meet their burden of demonstrating that the Board's decision was arbitrary, capricious, or unreasonable.

Contrary to the ALJ's conclusion, for the reasons detailed herein, the record contains sufficient credible evidence to support the Board's decision that A.K. continued to make

[4] This is consistent with the witnesses' explanations as to why certain information was not included in their notes. *See, e.g.*, Tr. Sept. 26, 2017, 89:15-23; Tr. Feb. 14, 2018, 19:4-9, 39:19-24, 48:5-11.

comments regarding N.V.'s gender identity after she had been told to stop by administrators and her mother. The only evidence petitioner presented to demonstrate that nothing happened between the students after the bus incident was T.K.'s testimony about what her daughter told her.[5] At best, this evidence balances the evidence that A.K. did continue to make comments to N.V. While the evidence may leave room for two opinions regarding whether A.K. continued her conduct, it is insufficient to overturn the Board's decision, because it does not demonstrate that the decision was arbitrary, capricious, or unreasonable. To overturn the Board's decision would require the Commissioner to substitute her judgment for the Board's, which is impermissible.

Even if the Commissioner accepted the ALJ's credibility findings, and thus disregarded the cafeteria incident, the Commissioner must still consider the remaining evidence regarding A.K.'s conduct. Specifically, the ALJ found that A.K. questioned N.V. about her choice of clothing, and N.V. was upset about the questions. Initial Decision at 22. The ALJ noted that when the principal and ABS interviewed N.V., N.V. stated that she asked A.K. to stop asking her questions, and A.K. would not stop; N.V. reported that the questioning made her feel bad. *Ibid.* The ALJ found that A.K. admitted that she asked N.V. about the clothing N.V. wore.[6] Initial Decision at 23. The ALJ also found that N.V. reported that A.K. made fun of her for liking Shopkins and Monster High toys. Initial Decision at 22. The Commissioner's review of the

[5] While the Commissioner accepts the ALJ's finding that T.K. was "mostly credible" in her testimony, that credibility finding does not dictate the weight placed on that testimony. Because T.K. was not present for the incidents at issue, her testimony is of limited value in determining what actually happened between the students. The Commissioner notes that the ALJ relied heavily on the fact that all the information provided to the investigators by N.V.'s mother was hearsay, but failed to address the same limitation in T.K.'s testimony.

[6] A.K.'s mother also testified that "A.K. asked the student many times" about her clothing and "the student was upset because A.K. kept asking." Initial Decision at 7. Additionally, the Appellate Division confirmed that the "parties do not dispute that A.K. questioned N.V. about wearing a dress while riding together on the school bus." *L.K., supra*, 2020 N.J. Super. Unpub. LEXIS 2082, at *4.

record supports these factual findings by the ALJ. In particular, the handwritten, contemporaneous notes of the interview the principal and ABS conducted with N.V. on the date of the bus incident include this information, Exhibit J-26, and it was recounted by the principal and ABS in their testimony.[7]

The Commissioner disagrees with the ALJ that the bus incident was insufficient to sustain the Board's finding that A.K. committed an act of HIB. The Commissioner finds that it was not arbitrary, capricious, or unreasonable for the Board to conclude that N.V. reasonably perceived A.K.'s questioning regarding her choice of dress or comments about the toys she liked as being motivated by the distinguishing characteristic of gender identity and that A.K.'s conduct substantially disrupted or interfered with N.V.'s rights, was insulting or demeaning, and created a hostile educational environment.

Initially, the Commissioner concludes that the Board was not arbitrary, capricious, or unreasonable in determining that A.K. questioned N.V. about her choice of clothing and commented on the toys that N.V. liked. Regarding the questioning, A.K. admitted that it occurred when she was interviewed on the day of the bus incident, and petitioner admitted that it occurred in her testimony. As the behavior was admitted, any alleged procedural flaws in the investigation are irrelevant to the determination of whether the questioning constituted HIB. It does not matter whether the investigation notes reflect every detail about the questioning, what other students on the bus reported, or whether the bus driver or teacher were interviewed. The Board was not arbitrary, capricious, or unreasonable in finding that the questioning occurred when all parties agree that it did occur. The only necessary analysis is

[7] *See, e.g.*, Tr. Sept. 26, 2017, 20:7-11, 21:14-20, 22:22-23:6, 90:2-6, 199:13-200:12, 200:23-24, 252:6-25, 287:23-24; Exhibit J-26.

whether the Board was arbitrary, capricious, or unreasonable in finding that the questioning met the criteria to be HIB under the Act.

Regarding A.K.'s comments about toys, the ALJ accepted the testimony that N.V. reported A.K's comments about toys. Furthermore, the handwritten, contemporaneous interview notes also reflect comments about toys, so the ALJ's concerns about lack of note-taking that arise regarding other parts of the HIB report do not apply to these comments. Furthermore, the Commissioner finds that N.V.'s report is sufficient to conclude that the Board was not arbitrary, capricious, or unreasonable in finding that the comments occurred, because the Act does not require corroboration of a victim's report. Accordingly, the only necessary analysis is whether the Board was arbitrary, capricious, or unreasonable in finding that the comments met the criteria to be HIB under the Act.

The Anti-Bullying Bill of Rights Act (the Act) defines HIB as follows:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or

> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> *N.J.S.A.* 18A:37-14.

Therefore, a finding of HIB requires three elements.[8] First, the conduct must be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. The third condition is that one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex County*, Commissioner Decision No. 51-20 (decided February 4, 2020).

Regarding the first element, in defining HIB as an action "that is *reasonably perceived* as being motivated either by any actual or perceived characteristic . . .", *N.J.S.A.* 18A:37-14 (emphasis added), the statute requires an analysis of how the actor's motivation is perceived and whether that perception is reasonable. It does not require an analysis of the actual motivation of the actor. *Wehbeh, supra.* Certainly, evidence that the actor was motivated by a distinguishing characteristic would meet the standard of this section of the Act, but evidence that the actor was not so motivated does not end the analysis.

Petitioner argued that A.K. does not even know what "gender identity" means. However, the Commissioner concludes that the distinguishing characteristic of gender identity is present when a student who was previously known as male begins to wear clothing and use a name typically associated with females. A.K.'s knowledge of gender identity as a concept, or

[8] The statute also requires that the conduct take place on school property, at a school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3. The parties do not contest that this requirement has been met.

lack thereof, does not change the fact that N.V. clearly had characteristics that distinguished her from other children. Furthermore, the Act does not require that A.K. be aware of the concept of gender identity or that she be specifically motivated by N.V.'s gender identity. As explained above, the focus of the Act is on the reasonable perception of the aggressor's motivation, and not on the actual motivation. While the Commissioner acknowledges the possibility that A.K.'s questions were motivated by curiosity rather than animus,[9] the fact remains that the questions could be reasonably perceived as being motivated by N.V.'s gender identity, such that it was not arbitrary, capricious, or unreasonable for the Board to find that this element of the Act had been met.

The ALJ improperly concluded that the superintendent had misstated the law when she told the Board that A.K.'s age was not relevant to their decision. The ALJ acknowledged that A.K.'s age was not a bar to a finding of HIB, but nonetheless indicated that it was incorrect to say that her age had no bearing on the Board's decision. Here, it is the ALJ who is incorrect, not the superintendent. While a student's age should be taken into consideration in determining the consequences of an HIB finding – and it was here – age is irrelevant to whether an act of HIB was committed. The Act does not establish an age range for students who may be HIB victims or offenders. As Superintendent Moutis explained to the Board, and Board Member Perrone recounted hearing, the focus of the Act is on the impact of the action. Therefore, there was no misstatement of the law by the superintendent, and even if the Board completely

[9] The Initial Decision correctly indicates, "There is no requirement that the Board find that A.K.'s conduct was actually motivated by the perceived characteristic." Initial Decision at 35. However, it continues to say that "the age of A.K. was relevant to whether A.K.'s conduct was motivated by the perceived characteristic or because a seven-year-old would be curious about why a student she knew as a boy was dressing like a girl." *Ibid.* This statement, which addresses actual motivation, is incorrect, and neither A.K.'s age nor her knowledge about gender identity is relevant in determining whether HIB occurred.

disregarded A.K.'s age in making its decision, doing so did not make its decision arbitrary, capricious, or unreasonable.

Regarding the second element – whether the conduct substantially disrupted or interfered with A.K.'s rights – the principal and the ABS testified that A.K.'s questioning on the bus made N.V. feel bad, and the ALJ accepted that testimony. Initial Decision at 22. The Commissioner has previously upheld HIB determinations when the targeted student was upset, embarrassed, or uncomfortable as a result of the conduct. *See, e.g., G.H., supra* ("Upset and embarrassed children are not fully available for learning"); *R.P., o/b/o minor child, A.P. v. Bd. of Educ. of the Twp. of Hamilton, Atlantic Cty.*, EDU 09436-17 (Initial Decision Feb. 13, 2018), *adopted* Commissioner Decision No. 100-18 (Mar. 29, 2018); *M.S. and N.S., o/b/o J.S. v. Bd. of Educ. of the Twp. of Hainesport, Burlington Cty., and J.M. and D.M., o/b/o J.M.*, EDU 08878 (Initial Decision Mar. 28, 2019), *adopted* Commissioner Decision No. 155-19 (June 18, 2019). The Commissioner concludes that it was not arbitrary, capricious, or unreasonable for the Board to find that A.K.'s questioning and comments interfered with N.V.'s rights because they made her feel bad.[10]

Regarding the third element, an act of HIB is one that "a reasonable person *should* know, under the circumstances, will have the effect of physically or emotionally harming a

[10] The Commissioner also notes that N.V.'s mother reported that N.V. did not want to ride the bus because of the incident with A.K. The ALJ found that the Board was arbitrary, capricious, or unreasonable in relying on this information, because the Board did not know that there was another student who bothered N.V. on the bus and could have been an additional source of N.V. not wanting to ride the bus. The ALJ noted that if the Board had that information and still decided that A.K. was the source of the substantial impact, "that would have been fine." Initial Decision at 36. The Commissioner disagrees with the ALJ that the Board needed information about another student in order for its determination to be upheld. The principal and ABS both testified that they spoke to N.V. about the other student, and N.V. reported that she was not bothered by J.T. *See, e.g.*, Tr. Sept. 26, 2017, 35:8-18, 85:13-14, 187:11-15, 275:11-13. The Commissioner finds that it was reasonable for the principal and ABS, in preparing the HIB report for superintendent and the Board, to present the information they found to be credible and not to present information that they found did not have an impact on N.V. Notwithstanding the Commissioner's conclusion on this issue, the fact that N.V. was clearly upset following the bus incident with A.K. – about which there is no dispute – is sufficient to support the Board's determination.

student," *"has the effect* of insulting or demeaning a student," *or "creates* a hostile educational environment . . .". *N.J.S.A.* 18A:37-14(a) (emphasis added). None of these criteria require the actor to have actual knowledge of the effect that his actions will have, or to specifically intend to bring about that effect. The first requires only that a reasonable person should know there would be a harmful effect, not that the actor knows there would be such an effect. The second two criteria address only the actual effect of the act, without any reference to what either the actor or a reasonable person does or should know. *Wehbeh, supra.* As such, a board of education can find that an individual committed an act of HIB even if the individual did not intend to cause harm. For this reason, neither A.K.'s age nor her alleged lack of knowledge about the concept of gender identity preclude a finding that the third element of the Act has been met.

While only one of these criteria about the effect of the conduct need to be met, the testimony demonstrates that at least two have been met. First, Ms. Perrone testified about the effect of A.K.'s conduct on N.V., stating, "I believe that the comment that [N.V.] should not be wearing a dress can be interpreted by a child as being critical or derogatory," Tr. October 17, 2017, 109:18-20, and, "the comments that were made to [N.V.] it appears made [N.V.] feel challenged or that she was doing something wrong by identifying as a girl." *Ibid.* 109:22-24. The Commissioner concludes that it was not arbitrary, capricious, or unreasonable for the Board to find that questions about a student's chosen clothing or comments about the toys that she likes are insulting or demeaning. Second, the fact that N.V. was upset by A.K.'s actions demonstrates that A.K. created a hostile educational environment. The Commissioner disagrees with the ALJ that the fact that the relationship between A.K. and N.V. was friendly

following the incident obviates a finding of HIB. There is nothing in the Act that requires that a hostile educational environment persist for a specified period of time.

Accordingly, the Board's determination that A.K. committed an act of HIB is affirmed.

IT IS SO ORDERED.[11]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 9, 2021
Date of Mailing: December 9, 2021

[11] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

319-21

319-21E
OAL Dkt. No. EDU 09091-21
Agency Dkt. No. 205-10/21

New Jersey Commissioner of Education

Order on Emergent Relief

A.O., on behalf of minor child, E.M.,

Petitioner,

v.

Board of Education of the Penns Grove-Carneys Point Regional School District, Salem County,

Respondent.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons stated therein. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.[1]

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 9, 2021
Date of Mailing: December 9, 2021

[1] While the ALJ's recommended order indicates that there is no need for a due process hearing following this decision on emergent relief, the Commissioner disagrees and notes that the issues in this matter are not fully resolved at this juncture; accordingly, this matter must proceed at the OAL.

321-21

OAL Dkt. No. EDU 1067-20
Agency Dkt. No. 331-12/19

New Jersey Commissioner of Education

Final Decision

S.N., on behalf of minor child, M.N.,

Petitioner,

v.

Board of Education of the Township of Cherry Hill, Camden County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 9, 2021
Date of Mailing: December 9, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01067-2020
AGENCY DKT. NO. 331-12/19

S.N. ON BEHALF OF CHILD, M.N.,
Petitioners,
v.
TOWNSHIP OF CHERRY HILL BOARD OF EDUCATION, CAMDEN COUNTY,
Respondent.

Louis N. Caggiano, Jr., Esq. for petitioners

Paul H. Green, Esq., for respondent (Schenck, Price, Smith and King, LLP, attorneys)

Record Closed: October 21, 2021 Decided: October 25, 2021

BEFORE **JOAN M, BURKE**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 22, 2020, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof. A copy of the Settlement Agreement is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 25, 2021
DATE

JOAN M. BURKE, ALJ

Date Received at Agency: 10/26/2021

Mailed to Parties: 10/27/2021

/mel

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October 20, 2021

Via Email (maria.lugo@oal.nj.gov)
Hon . Joan Burke, ALJ
New Jersey Office of Administrative Law
P.O. Box 049
Trenton, New Jersey 08625-0049

RE: ***S.N. o/b/o M.N. v. Cherry Hill Board of Education***
OAL Docket No. EDU 01067-2020

Dear Judge Burke:

Enclosed for filing and incorporation into an Initial Decision is a fully executed settlement agreement in the above-captioned matter.

Please advise should you require anything further. Thank you for your courtesies and cooperation.

Respectfully yours,

SCHENCK, PRICE, SMITH & KING, LLP



Paul H. Green

cc: Louis N. Caggiano, Jr., Esq. (*via email*)

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Attorneys for Respondent

S.N. o/b/o minor child M.N., Petitioner, v. Board of Education of the Township of Cherry Hill, Camden County, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY/ OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU 01067-2020 Agency Ref. No. 331-12/19 **SETTLEMENT AGREEMENT AND RELEASE**

1. This Settlement Agreement and Release ("Agreement") is made and entered into by and between S.N. (hereinafter, "Petitioner") and the Cherry Hill Board of Education (hereinafter "Board" or "Respondent").

RECITALS

WHEREAS, Petitioner has commenced the within administrative proceeding, which is currently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 01067-2020, Agency Ref. No. 514-9/10 (the "Litigation"), challenging the Board's determination to uphold its administration's finding that Petitioner's child, M.N., committed an act of harassment, intimidation or bullying ("HIB"); and

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. **Pupil Record.** The Respondent shall upon approval of this Agreement by the Commissioner of Education expunge and permanently remove all reference to the HIB proceeding from M.N.'s pupil file, including all correspondence and findings. It is understood that a record of the HIB incident will remain in the District's electronic HIB system, but will not appear in M.N.'s student record.

2. **General Release by Petitioner.** In exchange for the above consideration Petitioner and her heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any claims or rights, whether known or unknown, now and in the future, which they have or may have against the Board, personally and officially, individually and collectively, its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns, as it relates to the subject matter of the Litigation.

3. **Dismissal of Litigation.** Upon approval of this Agreement by the Commissioner, the within controversy shall be dismissed with prejudice.

4. **No Admissions.** The parties to this Agreement have agreed to this settlement solely to avoid the inconvenience, distractions, inherent uncertainties and legal fees associated with continuation of their dispute, and no party admits any liability, wrongdoing, malfeasance, misfeasance, or negligence.

5. **Reliance on Counsel.** Petitioner represents that she is freely entering into this Agreement, that she is acting with the advice of counsel of her choosing, and that she has read and fully understand the contents and effects of this Agreement.

6. **Binding Impact.** This Agreement shall be binding upon all parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors, predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, shareholders, members, employees, agents and assigns.

7. **Attorneys' Fees.** Each party hereto shall bear its/her own attorneys' fees and costs incurred through the execution of this Agreement.

8. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which, taken together, shall constitute one and the same agreement, and shall be deemed fully executed when each party has received at least one counterpart executed by each other party.

9. **New Jersey Law.** This Agreement shall be governed by and interpreted under the laws of New Jersey.

10. **Complete Agreement.** This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements, undertakings, restrictions, representations or warranties as between the parties other than those set forth herein. This Agreement supersedes all previous arrangements or understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the parties.

11. **Commissioner's Approval.** This Agreement will be incorporated into an Initial Decision by the Hon. Joan Burke, ALJ, and is subject to final approval by the Commissioner of Education.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the dates set forth below.

FOR PETITIONER

Date: 7-29-2021 Stuart Neeth

S. N.

FOR RESPONDENT,
CHERRY HILL BOARD OF EDUCATION

Date: October 19, 2021 J. M. Meloche

Joseph Meloche, Superintendent

327-21

327-21

New Jersey Commissioner of Education

Final Decision

Tristin Goode, Doreen Blanchard-Gliebe; D.G., on behalf of minor child N.G.; T.A., on behalf of minor children, C.A., C.A., C.A., G.A., C.A., and T.A. and L.V., on behalf of minor children, E.V., K.V. and D.V.,

Petitioners,

v.

Board of Education of the Watchung Hills Regional School District, Somerset County,

Respondent.

Synopsis

Petitioning parents alleged that the respondent Board violated *N.J.S.A.* 18A:33-1, which requires school districts to provide "courses of study suited to the ages and attainments of all pupils," by approving a twelfth-grade curriculum that includes as optional reading a book entitled Fun Home: A Family Tragicomic (Fun Home). Petitioners contended that the book contains obscene, age-inappropriate material that is ill-suited for the school curriculum. The Board filed a motion to dismiss the petition in lieu of filing an answer, arguing that the petition is time-barred pursuant to *N.J.A.C.* 6A:3-1.3(i) which requires petitions to be filed no later than 90 days from the date of the relevant Board decision.

The ALJ found, *inter alia*, that: pursuant to *N.J.A.C.* 6A:3-1.3(i), a petition must be filed no later than the 90th day from the date of receipt of the notice of a final order or action that is the subject of the appeal; the "90 day rule" may only be relaxed in cases where strict adherence to the rule would be inappropriate or result in an injustice, or if there is a substantial constitutional issue involved; in the instant case, petitioners argued that they did not know that they could file an appeal with the Commissioner until they received the Superior Court's June 10, 2019 order dismissing their complaint which sought to enjoin the Board from violating criminal statute *N.J.S.A.* 2C:34-3 by "distributing to minors" the "obscene and pornographic" Fun Home, yet they subsequently failed to file the within petition until nearly six months later, on December 6, 2019; and it is unclear how exactly Fun Home's placement in a twelfth-grade curriculum as an optional assignment violates the thorough-and-efficient-education clause of the New Jersey constitution and thus rises to the level of a "substantial constitutional issue" that would override the ninety-day rule. Accordingly, the ALJ concluded that petitioners failed to file a timely appeal and consequently declined to address any substantive issues in this matter.

The Commissioner concurred with the ALJ's determinations herein and adopted the Initial Decision of the OAL as the final decision in this case. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

327-21

OAL Dkt. No. EDU 00592-20
Agency Dkt. No. 314-12/19

New Jersey Commissioner of Education

Decision

Tristin Goode, Doreen Blanchard-Gliebe; D.G., on behalf of minor child N.G.; T.A., on behalf of minor children, C.A., C.A., C.A., G.A., C.A., and T.A. and L.V., on behalf of minor children, E.V., K.V. and D.V.,

Petitioners,

v.

Board of Education of the Watchung Hills Regional School District, Somerset County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions. Upon such review, the Commissioner concurs with the Administrative Law Judge that the petition should be dismissed because it was filed outside of the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons stated therein, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 13, 2021
Date of Mailing: December 14, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDU 00592-20
AGENCY DKT. 314-12/19

TRISTIN GOODE;
DOREEN BLANCHARD-GLIEBE;
D.G. ON BEHALF OF MINOR CHILD N.G.;
T.A. ON BEHALF OF MINOR CHILDREN C.A.,
C.A., C.A., G.A., C.A., AND T.A.; AND
L.V. ON BEHALF OF MINOR CHILDREN E.V., K.V., AND D.V.,
Petitioners,

v.

BOARD OF EDUCATION,
WATCHUNG HILLS REGIONAL SCHOOL DISTRICT,
SOMERSET COUNTY,
Respondent.

Demetrios K. Stratis, Esq., appearing for petitioners Tristin Goode; Doreen Blanchard-Gliebe; D.G. on behalf of minor child N.G.; T.A. on behalf of minor children C.A., C.A., C.A., G.A., C.A., and T.A.; and L.V. on behalf of minor children E.V., K.V., and D.V. (Ruta, Soulios & Stratis, attorneys)

Erik Harrison, Esq., appearing for respondent Board of Education, Watchung Hills Regional School District (Methfessel & Werbel, attorneys)

Record Closed: December 7, 2020 Decided: November 5, 2021

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

The petitioners, five individual parents of children who attend or attended school in the Watchung Hills Regional School District,[1] allege that the respondent, the Board of Education of the Watchung Hills Regional School District (Board), violated N.J.S.A. 18A:33-1, which requires school districts to provide "courses of study suited to the ages and attainments of all pupils," by approving a twelfth-grade curriculum that includes as optional reading Alison Bechdel's graphic memoir entitled Fun Home: A Family Tragicomic (Fun Home), which includes comic illustrations and in which the author chronicles her early struggles with her sexual identity as a lesbian and her complicated relationship with her gay father. According to petitioners, the book contains obscene, age-inappropriate material that is ill-suited for the curriculum.

In response, the Board has moved to dismiss the petition in lieu of filing an answer on the basis that petitioners failed to file their challenge within ninety days of the relevant Board decision, as required by N.J.A.C. 6A:3-1.3(i).

PROCEDURAL HISTORY

On December 6, 2019, the petition was filed with Commissioner of the Department of Education. The District responded by filing a motion to dismiss in lieu of an answer, contending that because the petitioners had failed to file their petition within the ninety-day limitation required under N.J.A.C. 6A:3-1.3(i), dismissal was required.

The matter was transmitted to the Office of Administrative Law, where it was filed as a contested case on January 13, 2019 [sic, 2020]. N.J.S.A. 52:14B-1 to -15; N.J.S.A.

[1] The petitioners are Tristin Goode and Doreen Blanchard, individually; D.G., on behalf of her child N.G.; T.A. on behalf of her six children; and L.V. on behalf of her three children.

52:14F-1 to -13. On June 19, 2020, the petitioners filed a response to the motion in which they contend that the petition is not time barred, and that even if the time limits had been exceeded, the issue is of such importance that the rule should be relaxed to permit the matter to go forward. Supplemental responses were received from the parties on December 2, December 4, and December 7, 2020, when the record closed.[2]

STATEMENT OF FACTS[3]

On November 7, 2017, the Board ostensibly approved a revised curriculum resolution that added Fun Home to the twelfth-grade English curriculum. Board Ex. E. While it may be accurate to say that the Board did, in fact, resolve to add Fun Home to the curriculum at that meeting, the meeting minutes provided by the Board in support of its motion to dismiss simply state "RESOLVED, the Board of Education approves the curriculum for the courses as per the attached list"; however, there is no list attached to the minutes, and the Board has not otherwise submitted a list showing that Fun Home was added to the curriculum at its November 7, 2017, meeting. Ibid.

Nonetheless, it is not disputed that the Board distributed Fun Home to certain students in spring 2018. At the Board's May 22, 2018, meeting, several parents voiced their concern about sexually explicit material contained in the book. Board Ex. F. One parent asked the Board and the district's superintendent about the process to remove the book from the curriculum. Ibid. In response, the Board's president, Peter Fallon, stated, "[w]e don't have that set out in a particular policy," but encouraged the parent to come to the next Board meeting, if, after speaking with certain district personnel, the parent's concerns were not allayed. Petitioners' Ex. B. The district's superintendent, Elizabeth Jewett, advised, "if you do not want your child to participate in a certain part of the curriculum, we have a process for that." Ibid.

At the next Board meeting on June 5, 2018, the Board again allowed for public comment on the inclusion of Fun Home in the curriculum. Board Ex. G. Prior to public

[2] This decision was delayed in filing by a personal extended medical emergency and the COVID-19 pandemic.
[3] The facts are gleaned from the exhibits of both parties.

comment, Mr. Fallon and Ms. Jewett made statements regarding Fun Home. Ibid. Mr. Fallon acknowledged that the Board had recently received many emails and phone calls from parents about the book. Ibid. He explained that Fun Home was added to the curriculum as part of a five-year strategic plan that the Board had implemented in part to "enhance the social and emotional wellness of all students within a compassionate learning community." Ibid.

He clarified that Fun Home was optional reading, such that if students "are uncomfortable with the content or the images in the book, they can opt out of reading the book and another book will be assigned." Ibid. He also stated, "approval of the curriculum for the next school year is not on our Meeting Agenda for tonight." Ibid. He surmised that "[i]t is possible that after listening to your comments tonight some Board members may want to revisit that and discuss whether or not the current curriculum—which does include [Fun Home]—should be revised," but he also advised that absent such revision by the Board, "the next time this will be considered would likely be next January, when the Board typically is asked to approve or disapprove of the entire curriculum." Ibid.

Mr. Fallon directed "those of you who find the images [in the book] offensive" to Board Policy No. 2240, which pertains to "Controversial Issues." Ibid. That policy states that "[a]ll complaints about instructional material directed to the [Board] must be in writing," and advises that the Board has the "ultimate responsibility to decide on the educational materials to be used." Petitioners' Ex. E.

Ms. Jewett then gave a statement on the district's reasoning for including the book in the curriculum. Board Ex. E. She explained that "[w]e chose Fun Home to advance our goals for thoughtful, contextualized literary reading and to expand the LGBTQ voices in our curriculum." Ibid.

Thereafter, several members of the public made comments, some in favor of the book, but many in opposition to the inclusion of Fun Home in the curriculum. Ibid.

After public comment, Ms. Jewett announced that "the English supervisor will be working with members of the English department this summer to select additional titles to

add to the LGBTQ literature unit of study in addition to . . . Fun Home," and that "[t]his will allow students to have several options from which to choose one work to read during the LGBTQ literature unit." Ibid. She stated that she anticipated "the additional titles being shared with the [Board's] Education Committee in September and subsequently being recommended to the full Board for approval at our September or early October board meeting." Ibid.

At its September 6, 2018, meeting, the Education Committee ultimately approved the addition of two other books that students could choose if they did not want to read Fun Home. Board Ex. K.

At a September 11, 2018, Board meeting, a parent presented the Board with a petition signed by 650 parents and community members urging the Board to remove Fun Home from the curriculum. Petitioners' Ex. F.

On September 29, 2018, petitioner Tristin Goode emailed her concerns about Fun Home to the Somerset County executive superintendent, Roger Jinks. Board Ex. L. She asked that Mr. Jinks "address our concerns regarding the apparent criminal offense posed by requiring this book to be read by students under age 18." Ibid. She stated that "[a]n expedited response is requested, since if this curriculum is approved at the next [Board] meeting on October 2, 2018, the book will be included in the current Class of 2019 curriculum." Ibid.

In response, Mr. Jinks stated, "[t]he selection of materials to implement the curriculum is in the discretion of the school district," and "[p]lease continue to share your concerns with the board of education." Ibid. He also advised Ms. Goode to "address this [criminal] issue with your county prosecutor's office." Ibid.

On October 2, 2018, the Board approved the inclusion in the curriculum of Fun Home and the two alternative books recommended by the Education Committee. Board Ex. M.

On May 3, 2019, several of the petitioners in this matter filed a verified complaint against the Board in the New Jersey Superior Court, Chancery Division, seeking to enjoin the Board from violating criminal statute N.J.S.A. 2C:34-3 by "distributing to minors" the "obscene and pornographic" Fun Home. Board Ex. N. On June 10, 2019, the court dismissed the complaint for several reasons, including the complainants' failure to exhaust their administrative remedies with the Commissioner of Education. Board Ex. O.

According to petitioners, "[i]n July and August 2019, the lawsuit participants, following the order of the Court, worked with the staff of the Commissioner of Education to set a date to meet with the Commissioner to have our dispute heard." Petition, ¶ 13. Petitioners met with staff on September 23, 2019, and "[t]hey then were made aware of the procedure to follow to have the dispute formally heard by the Commissioner." Ibid.

On December 6, 2019, petitioners filed with the Commissioner of Education this petition seeking to remove Fun Home from the curriculum. On December 26, 2019, the Board filed a brief in support of its motion to dismiss in lieu of an answer in accordance with N.J.A.C. 6A:3-1.5(g).

According to the Board, the petition should be dismissed as untimely under N.J.A.C. 6A:3-1.3(i), also known as the "ninety-day rule," which requires a petitioner who seeks to challenge a school board's action to file a petition with the Commissioner of Education "no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education." The Board argues that the December 6, 2019, petition should be dismissed because the petitioners failed to file their petition within ninety days of the Board's initial decision to add Fun Home to the curriculum on November 7, 2017, or within ninety days of the Board's decision on October 2, 2018, to revise the curriculum to add two other books from which students could choose to read instead of Fun Home.

The Board alternatively argues that good cause does not exist to relax the ninety-day rule, and questions the standing of several of the petitioners.

In opposition to the Board's motion, petitioners contend that the ninety-day rule should be relaxed because this matter implicates significant questions of public interest and constitutionality with respect to whether certain material in Fun Home is obscene and the book should be removed from the curriculum. Petitioners further argue that the ninety-day rule should not apply to this matter because the Board's action in including the book in the curriculum was not limited to certain votes taken in 2018, as the Board votes on the curriculum on a yearly basis, and thus the repeated inclusion of Fun Home in the curriculum "involves an ongoing violation" that should be subject to the Commissioner's review.

Petitioners also submit that the ninety-day rule should not apply here because the Board misled petitioners by advising them of the incorrect policy for seeking removal of the book from the curriculum. Specifically, the Board directed parents who wished to have Fun Home removed from the curriculum to seek redress through Board Policy No. 2240, which pertains to "Controversial Issues"; however, the appropriate policy is No. 9130, "Public Complaints and Grievances," which sets forth the procedure for "complaints about instructional or resource materials" and for the Board's determination of whether "challenged material may be removed from the curriculum." Petitioners' Ex. D.

That policy further provides that, upon receipt of a written complaint, "[t]he Superintendent shall appoint a committee of professional staff members and community representatives to review the challenged material against the standards for the selection of resource materials established by Board policy." Ibid. The committee would then report its findings to the Board and, if the Board ultimately decides not to remove challenged material from the curriculum, "[a] complainant shall be notified that a decision of the Board may be appealed to the Commissioner of Education." Ibid. Petitioners argue that the Board's failure to advise them of this policy caused a delay in the filing of the petition such that the ninety-day rule should be relaxed.

Finally, the parties dispute whether, even if the matter is not dismissed pursuant to the ninety-day rule, the Board's decision to include Fun Home in the curriculum was arbitrary and capricious and in violation of N.J.S.A. 18A:33-1.

LEGAL ANALYSIS AND CONCLUSION

Under the "rules of procedure for the filing of petitions with the Commissioner of Education to hear and decide controversies and disputes arising under school laws," N.J.A.C. 6A:3-1.1 to -1.17, "[t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing." N.J.A.C. 6A:3-1.3(i). The rules further provide that a respondent may file a motion to dismiss in lieu of an answer to a petition. N.J.A.C. 6A:3-1.5(g). Such motion may be made "on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason." N.J.A.C. 6A:3-1.10.

Here, the Board has filed a motion to dismiss in lieu of an answer to the petition on the grounds that the petition is untimely under the ninety-day rule, N.J.A.C. 6A:3-1.3(i). As the Supreme Court has explained, the ninety-day rule serves the dual purposes of (1) "stimulat[ing] litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims" and (2) "penaliz[ing] dilatoriness and serv[ing] as a measure of repose by giving security and stability to human affairs." Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 587 (1993) (citations and quotations omitted).

The ninety-day rule may be "relaxed or dispensed with . . . in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice," or if there is "the presence of a substantial constitutional issue or other issue of fundamental public interest beyond that of concern only to the parties themselves." N.J.A.C. 6A:3-1.16; Balwierczak v. Bd. of Educ. of Berkeley Heights, 1999 N.J. AGEN LEXIS 1367 (Dec. 8, 1999).

The ninety-day rule has been relaxed in several cases. For example, in D'Alessandro v. Board of Education of Middletown, 1986 S.L.D. 2496, although a teacher untimely filed his petition alleging that the school board had adopted a discriminatory affirmative-action policy, the Commissioner relaxed the ninety-day rule "in the interest of

justice" because "if the facts of this case are as petitioner alleges, then, potentially, the situation could constitute a continuing violation . . . in permitting a potentially illegal discriminatory practice to continue in perpetuity," absent a review by the Commissioner. Id. at 2514, 2515.

In Newark Teachers Union Local 481 v. State-Operated School District of Newark, 2016 N.J. AGEN LEXIS 502 (May 12, 2016), in a case involving the layoff of forty-six attendance officers responsible for monitoring and locating truant students, the Commissioner deemed relaxation of the ninety-day rule appropriate due to "the importance of attendance."

Lastly, in C.G. & R.G. ex rel. R.M.G. v. Board of Education of Brick, EDU 2375-05 (State Bd. of Educ. July 19, 2006), in which parents sought to challenge the grade their child received in an English class, the State Board of Education relaxed the ninety-day rule because the parents twice sought help from the Department of Education in filing an appeal within the relevant limitations period but were given insufficient guidance.[4]

Here, there are two relevant Board actions for purposes of the ninety-day rule. The first is the Board's November 7, 2017, vote to add Fun Home to the curriculum; the second is the Board's October 2, 2018, decision to keep Fun Home in the curriculum, but to make the book optional reading by offering two other books from which twelfth-grade students could choose. Petitioners filed their petition on December 6, 2019, well more than ninety days from either Board decision. However, the papers submitted in support of and in opposition to the Board's motion reveal that petitioners' late filing was not entirely without excuse.

First, the minutes from the November 7, 2017, meeting in which the Board added Fun Home to the curriculum state that the Board approved "the curriculum for the courses as per the attached list"; however, there is no list attached to the minutes, and the Board has not otherwise submitted a list showing that the public was then put on notice that Fun Home was added to the curriculum. As the Court stated in Kaprow, "[a]dequate notice"

[4] This decision is available at https://www.nj.gov/education/legal/sboe/index.shtml.

to trigger the ninety-day limitations period "must be 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 N.J. at 587. Because the November 7, 2017, meeting minutes do not reflect that the public, including petitioners, were given adequate notice of the Board's decision to add Fun Home to the curriculum, the Board's November 7, 2017, decision cannot be said to have started the ninety-day clock to challenge the Board's decision and to seek the removal of the book from the curriculum.

Moreover, it appears from the record that the Board misinformed the public at subsequent meetings of the proper procedure to use, and that this misinformation also could have delayed the filing of the instant petition. Specifically, at the Board's May 22, 2018, meeting, in response to a parent who asked how to pursue the removal of Fun Home from the curriculum, Mr. Fallon, the Board president, stated, "[w]e don't have that set out in a particular policy," and Ms. Jewett, the superintendent, advised, "if you do not want your child to participate in a certain part of the curriculum, we have a process for that." Then, at the June 5, 2018, Board meeting, Mr. Fallon advised parents who objected to Fun Home to seek redress under Board Policy No. 2240, "Controversial Issues," which states that "[a]ll complaints about instructional material directed to the [Board] must be in writing," and that the Board has the "ultimate responsibility to decide on the educational materials to be used."

However, as petitioners point out, it is Board Policy No. 9130, and not Board Policy No. 2240, that sets out the procedure for seeking the removal of material from the curriculum. Board Policy No. 9130, "Public Complaints and Grievances," includes the procedure for "complaints about instructional or resource materials" and for the Board's determination of whether "challenged material may be removed from the curriculum." That policy provides that, upon receipt of a written complaint, "[t]he Superintendent shall appoint a committee of professional staff members and community representatives to review the challenged material against the standards for the selection of resource materials established by Board policy." The committee would then report its findings to the Board and, if the Board ultimately decided not to remove challenged material from the curriculum, "[a] complainant shall be notified that a decision of the Board may be appealed to the Commissioner of Education."

Petitioners' argument that the Board caused a delay in the filing of this appeal by directing the public, including petitioners, to Board Policy No. 2240, and not to Board Policy No. 9130, has some merit. It seems clear that Board Policy No. 9130 governs the removal of material from the curriculum, and the policy clearly states that at the end of the process, the Board has an affirmative duty to notify a complainant that he or she may appeal the Board's decision not to remove material from the curriculum to the Commissioner of Education. If Mr. Fallon had properly referred those who objected to Fun Home to Board Policy No. 9130, and not Board Policy No. 2240, petitioners could have filed a written complaint with the Board; the superintendent would have formed a committee that included members of the public; and if the Board thereafter declined to remove Fun Home, the Board would have had to inform any complainants of their appeal rights. That certainly would have triggered the ninety-day limitations period. However, because the Board misinformed the public about the relevance of that policy, the Board is not without fault with respect to petitioners' delayed filing.

The record further shows that one of the petitioners, Tristin Goode, sought redress from the Somerset County executive county superintendent of schools Roger Jinks prior to the Board's October 2, 2018, meeting. The superintendent was asked to "address our concerns regarding the apparent criminal offense posed by requiring this book to be read by students under age 18." In response, Mr. Jinks stated, "[t]he selection of materials to implement the curriculum is in the discretion of the school district," and "[p]lease continue to share your concerns with the board of education." He also advised Mr./Ms. Goode to "address this [criminal] issue with your county prosecutor's office." Whether Mr. Jinks had a duty or not, he did not inform Mr./Ms. Goode of the potential right to seek redress from the Commissioner of Education if, at the October 2, 2018, meeting, the Board had approved a curriculum including Fun Home. As in C.G., this interaction with Mr. Jinks also could have delayed a filing of an appeal with the Commissioner, as Mr. Jinks advised Mr./Ms. Goode to seek redress instead from a county prosecutor.

It appears that this was followed when Tristin Goode and others filed a verified complaint in Superior Court, Chancery Division, on May 3, 2019, seeking to enjoin the Board from violating criminal statute N.J.S.A. 2C:34-3 by "distributing to minors" the "obscene and pornographic" Fun Home. However, on June 10, 2019, the court dismissed

the complaint for several reasons, including the complainants' failure to exhaust their administrative remedies. In dismissing the complaint, the court stated that "the Commissioner [of Education] has special expertise on matters regarding curriculum, and what is or is not appropriate curricular material for 12th grade English students."

However, even if the foregoing could serve as good cause to relax the ninety-day rule, such that petitioners did not receive adequate notice of the Board's initial decision to add Fun Home to the curriculum; that they were misinformed of the proper procedure to seek the removal of Fun Home under Board Policy No. 9130; that they were misinformed by the executive county superintendent of their right to seek redress from the Commissioner; and that they did not know that they could file an appeal with the Commissioner until they received the court order dismissing their complaint on June 10, 2019, no reason has been presented as to why the petitioners waited until December 6, 2019, nearly six months after the court order, to file an appeal with the Commissioner.

Certainly, as a party to that judicial matter, the Board reasonably could have expected petitioners to file an appeal with the Commissioner upon the dismissal of the verified complaint. And if petitioners had done so within ninety days of June 10, 2019, perhaps a stronger argument for relaxation could have been made.[5] However, petitioners still waited almost six months after the Superior Court order to file their petition. While petitioners state that they first contacted the Commissioner about filing an appeal in July or August 2019, there comes a point at which petitioners can no longer blame others for their dilatoriness and must take required action on their own. To be sure, a simple internet search would have directed petitioners to the Department of Education's website, which clearly sets forth the procedures for filing an appeal.[6]

As such, the ninety-day rule should not be relaxed or dispensed with since, under these circumstances, strict adherence to the rule would not be inappropriate. The fact

[5] The filing of a Superior Court action does not toll the ninety-day period for filing an appeal with the Commissioner. Semprevivo v. Bd. of Educ. of the Pinelands Reg'l Sch. Dist., EDU 6386-09, Initial Decision (Dec. 8, 2009), adopted, Comm'r (Jan. 15. 2010), available at https://njlaw.rutgers.edu/collections/oal. However, given the misinformation received by petitioners from the Board and the executive county superintendent, it may be considered that the petitioners' delayed filing could have otherwise been excused.
[6] See Controversies and Disputes, https://www.nj.gov/education/cd/faq.

that one month *after* the filing of this petition the Board again voted to approve a curriculum that included Fun Home also does not save the petition from dismissal as untimely, nor can the Board's continued approval of the book constitute an ongoing violation. See N. Plainfield Educ. Ass'n v. Bd. of Educ. of N. Plainfield, 96 N.J. 587 (1984) (holding that teachers who untimely filed an appeal regarding salary credit could not claim that "the withholding of [an] increment constitute[d] a continuing violation" because "[s]uch a claim, which is associated with the assertion of discrimination in employment, has no relevance to this case").

The ninety-day rule should also not be relaxed or dispensed with because, contrary to petitioners' arguments, this case does not involve a "substantial constitutional issue" or a "fundamental public interest." First, petitioners have failed to articulate how this matter involves a "substantial constitutional issue." Petitioners generally allege that the inclusion of Fun Home in the curriculum conflicts with the thorough-and-efficient-education clause of the State Constitution, such that "the 90-day rule should not be applied to prevent the Commissioner from reviewing the suitability of this book in the high school classroom as required in the fulfillment of his constitutional mandate."[7] Petitioners also argue that "the 90-day rule should be dispensed with in cases such as this where a school board has run roughshod over parents' rights to direct the education of their children and to protect them from exposure to obscene and otherwise inappropriate material."

To raise a constitutional claim, a party "must have suffered, or may presently suffer, a direct impairment of his *own* constitutional rights." Trombetta v. Mayor & Comm'rs of Atl. City, 181 N.J. Super. 203, 222 (Law. Div. 1981). Petitioners have not articulated how an optional book directly impairs their children's constitutional right to a thorough and efficient education or their right to make decisions regarding their children's upbringing. Petitioners argue that the inclusion of Fun Home in the curriculum somehow offends the thorough-and-efficient-education clause because the book "is riddled with numerous sexually explicit illustrations and narrative accounts and promotes adult themes and erotic and other age-inappropriate literature throughout." It is unclear how

[7] Under the New Jersey State Constitution, the "Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. art. VIII, § 4, ¶ 1.

exactly Fun Home's placement in a twelfth-grade curriculum as an optional assignment violates the thorough-and-efficient clause and thus rises to the level of a "substantial constitutional issue" that would override the ninety-day rule.

And while "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children," there are "certain circumstances [in which] the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment." Troxel v. Granville, 530 U.S. 57, 66 (2000); C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 182 (3d Cir. 2005).

In Smith v. Ricci, 89 N.J. 514 (1982), the New Jersey Supreme Court upheld a State regulation that required local school boards "to develop and implement a family life education program in the public elementary and secondary curricula." Id. at 516. In that case, a group of parents "contend[ed] that such a program impinges upon the free exercise of their religion and constitutes an establishment of religion in violation of the United States Constitution." Ibid. In particular, the parents argued that through the teaching of family life and human sexuality "children will be exposed to attitudes, goals, and values that are contrary to their own and to those of their parents, and will thereby be inhibited in the practice of their religion." Id. at 520–21. However, because the regulation included an "excusal clause," the Court stated that "[w]hether or not [the parents' argument was] well-reasoned we need not now decide, for we believe that the simple fact that parents can remove their children from any objectionable part of the program is dispositive." Id. at 521. That is, "if the program violates a person's beliefs, that person is not required to participate." Ibid. Thus, "[w]here there is no compulsion to participate in this program, there can be no infringement upon appellants' rights freely to exercise their religion." Ibid.

Here, as in the family life program in Smith, Fun Home is optional. Any twelfth-grade student who finds the book objectionable need not read it. Thus, there is no "substantial constitutional issue" involving the thorough-and-efficient clause or a parent's right to control their children. The unproven fear that "there is no way [to] reasonably prevent Fun Home's obscene images from being viewed by other children in the school

or on the bus or even by young siblings at home," as petitioners argue, is also an unavailing claim for dispensing with the ninety-day rule.[8]

Finally, petitioners maintain that relaxation is appropriate because of the "[p]ublic interest in protecting children from inappropriate, sexually explicit, illicit and otherwise harmful material." While it appears that 650 parents and community members signed a petition asking the Board to remove Fun Home from the curriculum, and these numbers reflect a public interest beyond petitioners' private interest, "the greater public interest in this matter lies with enforcement of the 90-day rule and dismissal of petitioner[s'] appeal as untimely." Le Mee v. Bd. of Educ. of Ridgewood, 1990 S.L.D. 671, 673. There is no "fundamental public interest" in the inclusion of an optional reading assignment in a twelfth-grade curriculum as was seen in D'Alessandro or Newark Teachers Union.

N.J.S.A. 18A:33-1 empowers a school board to provide "courses of study suited to the ages and attainments of all pupils," and further provides that "no course of study shall be adopted or altered except by the recorded roll call majority vote of the full membership of the board of education of the district." An action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). If petitioners had wished to challenge the Board's decision, they should not have waited more than a year to file this appeal in violation of the ninety-day rule, which is designed to "stimulate litigants to pursue

[8] It should be noted that N.J.S.A. 18A:35-4.35 became effective January 31, 2019, and provides that the history of disabled and LGBT persons be included in the middle- and high-school curriculum. "A board of education shall include instruction on the political, economic, and social contributions of persons with disabilities and lesbian, gay, bisexual, and transgender people, in an appropriate place in the curriculum of middle school and high school students as part of the district's implementation of the New Jersey Student Learning Standards."

N.J.S.A. 18A:35-4.36, effective the same date, provides for the policies and procedures pertaining to inclusive instructional materials. "A board of education shall have policies and procedures in place pertaining to the selection of instructional materials to implement the requirements of section 1 [C.18A:35-4.35] of this act. When adopting instructional materials for use in the schools of the district, a board of education shall adopt inclusive instructional materials that portray the cultural and economic diversity of society including the political, economic, and social contributions of persons with disabilities and lesbian, gay, bisexual, and transgender people, where appropriate."

a right of action within a reasonable time" and "penalize dilatoriness and serve as a measure of repose."[9]

For these reasons, the Board's motion to dismiss the petition as untimely shall be granted, and the petition shall be dismissed. As such, it is unnecessary to reach the substantive issue of whether the Board's decision to include Fun Home in the curriculum was arbitrary or capricious.

ORDER

I hereby **ORDER** that the motion to dismiss filed by the respondent Board of Education of the Watchung Hills Regional School District is **GRANTED**, and the petition is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

[9] The Board also questions the standing of several of the petitioners. Given that the Board filed its motion during the 2019–2020 school year, and it is currently the 2021–2022 school year, the status of the various petitioners is unclear. That is, it is not now known with certainty if any of the petitioners have moved out of the school district, what grade or grades their children are in, or if some of the children on whose behalf the petition was filed have graduated and/or are now adults. Standing is "a threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal." In re Six-Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super. 61, 85 (App. Div. 2004). However, because this matter should be dismissed under the ninety-day rule, any standing issues need not now be addressed.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 5, 2021
DATE

SUSAN M. SCAROLA, ALJ
(Ret., on recall)

Date Received at Agency: November 5, 2021 (emailed)

Date Mailed to Parties:

APPENDIX

WITNESSES

For petitioners:

None

For respondent:

None

EXHIBITS

For petitioners:

Brief and Certification

Letter Supplement

Response

For respondent:

Brief and Certification

Letter response to Supplement

328-21
OAL Dkt. No. EDU 09790-20
Agency Dkt. No. 202-9/20

New Jersey Commissioner of Education

Final Decision

Darnell Davis,

Petitioner,

v.

Board of Education of the City of Newark,
Essex County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that the Agreement references actions that were to take place in a time frame that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 13, 2021
Date of Mailing: December 14, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09790-20
AGENCY REF. NO. 202-9/20

DARNELL DAVIS,
Petitioner,

v.

BOARD OF EDUCATION OF THE
CITY OF NEWARK, ESSEX COUNTY,
Respondents.

Stuart Ball, Esq., for Petitioner

Arsen Zartarian, Esq., for Respondent Newark Board of Education

Record Closed: November 8, 2021 Decided: November 8, 2021

BEFORE **THOMAR R. BETANCOURT,** ALJ:

NATURE OF PROCEEDINGS

Petitioner challenges the Board's decision to withhold a salary increment.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on October 13, 2020.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached Stipulation and Settlement Agreement.

I have reviewed the terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

It is hereby **ORDERED** that the parties comply with the terms of the settlement agreement; and

It is further **ORDERED** that Petitioner's petition is withdrawn with prejudice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey**

08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 8, 2021
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: 11-08-21

Date Mailed to Parties: 11-09-21
db

Batista, Diana [OAL]

From: Johnson, Elijah <e9johnson@NPS.K12.NJ.US>
Sent: Monday, November 8, 2021 10:44 AM
To: Batista, Diana [OAL]
Cc: Zartarian, Arsen; Stuart Ball
Subject: [EXTERNAL] RE: [EXTERNAL EMAIL] RE: EDU 09790-20 Davis v. City of Newark BOE
Attachments: Davis settlement resolution.pdf; Davis executed settlement.pdf

Good morning,

The Board resolution and executed settlement agreement are attached.

Thank you,

Elijah Johnson, Jr. Esq.
Associate General Counsel
NEWARK BOARD OF EDUCATION

This e-mail message is from the Office of the General Counsel of the Newark Board of Education and is for the sole use of the intended recipient and may contain confidential and/or privileged information. Any unauthorized use, review, distribution or disclosure is prohibited without the prior written consent of the person/entity that drafted this communication. If you are not the intended recipient, please contact the sender by reply e-mail or express mail and destroy all copies of the original message.

From: Batista, Diana [OAL] [mailto:Diana.Batista@oal.nj.gov]
Sent: Monday, November 08, 2021 10:32 AM
To: Zartarian, Arsen <AZartarian@NPS.K12.NJ.US>; Johnson, Elijah <e9johnson@NPS.K12.NJ.US>; Stuart Ball <stuball2@comcast.net>
Subject: RE: [EXTERNAL EMAIL] RE: EDU 09790-20 Davis v. City of Newark BOE
Importance: High

The Court has not received the fully executed Settlement Agreement. Kindly submit same so that we may proceed to issue an Initial Decision-Settlement. Thank you.

NEWARK BOARD OF EDUCATION
Office of General Counsel
765 Broad Street, 7th Floor
Newark, New Jersey 07102
(973) 733-7139
Attorneys for Respondent

DARNELL DAVIS,	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	OAL Docket No. EDU-09790-2020 N Agency Ref. No. 202-9/20
v.	
NEWARK BOARD OF EDUCATION,	
Respondent.	**SETTLEMENT AGREEMENT**

The parties involved herein have voluntarily resolved all disputed matters and enter into the following Settlement Agreement (the "Settlement Agreement") that fully disposes of all issues in controversy between Darnell Davis ("Davis") and the Board of Education of the City of Newark, County of Essex (the "Board"):

1. Davis hereby agrees to resign for the purpose of retirement from his tenured position effective November 1, 2021. Attached is a copy of Davis' signed Letter of Resignation. (Exhibit A). Davis' separation from employment will be deemed a voluntary resignation and retirement in good standing. Other than as required by law, upon inquiry from any third parties, the Board will only confirm Davis' employment, position, title, salary and dates of employment.

2. Davis also agrees to withdraw with prejudice any and all claims or suits that he may have previously filed against the Board that are still pending in any and all courts and/or before any and all agencies with the exception of workers' compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the Board and Davis, including this Petition, challenging Davis' withholding of increment. Should Davis fail to submit letters of withdrawals for any such pending

claims or suits, this Settlement Agreement will serve as Davis' formal written notice of withdrawal of those pending claims or suits, except for workers' compensation claims.

3. In exchange, upon final execution of this settlement agreement by the Board, the Board will restore Davis' salary increment for the 2020-21 school year, and Davis will be placed at the appropriate step on the salary guide from the start of the 2020-21 school year through his date of retirement on November 1, 2021. As a result, Davis will receive $1,000 minus standard withholdings and deductions, including required pension contributions.

4. As of the date of his resignation, all of Davis' employment rights, including but not limited to salary, insurance coverage, tenure and seniority, will permanently end.

5. This Settlement shall not constitute a precedent in any matters involving other employees.

6. Except as noted above, Davis waives all claims of any nature against the Board with regard to his employment with and/or his separation from the District, including fees, or other monetary relief, with the exception of workers' compensation claims.

7. By entering into this Settlement Agreement, and in exchange for good consideration as set forth above, the sufficiency of which is hereby acknowledged by the parties, Davis releases and discharges the Board, the Board Superintendent, its Board of Education and its Board members, and any and all other Board officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or rights that he has or may have against the Board regarding his employment with the District. This includes without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Davis' employment with the Board and separation from the Board except for workers' compensation claims. It specifically includes, without limitation, all claims which Davis may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the

Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensation laws, disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law and/or contract or implied contract or collective bargaining/ contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on his employment by and the termination of his employment with the District, including, but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys fees, costs, and/or future wage loss, except for workers compensation claims. Davis agrees to save, hold harmless and indemnify the Board for any legal costs and attorneys' fees associated with the enforcement of the terms of this Settlement Agreement should enforcement become necessary.

8. It is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the Board based upon any of the above-released claims, Davis agrees not to seek or accept any resulting relief whatsoever.

9. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Davis of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Settlement Agreement. Accordingly, by executing this Settlement Agreement, Davis acknowledges that he: (i) fully understands the terms and conditions of this Settlement Agreement; (ii) has consulted with an attorney to review the Settlement Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given twenty one days within which to consider this Settlement Agreement; and (v) has seven (7) days from the date of the execution of this Settlement Agreement to revoke it. Davis understands that he may rescind this Settlement Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven-day period.

10. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

11. This Settlement Agreement constitutes the full agreement between the parties, and shall be construed and enforced in accordance with New Jersey law.

12. If any provision or portion of a provision of this Settlement Agreement is held by a court of competent jurisdiction, or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or remaining portions of a provision will continue and remain in full force and effect.

13. This Settlement Agreement is subject to final approval by the Board and will only become effective upon the approval of the Board. Any disapproval by the Board shall not interfere with the rights of either party to pursue the matter further.

Dated: Oct 14, 2021

DARNELL DAVIS

Dated: 10/15/2021

STUART BALL
Attorney for Darnell Davis

Dated: _____

DAWN HAYNES
Board President

Dated: 10/29/21

ARSEN ZARTARIAN
Attorney for Newark Board of Education

CERTIFICATION

I, DARNELL DAVIS, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: Oct 14, 2021

Darnell Davis

DARNELL DAVIS

Newark
Board of Education

AGENDA ITEM

Meeting Date: 8/26/2021 - 6:00 PM

Category: General Counsel - Legal - Votes

Type: Action

Subject: 12.3 Resolution of the Board of Education of the City of Newark, County of Essex, Approving Settlement Involving Employee No. 16284 and Authorizing Implementation of Settlement

Strategic Plans:

Enclosure:

File Attachment:

Summary: WHEREAS Employee No. 16284 is a tenured teacher employed by the Board of Education of the City of Newark, County of Essex (the "Board");
WHEREAS the Board withheld the salary increment of Employee No. 16284 for the 2020-2021 school year;
WHEREAS Employee No. 16284 challenged the increment withholding by filing a Petition with the Commission of Education, and the matter is currently pending in the Office of Administrative Law;
WHEREAS, subject to approval by the Board, the parties have resolved all matters in dispute by way of Settlement Agreement providing that Employee No. 16284 will retire, effective November 1, 2021, in exchange for the restoration of the salary increment withheld;
WHEREAS accordingly, Employee No. 16284 will submit a retirement letter effective November 1, 2021;
WHEREAS this settlement is in the best interests of the Board and the public, since it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public.

Funding :

Recommendation to the Board NOW THEREFORE, BE IT RESOLVED that the Board hereby authorizes and approves the settlement involving Employee No. 16284 with the terms as set forth above and authorizes the President to execute said Settlement Agreement on its behalf; and the Board authorizes and directs implementation of said Settlement Agreement in accordance with its terms.

Approvals:

Recommended By:

Signed By: *Signature*
Pamela Luke - Executive Legal Assistant

Signed By: *Signature*
Brenda Liss - General Counsel

Signed By: *Signature*
Roger León - Superintendent

Vote Results:

Original Motion
Member **Daniel Gonzalez** Moved, Member **Asia J. Norton** seconded to approve the **Original** motion 'NOW THEREFORE, BE IT RESOLVED that the Board hereby authorizes and approves the settlement involving Employee No. 16284 with the terms as set forth above and authorizes the President to execute said Settlement Agreement on its behalf; and the Board authorizes and directs implementation of said

Settlement Agreement in accordance with its terms.'. Upon a Roll-Call Vote being taken, the vote was: Aye: **7** Nay: **0**.
The motion **Carried** 7 - 0

Flohisha Johnson	Yes
Dawn Haynes	Yes
Asia J. Norton	Yes
Shayvonne Anderson	Yes
A'Dorian Murray-Thomas	Yes
Hasani Council	Yes
Daniel Gonzalez	Yes

329-21

OAL Dkt. No. EDU 08007-21
Agency Dkt. No. 122-8/21

New Jersey Commissioner of Education

Final Decision

D.S., on behalf of minor child, A.R.,

Petitioner,

v.

Board of Education of the Carlstadt-East Rutherford Regional High School District, Bergen County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes with respect to paragraph 4 of the Agreement that the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.* in regard to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential. Further, the Commissioner notes that the Agreement references actions that were to take place in a time frame that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon

mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 13, 2021
Date of Mailing: December 14, 2021

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 08007-21
AGENCY DKT. NO. 122-8/21

D.S. ON BEHALF OF MINOR CHILD,
Petitioner,
v.
BOARD OF EDUCTION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,
Respondents.

D.S. o/b/o minor child petitioner pro se

Athina Cornell, Esq., for respondent, (Sciarrillo, Cornell, Merino, McKeever & Osborne, attorneys)

Record Closed: November 4, 2021 Decided: November 08, 2021

BEFORE **JUDE-ANTHONY TISCORNIA,** ALJ:

On September 27, 2021, the matter was transmitted to the Office of Administrative Law for determination as an Emergent Relief matter.

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement and the Board's resolution dated October 15, 2021. As per paragraph No. 3 of the aforementioned Settlement Agreement, petitioner agrees to withdraw the within emergent application. The petitioner sent a withdrawal via e-mail on September 4, 2021.

Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 8, 2021

DATE

JUDE-ANTHONY TISCORNIA., ALJ

Date Received at Agency: 11-08-21

Date Mailed to Parties: 11-09-21

id

SCIARRILLO CORNELL
MERLINO, MCKEEVER & OSBORNE, LLC
ATTORNEYS AT LAW

Email: acornell@sciarrillolaw.com

October 15, 2021

Via Electronic Mail and Federal Express
Honorable Jude-Anthony Tiscornia, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: D.S. o/b/o A.R. v. Board of Education of the Carlstadt-East Rutherford Regional High School District
OAL Docket No. EDU 08007-2021 N; Agency Ref. No. 122-8/21

Dear Judge Tiscornia:

Enclosed please find a copy of the fully executed Settlement Agreement as well as a copy of the Board resolution approving same in the referenced matter. Per the Agreement, Ms. Santiago will withdraw this matter. We thank Your Honor for your assistance in this matter.

Respectfully submitted,
SCIARRILLO, CORNELL, MERLINO, McKEEVER & OSBORNE, LLC

Athina Lekas Cornell
ALC/er
Enclosures

cc: Dario Sforza, Ed.D., Superintendent/Principal (via electronic mail)
Pro Se Petitioner, D.Santiago (via electronic mail)

CARLSTADT-EAST RUTHERFORD
REGIONAL BOARD OF EDUCATION

120 PATERSON AVENUE
EAST RUTHERFORD, N.J. 07073

NICHOLAS ANNITTI
BUSINESS ADMINISTRATOR/
BOARD SECRETARY

TELEPHONE: (201) 935-4940
FAX: (201) 935-3047

H.P. BECTON REGIONAL HIGH SCHOOL
120 PATERSON AVENUE
EAST RUTHERFORD, N.J. 07073

CERTIFICATION OF MINUTES

RESOLUTION: **Result of the Executive Session.**

- **SETTLEMENT AGREEMENT:**

Moved: Mr. Young Second: Mr. Bulger Approved: Unanimous

Be it resolved, upon the recommendation of the Superintendent the Board of Education approves the Settlement Agreement between the Board and the parent of Student ID 23240 for the terms and conditions specified.

Roll Call:

MEMBER	YES	NO	ABSENT	MEMBER	YES	NO	ABSENT
Mr. Anderson	X			Dr. Lahullier	X		
Mr. Bulger	X			Ms. Landolfi	X		
Mr. DeLizio			X	Mr. Taylor	X		
Mr. Grabowski	X			Mr. Young	X		
Mr. Kandiel	X			Ms. Fukushima			X

CERTIFICATION:

I, Nicholas Annitti, Board Secretary/Business Administrator of the Carlstadt-East Rutherford Regional Board of Education do hereby certify that the above is an extract from the minutes of the October 13, 2021 regular public meeting of the Carlstadt - East Rutherford Regional Board of Education.

Nicholas Annitti
Board Secretary/Business Administrator
Dated: October 14, 2021

SCIARRILLO, CORNELL, MERLINO, McKEEVER & OSBORNE, LLC
238 St. Paul Street
Westfield, New Jersey 07090
Office: 908.481.5000
Fax: 908.264.2045
Attorneys for Respondent
Carlstadt-East Rutherford Regional High School Board of Education

D.S. on behalf of minor child A.R., School Board of Education,	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL Docket No. EDU 08007-2021 N
Petitioner,	AGENCY REF. NO.: 122-8/21
-v-	
Carlstadt-East Rutherford Regional High School Board of Education,	**STIPULATION OF SETTLEMENT**
Respondent.	

WHEREAS, A.R. is an eleventh grade student in the Carlstadt-East Rutherford Regional High School District; and

WHEREAS, the Carlstadt-East Rutherford Regional High School District ("Respondent"/ "District") is the local educational authority with the responsibility of providing an appropriate public education to A.R.; and

WHEREAS, D.S. ("Petitioner"/"Parent") filed an application for emergent relief regarding A.S.'s long term suspension for physically assaulting another student; and

NOW THEREFORE, the parties having a desire to settle the above matter in an amicable way hereby agree as follows:

1. The District and Petitioner shall explore educational placements for A.R. to attend outside of the District as follows:

    a. Other Local Public High Schools: Petitioner and the District shall identify local public high schools as possible placements. Petitioner may visit these schools prior to making a determination as to their appropriateness. The parties acknowledge that other local public high schools need to accept A.R. into their programs. If accepted, the District will pay the general education tuition and transport A.R. portal to portal during the regular school day hours. The parties also acknowledge that the District has no control over and makes no representation regarding the admissions process.

    b. Paramus Catholic: Petitioner shall apply to Paramus Catholic and the District shall assist in the application process by sending student records and any other information. If accepted to Paramus Catholic, the District will pay for the non-sectarian portion of the Paramus Catholic tuition and transport A.R. portal to portal during the regular school day hours.. As referenced above, the District has no control over and makes no representation regarding Paramus Catholic's admissions process.

2. A.R. shall remain on virtual home instruction pending placement. Virtual home instruction shall commence no later than October 11, 2021.

3. Petitioner agrees to withdraw the within emergent application.

4. This Agreement relates to a student matter and as such, the parties agree that the terms of this settlement are confidential.

5. This Agreement disposes of any and all claims that were raised or could have been raised in the captioned Petition of Appeal and Petition for Emergent Application.

6. This Agreement shall be incorporated into a Final Order by the Honorable Jude-Anthony Tiscornia, A.L.J.

7. This Agreement is subject to ratification by the Carlstadt-East Rutherford Regional High School Board of Education.

- The District and Petitioner shall explore educational placements for A.R. to attend outside of the District as follows:

  - Other Local Public High Schools: Petitioner and the District shall identify local public high schools as possible placements. Petitioner may visit these schools prior to making a determination as to their appropriateness. The parties acknowledge that other local public high schools need to accept A.R. into their programs. If accepted, the District will pay the general education tuition and transport A.R. portal to portal during the regular school day hours. The parties also acknowledge that the District has no control over and makes no representation regarding the admissions process.

  - Paramus Catholic: Petitioner shall apply to Paramus Catholic and the District shall assist in the application process by sending student records and any other information. If accepted to Paramus Catholic, the District will pay for the non-sectarian portion of the Paramus Catholic tuition and transport A.R. portal to portal during the regular school day hours.. As referenced above, the District has no control over and makes no representation regarding Paramus Catholic's admissions process.

- A.R. shall remain on virtual home instruction pending placement. Virtual home instruction shall commence no later than October 11, 2021.

- Petitioner agrees to withdraw the within emergent application.

- This Agreement relates to a student matter and as such, the parties agree that the terms of this settlement are confidential.

- This Agreement disposes of any and all claims that were raised or could have been raised in the captioned Petition of Appeal and Petition for Emergent Application.

- This Agreement shall be incorporated into a Final Order by the Honorable Jude-Anthony Tiscornia, A.L.J.

- This Agreement is subject to ratification by the Carlstadt-East Rutherford Regional High School Board of Education.

10/8/2021

ON BEHALF OF A.R.
DENISE SANTIAGO Date:

ON BEHALF OF A.R.

Denise Santiago, Parent Date: 10/14/2021

ON BEHALF OF THE CARLSTADT-EAST RUTHERFORD REGIONAL HIGH SCHOOL BOARD OF EDUCATION

Date: 10/14/21

330-21

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

December 13, 2021

VIA EMAIL
Andy Jong, DAG
Division of Law
25 Market Street
Trenton, New Jersey 08625

Ragan Van Campen
738 So. Delaware Dr.
Mt. Bethel, PA 18343

Re: *In the Matter of the Tenure Hearing of Ragan Van Campen, New Jersey Department of Human Services, Commission for the Blind and Visually Impaired, Agency Dkt. No. 197- 10/21.*

Dear Parties:

I have reviewed the record in the contested case entitled *In the Matter of the Tenure Hearing of Ragan Can Campen, New Jersey Department of Human Services, Commission for the Blind and Visually Impaired, Agency Dkt. No. 197-10/21.* The record includes the the respondent's advisement of her resignation from the Department of Human Services effective November 4, 2021. In light of this information, I find that no purpose would be served by further proceedings in this matter.

Accordingly, the tenure charges are dismissed.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

330-21L

331-21

331-21

New Jersey Commissioner of Education

Final Decision

Patricia Montana, David M. Grande,
Thomas Perri, Agnieszka Norman,
Lisa Cassilli, and Janet DeSiano,

Petitioners,

v.

Anthony Grosso, Superintendent, and Board of Education of the Township of Cedar Grove, Essex County,

Respondent.

Synopsis

Petitioners – parents of students attending Cedar Grove schools – alleged that the Board improperly administered surveys to students without obtaining parental consent. Petitioners sought, among other things, to have the surveys and all related results removed from any student records and discarded. The respondent Board filed a motion to dismiss in which it denied that the survey in question required prior parental consent, arguing that said survey did not touch upon any of the personal and sensitive categories enumerated in *N.J.S.A.* 18A:36-34(a). The petitioners filed a motion for summary decision.

The ALJ found, *inter alia*, that: the survey was not voluntary, as students were not informed that it was voluntary at the time the surveys were distributed; the surveys did in fact touch on subjects for which parental consent is required by *N.J.S.A.* 18A:36-34 as they included questions about gender identity, gender discrimination, and family demographics which could elicit responses concerning sexual behavior or attitudes; accordingly, the Board did violate the statute by failing to obtain consent prior to administering the surveys; further, the survey distributed to elementary students violated *N.J.S.A.* 18A:36-36(a) by requiring students to provide information regarding their race and ethnicity in class. The ALJ concluded that the appropriate remedy is for the Board to discard the surveys and all results derived therefrom from the district's website, student records, the district's Equity and Diversity Advisory Council, and any other entity with whom the results of the survey were shared. Accordingly, the ALJ denied the Board's motion to dismiss and granted petitioner's motion for summary decision.

Upon review, the Assistant Commissioner, to whom this matter was delegated pursuant to *N.J.S.A.* 18A.4-34, concurred with the ALJ's determinations herein and granted the petitioners' motion for summary decision. In so doing, the Assistant Commissioner noted that while the Board's efforts to explore and address diversity, inclusion, and equity in its schools is commendable, such efforts cannot outweigh statutory requirements regarding the administration of surveys to students.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

331-21

OAL Dkt. No. EDU 06551-21
Agency Dkt. No. 104-7/21

New Jersey Commissioner of Education

Final Decision

Patricia Montana, David M. Grande, Thomas Perri, Agnieszka Norman, Lisa Cassilli, and Janet DeSiano,

Petitioners,

v.

Anthony Grosso, Superintendent, and Board of Education of the Township of Cedar Grove, Essex County,

Respondents.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL) and the exceptions filed by the Board[1] pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.[2]

Petitioners, who are parents and caregivers of students in Cedar Grove schools, filed a petition of appeal asserting that the Board had improperly administered surveys to students without obtaining parental consent. Following the Board's motion to dismiss and petitioner's motion for summary decision, the Administrative Law Judge (ALJ) found that the survey was not voluntary, as no students were informed it was voluntary. The ALJ concluded that the surveys touched on subjects for which parental consent is required by *N.J.S.A.* 18A:36-34 and that the Board

[1] Respondents shall collectively be referred to as "the Board."

[2] Petitioners did not file a reply to the Board's exceptions. The Department of Education received several submissions from members of the public regarding this matter. As there is no provision in the applicable statutes or regulations for submissions from the public regarding contested cases, these submissions were not considered.

violated the statute by failing to obtain consent prior to administering the surveys. Specifically, the ALJ concluded that questions about gender identity, gender discrimination, and family demographics could elicit responses concerning sexual behavior or attitudes. The ALJ also concluded that the survey distributed to elementary school students violated *N.J.S.A.* 18A:36-36(a) by requiring students to provide information regarding their race and ethnicity in class. The ALJ determined that the appropriate remedy is for the Board to discard the surveys and all results derived therefrom from the district's website, student records, the district's Equity and Diversity Advisory Council, and any other entity with whom the results of the survey were shared. Accordingly, the ALJ denied the Board's motion to dismiss and granted petitioner's motion for summary decision.

In its exceptions, the Board argues that there is an issue of material fact regarding whether parental consent is required to ask a student's gender identity and that the ALJ improperly equated "gender identity" to "sexual behaviors and attitudes." The Board notes that the New Jersey Department of Education's (DOE) "Transgender Student Guidance for School Districts" states that "a school district shall accept a student's asserted gender identity; parental consent is not required." The Board also contends that the ALJ's conclusion was based on outdated information that characterized gender dysphoria as a mental illness, despite the fact that it has not been so characterized since 2013. Additionally, the Board argues that the surveys were voluntary, not required, and therefore no violation of *N.J.S.A.* 18A:36-36 occurred. Finally, the Board contends that none of the surveys touched on the areas listed in *N.J.S.A.* 18A:36-34, and therefore parental consent was not required.

Upon review, the Assistant Commissioner[3] concurs with the ALJ that the Board violated *N.J.S.A.* 18A:36-36(a) by asking students to identify their race and ethnicity on a survey distributed in elementary school classrooms. While the Board contends that the surveys were voluntary rather than required, the Assistant Commissioner does not find this argument persuasive. Third and fourth graders who receive a survey in class would reasonably conclude that they are required to complete it, just as they are required to complete any other work distributed in the classroom.[4]

The Assistant Commissioner agrees with the ALJ that the questions on the surveys related to gender identity and gender discrimination could have resulted in students revealing information about their sexual behaviors or attitudes. While the questions do not outright request such information, *N.J.S.A.* 18A:36-34 is triggered based on the information revealed, not the questions posed. The Assistant Commissioner acknowledges that gender identity is not equivalent to sexual behaviors and attitudes.[5] However, the combination of these questions,[6] and the fact that they were open-ended, invited students to reveal information that might include their sexual behaviors and attitudes.

Although the Board contends that the DOE's guidance pertaining to transgender students indicates that districts shall accept a student's asserted gender identity and that parental consent is

---

[3] Pursuant to *N.J.S.A.* 18A.4-34, this matter has been delegated to Assistant Commissioner Kevin Dehmer because of the Acting Commissioner's recusal.

[4] Furthermore, the record demonstrates that in distributing the survey to teachers, the elementary school principals did not in any way indicate that the survey was voluntary; it is highly unlikely that the students were informed the survey was voluntary if their teachers were not so informed.

[5] The Board's exceptions suggest that the ALJ erroneously based her decision on outdated information relating gender dysphoria to a mental illness or a deviant sexual behavior, presumably because those issues were raised by petitioners during briefing. The Assistant Commissioner disagrees with the Board's characterization of the Initial Decision and, to the extent clarification is necessary, notes that the DOE does not consider students who assert a gender identity different than the one they were assigned at birth to be mentally ill or deviant.

[6] The Board's exceptions focus only on the questions regarding gender identity and fail to include any specific arguments regarding the ALJ's conclusion that the questions regarding gender discrimination implicate *N.J.S.A.* 18A:36-34.

not required, that guidance is inapplicable to the current situation. Given that the surveys were anonymous, the district could not have been using them to ascertain and record the asserted gender identity for each student. Furthermore, as discussed above, the question regarding gender identity is not the only question that could cause students to reveal information about their sexual behaviors and attitudes.[7]

The Assistant Commissioner recognizes and commends the Board's efforts to explore and address diversity, inclusion, and equity in its schools. However, those efforts cannot outweigh statutory requirements regarding the administration of surveys to students.[8]

Accordingly, petitioner's motion for summary decision is granted. The Board is directed to discard the surveys and results from all records.[9]

IT IS SO ORDERED.[10]



ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: December 16, 2021
Date of Mailing: December 16, 2021

[7] The Board also contends that there is an issue of material fact regarding whether parental consent is required to ask a student's gender identity. The Assistant Commissioner disagrees that this is an issue of fact, and finds that, in this matter, it is a question of law appropriate for resolution by summary decision.

[8] Having concluded that the surveys violate *N.J.S.A.* 18A:36-34 and -36, the Assistant Commissioner need not reach the question of whether the surveys violated district policy or federal law, or the Assistant Commissioner's jurisdiction to decide any questions of federal law.

[9] Other relief sought by petitioners, including monetary penalties, is denied for the reasons detailed in the Initial Decision.

[10] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON
CROSS MOTIONS
OAL DKT. NO. EDU 06551-21
AGENCY DKT. NO. 104-7/21

PATRICIA MONTANA, DAVID M. GRANDE, THOMAS PERRI, AGNIESZKA NORMAN, LISA CASSILLI, AND JANET DESIANO,
Petitioners,
v.
ANTHONY GROSSO, SUPERINTENDENT, AND BOARD OF EDUCATION OF THE TOWNSHIP OF CEDAR GROVE, ESSEX COUNTY,
Respondents.

Patricia Montana, petitioner pro se on behalf of all petitioners.

Jeffrey R. Merlino, Esq., on behalf of respondents Anthony Grosso and Cedar Grove Township Board of Education (Sciarrillo Cornell Merlino McKeever & Osborne, attorneys)

Record Closed: October 12, 2021 Decided: November 15, 2021

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

Petitioners are several parents whose children attend Township of Cedar Grove ("Cedar Grove") schools. They have brought this action in order to obtain certain relief from a survey presented to students on June 9, 2021, by the Cedar Grove Board of Education ("District").[1] Petitioners allege that the survey was conducted in such a manner as to violate a requirement that a district obtain "prior written informed consent from a student's parent or legal guardian and provide[ ] for a copy of the document to be available for viewing at convenient locations and time periods" before administering any "survey, assessment, analysis or evaluation which reveals information concerning" eight personal and sensitive categories. N.J.S.A. 18A:36-34(a); 20 U.S.C. § 1232h(b), Protection of Pupil Rights Act ("PPRA"). See also District Policy 2415.05.

Petitioners seek to have the surveys and all results removed from any student records and discarded, identification of any other agency or entity that received the results, identification of the members of the District's Equity and Diversity Advisory Council ("EDAC") that designed the survey, a public apology, affirmative action on assuring future compliance, and an award of fees and monetary penalties.

PROCEDURAL HISTORY

The Petition of Appeal was filed with the New Jersey Department of Education, Office of Controversies and Disputes ("Department") on July 6, 2021. The District filed its Answer to the Petition on July 29, 2021. The Department transmitted the petitioners' complaint to the Office of Administrative Law ("OAL") where it was filed on August 4, 2021, for adjudication as a contested matter pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13.

On August 6, 2021, the matter was assigned to the undersigned. On August 30, 2021, a telephonic case management conference was convened at which time pretrial

[1] While petitioners have also named the District Superintendent individually as a respondent, I shall refer to the respondents in the singular and as the "District."

issues and motions were discussed. A briefing schedule was established as both parties were of the opinion that the case could be disposed of without evidentiary hearings. The papers have all been filed and the cross-motions are now ripe for determination.

MOTIONS PRESENTED

Respondent has filed a Motion to Dismiss the Complaint on several grounds. The District denies that the subject survey required prior parental consent because it disputes that it touched upon any of the statutory categories. It also disputes that the OAL has jurisdiction over any alleged PPRA violations, which it asserts must be brought in the federal administrative process before the United States Department of Education. The District also asserts as a defense to any consideration of the merits of the PPRA, in the event that I reach such, that the surveys were voluntary and thus, not "required," a condition it states is necessary to trigger the PPRA's strictures. Further, the District argues that the EDAC does not receive any federal funds and thus its Policy 2415.05 is not applicable.

Petitioners have filed a Motion for Summary Decision on their Complaint asserting that they are entitled to judgment in their favor as a matter of law and undisputed facts because the surveys touched upon gender identity and for the older students, religious affiliation. They also assert that the surveys were not genuinely "voluntary," especially for the younger grades who were given the survey in class by the teacher as an anonymous but required assignment to be done right then and there.

LEGAL STANDARDS ON THE MOTIONS

Here, both parties have moved for a determination that the application of the law entitles each to a favorable decision. Respondent moved, however, for a dismissal as a matter of law. For the purposes of a motion to dismiss –

> [A] trial court should grant a dismissal "in only the rarest of instances." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772, 563 A.2d 31 (1989). A court's review of a complaint is to be "undertaken with a generous and hospitable

> approach," id. at 746, 563 A.2d 31, and the court should assume that the nonmovant's allegations are true and give that party the benefit of all reasonable inferences, Smith v. SBC Communications Inc., 178 N.J. 265, 282, 839 A.2d 850 (2004). If "the fundament of a cause of action may be gleaned even from an obscure statement of claim," then the complaint should survive this preliminary stage. Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 626, 660 A.2d 505 (1995) (citation omitted).
>
> [NCP Litig. Tr. v. KPMG LLP, 187 N.J. 353, 365 (2006).]

Petitioners have moved for summary decision in their favor. On such a motion, it is well established that if there is no genuine issue as to any material fact, a moving party may be entitled to prevail as a matter of law without an evidentiary hearing. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public and private litigation resources.

STATEMENT OF FACTS ON THE MOTIONS

Applying those legal standards to the pleadings and any factual matters presented outside the pleadings, I **FIND** the following as facts that form the predicate to these cross-motions.

First, the "Community Needs Assessment" surveys at issue herein included the following questions at each of these school levels:

Elementary School:

1. Race/Ethnicity
2. Gender Identity
3. "Do you feel school is a safe place?"
4. "Do you feel school is a safe place for people who look like you?"
5. "Do you feel school is a safe place for people who don't look like you?"
6. "Do you feel the adults in your school are fair in dealing with people who look like you?"
7. "Do you feel the adults in your school are fair in dealing with people who don't look like you?"
8. "If you felt unsafe at school, would you feel comfortable going to your teacher or principal?"

9. "What activities in school do you enjoy the most?"
10. "What change would you like to see happen at your school?"

Middle School:

1. Race/Ethnicity
2. Gender Identity
3. "Do you feel Memorial Middle School is a safe space for your particular racial/ethnic group?"
4. "Do you feel the adults in your school are fair in dealing with people who look like you?"
5. "Do you feel the adults in your school are fair in dealing with people who don't look like you?"
6. "If you felt unsafe at school, would you feel comfortable going to your teachers or principal?"
7. "What activities in school do you feel are most enjoyable?"
8. "Can you provide any examples of racial or gender-based discrimination you have experienced in the Cedar Grove Public Schools?"
9. "What change would you like to see happen at your school?"

High School:

1. Race/Ethnicity
2. Gender Identity
3. Religious Affiliation
4. Family Demographic
5. "Do you value diverse perspectives presented in the curriculum?"
6. "Prior to the shift to virtual learning, do you feel supported in Cedar Grove Public Schools?"
7. "Do you feel the school is a safe space for your particular racial/ethnic group?"
8. "Can you provide any examples of racial, gender based or religious discrimination you have experienced in the Cedar Grove Public Schools?"
9. "Do you feel Cedar Grove Public School leadership is supportive of Diversity, Equity and Inclusion efforts?"
10. "How comfortable are you speaking about racial or religious diversity?"
11. What activities in school do you feel are most enjoyable?"
12. "What changes would you like to see happen at your school?"
13. "If there is an issue of discrimination, do you feel comfortable going to leadership?"
14. "Please use this space to communicate other information based on this survey."

[Certification of Jeffrey R. Merlino, Esq. ("Merlino Cert.") Exhibits A, B, and C.]

Prior announcements about a survey being prepared by EDAC for students, staff, and the community were made during Board meetings but did not provide sufficient detailed information to allow parents or members of the public to determine whether the questions would be touching upon subject matters for which special consideration and permissions might be required. [Certification of Anthony Grosso ("Grosso Cert.") ¶ 12.]

The surveys were provided to the children by email link or in the classroom (elementary grades) on June 9, 2021. [Grosso Cert. ¶¶ 14-15.]

Only on that same date, June 9, did parents receive an email invitation and link in order to complete the community version of the survey. It did not include any opt-in or opt-out language for parents to object to the student versions of the survey. [Grosso Cert. ¶ 13.] It also did not provide any location or time when parents could review and inspect the surveys in advance. [Petition of Appeal ¶¶ 4, 7.]

The surveys completed by third and fourth grade students were distributed, completed and collected by the classroom teachers during a classroom session. While the students were told that the surveys were anonymous, they were not told that they were voluntary and that they could decline to complete it or that they could discuss it with their parents prior to completing it. Any clarifying questions would have been asked in person of the teacher, negating to some extent the anonymity of the survey. [Petition of Appeal ¶ 6.]

In fact, the email instructions to those teachers stated:

> We would very much appreciate that you have the kids take the survey in class tomorrow, Wednesday June 9. It is only about 8 questions and shouldn't take a great deal of time. To introduce the survey, tell the kids that no name is needed. Their answers are private, and no one will know how they answered. Tell them it is to help us plan for the future at [South End/North End] to help make it a better school. Keep it simple.

[Certification of David M. Grande ("Grande Cert.") ¶¶ 3-4, Exhibits C & D).]

At a June 15, 2021, Board meeting, the Superintendent presented a PowerPoint on the surveys' results, inclusive of "student responses, taken out of context, without consent." Upon questions and concerns expressed by parents at the meeting, he would not identify members of EDAC[2], commit to discarding the surveys and results, acknowledge that it had been unlawfully conducted, or that the District would comply with the laws in the future. [Petition of Appeal ¶¶ 8-9.]

The District does receive federal education funding; it is irrelevant that the EDAC itself specifically does not.

The surveys completed by students were anonymous and yet the District refused to produce them in response to an OPRA request from petitioners stating that they constitute "student records." [Certification of Patricia Montana ("Montana Cert.") ¶ 3.]

Yet, the summary of the surveys was posted on the District website. And that summary included language which showed the focus of the surveys:

> The purpose of this needs assessment was to explore diversity and inclusion in the Cedar Grove Public Schools and seeks to eliminate bias and enhance diversity in all schools. Diversity is considered race/ethnicity, gender identity, LGBTQ+ status and disability status. This needs assessment seeks to explore previous and present bias to provide tangible solutions for all stakeholders. The survey participation yielded 567 participants (64 Faculty/Staff, 158 Families/Caregivers, 132 Elementary Students, 64 Middle School Students, 149 High School Students. . . .
>
> When exploring responses of biased or discriminatory acts against individuals, the experiences varied. These experiences also varied from race, gender identity, religious affiliation and family demographics. It was clear that Cedar Grove Public Schools has had biased acts that have faced all subgroups who participated in this needs assessment.
>
> [https://sites.google.com/cgschools.org/edac/2021-needs-assessment (emphasis added).]

[2] The District website now sets forth the names for the next school year. https://sites.google.com/cgschools.org/edac/members

LEGAL ANALYSIS AND CONCLUSIONS

All parties acknowledge the importance of diversity in the schools and the requirements that boards develop comprehensive equity plans to ensure that all students, regardless of their race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status are not subject to discrimination and that any barriers to achieving equity are removed. N.J.A.C. 6A:7-1.4(c). The question here, however, is whether the survey provided to students in June of this year and which might have been geared toward assisting the District in developing an equity plan, were undertaken in a manner inconsistent with the laws governing the rights of parents and students.

N.J.S.A. 18A:36-34 ("School surveys, certain, parental consent required before administration")[3] provides –

> a. Unless a school district receives prior written informed consent from a student's parent or legal guardian and provides for a copy of the document to be available for viewing at convenient locations and time periods, the school district shall not administer to a student any academic or nonacademic survey, assessment, analysis or evaluation which reveals information concerning:
>
> (1) political affiliations;
>
> (2) mental and psychological problems potentially embarrassing to the student or the student's family;
>
> (3) sexual behavior and attitudes;
>
> (4) illegal, anti-social, self-incriminating and demeaning behavior;
>
> (5) critical appraisals of other individuals with whom a respondent has a close family relationship;

[3] I note that there is a new provision, N.J.S.A. 18A:36-34.1, but same is not in effect until December 29, 2021.

> (6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
>
> (7) income, other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under a program; or
>
> (8) social security number.

b. The school district shall request prior written informed consent at least two weeks prior to the administration of the survey, assessment, analysis or evaluation.

c. A student shall not participate in any survey, assessment, analysis or evaluation that concerns the issues listed in subsection a. of this section unless the school district has obtained prior written informed consent from that student's parent or guardian.

d. A school district that violates the provisions of this act shall be subject to such monetary penalties as determined by the commissioner.

District Policy 2415.05 provides:

> PPRA requires written consent from parents of unemancipated minor students and students who are eighteen years old or emancipated minor students before such students are required to participate in a survey, analysis, or evaluation funded in whole or in part by a program of the United States Department of Education that concerns one or more of the following areas referred to as "protected information surveys":
>
> 1. Political affiliations or beliefs of the student or student's parent;
>
> 2. Mental or psychological problems of the student or student's family;
>
> 3. Sex behavior or attitudes;
>
> 4. Illegal, anti-social, self-incriminating or demeaning behavior;
>
> 5. Critical appraisals of others with whom respondents have close family relationships;

> 6. Legally recognized privileged or analogous relationships, such as with lawyers, physicians, and ministers;
>
> 7. Religious practices, affiliations, or beliefs of the student or parents;
>
> 8. Income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program); or
>
> 9. Social security number.
>
> This consent requirement also applies to the collection, disclosure or use of student information for marketing purposes, referred to as "marketing surveys", and for certain physical examinations and screenings."

The District intended to and did actually seek answers from students, who were not told it was voluntary but only anonymous, with elementary students being given it as an assignment in class, on the subjects of gender identity, gender discrimination, and for the older students, religion and religious discrimination, and family demographics. It matters not that there were only a few questions, cf. Green v. Bd. of Ed. of Ocean, Monmouth Cty, OAL Dkt. No. EDU 4867-15, Initial Decision (September 8, 2016), adopted with modif. Comm'r Final Decision (October 24, 2016), http://www.njlaw.rutgers.edu/collections/oal, but whether the subject of the questions triggered the legal requirement to provide advance opt-in notice to parents.

While respondent argues that no questions were asked which touched on prohibited subjects, except for the high school students on religion which is enforceable only under the PPRA, I concur with petitioners that –

> Children confuse gender identity and sexual identity/orientation also. Often, young people "direct anti-lesbian, gay, or bisexual (LGB) language; negative attitudes; and hostility toward others not because of others' actual or perceived sexual orientation but because they do not adhere to conventional gender or other prescriptive norms about appropriate or acceptable behavior." Stacey S. Horn, *Sexual Orientation and Gender Identity-Based Prejudice*, 13 Child Dev. Persps. 21, 21 (2009) (citations omitted). This is especially frequent as "young people try to figure out their own

> sexual orientations and gender identities." *Id.* These concerns lead students to ponder their sexual behaviors and attitudes, including behaviors they might consider anti-social or demeaning, when assessing their gender identity.
>
> [Petitioners' Brief at 18.]

Similarly, the surveys asked some students about family demographics which could easily elicit highly personal, and oft publicly shamed, information, such as same-sex unions. Furthermore, for the elementary students to whom the survey was distributed in class, I agree with petitioners that such violated the law also prohibits public schools from requiring students to "supply information regarding [their] race, ethnicity, migrant status or economically disadvantaged status on any materials distributed in class." N.J.S.A. 18A:36-36(a) (emphasis added).

I **CONCLUDE** on the basis of the undisputed facts and the law cited above that the legal requirement of the state education law, N.J.S.A. 18A:36-34, was triggered and this survey was not voluntary. I also **CONCLUDE** that the appropriate remedy is to discard the surveys and all results derived therefrom from the District's website, student records, the EDAC, and to similarly extend and advise any other entity with whom the surveys or results were shared of this requirement, which entities must be disclosed. I do not consider it necessary for there to be a mandated public apology as the respondent is now the subject of this adverse ruling. Nor do I think monetary damages are called for; and fees are not warranted as the petitioners are representing themselves. Similarly, this Initial Decision, assuming adoption or only minor modification, also serves as guidance and stricture to the District with respect to future surveys conducted on diversity and related issues in the community and the schools.

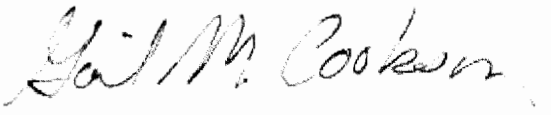
ORDER

Based upon the foregoing, it is **ORDERED** that the petitioners' Motion for Summary Decision on their Petition of Appeal shall be **GRANTED**. It is further **ORDERED** that the respondent's Motion to Dismiss the Petition of Appeal shall be **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties. of any exceptions must be sent to the judge and to the other parties.



November 15, 2021
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 11/15/21

Date Mailed to Parties: 11/15/21

id

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State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

December 20, 2021

Maryann Moretti
12 Meadow Ridge Lane
Lafayette, NJ 07932

Marc H. Zitomer, Esq.
Schenck, Price, Smith & King, LLP
115 West Century Road, Suite 100
Paramus, NJ 07652

Re: ***M.M., on behalf of minor child v. Board of Education of the Township of Lafayette, Sussex County, Agency Dkt. No. 216-11/21***

Dear Parties:

I have reviewed the materials filed in connection with the Board's motion for summary decision in the above-captioned matter. The Board contends that the petition was untimely pursuant to *N.J.A.C.* 3A:3-1.3 because it has been more than 90 days since the Board approved the harassment, intimidation, and bullying (HIB) report at issue in the petition.

In its motion for summary decision, the Board maintains that it made its HIB decision in March 2020, while simultaneously arguing in a related matter (Agency Dkt. No. 94-5/20) that is based on the exact same allegation of HIB, that no decision had yet been made and therefore that the appeal was not ripe for review. In fact, the Board represented to the Appellate Division of the Superior Court (Appellate Division) that no decision had been made. The Board's prior representations that no decision was made by the Board resulted in an enormous expenditure of time and effort by petitioner; the Department of Education; the Office of Administrative Law (OAL); and the Appellate Division that now appears to be have been totally unnecessary given that the Board admits that a decision was made in March 2020. The Board cannot argue that petitioner had notice of its decision – sufficient to trigger the 90-day time limitation period – when the question of whether a decision was issued has been so complicated and confusing as to necessitate fact-finding proceedings.

Furthermore, the Commissioner notes that neither an Anti-Bullying Coordinator's report, nor meeting minutes reflecting a Board vote to approve that report, meet the Board's obligations under *N.J.S.A.* 18A:37-15(e) to issue a decision in writing to affirm, reject, or modify the decision of the superintendent. Therefore, the Board is directed to issue a written decision affirming, rejecting, or modifying the superintendent's HIB decision within seven days of the date of this decision, and to submit that decision to the petitioner and the Office of Controversies and Disputes.

The Commissioner also notes that there is an ongoing dispute in Dkt. No. 94-5/20 regarding petitioner's discovery request for video evidence that she alleges supports her claim regarding the merits of the Board's HIB decision. The Commissioner has previously declined to order the disclosure of the video because it did not appear that the Board's decision was ripe for review. However, as the Board will be issuing a decision pursuant to the Commissioner's directive herein, which will be ripe for review, the Board is ordered to provide a copy of the video to petitioner within ten days after the receipt of this decision.

Accordingly, the Board's motion for summary decision is denied. The Board is ordered to issue a written decision reflecting the vote taken at its March 18, 2020 meeting within seven days of the receipt of this decision. The Board is further ordered to produce the video sought by petitioner within ten days of the receipt of this decision. Petitioner shall not share the video with any third parties nor may she use the video for any other purpose than pursuing the merits of this matter.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

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ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

December 20, 2021

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12 Meadow Ridge Lane
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I have reviewed the materials filed in connection with the Board's motion for summary decision in the above-captioned matter. The Board contends that the petition was untimely pursuant to *N.J.A.C.* 3A:3-1.3 because it has been more than 90 days since the Board approved the harassment, intimidation, and bullying (HIB) report at issue in the petition.

In its motion for summary decision, the Board maintains that it made its HIB decision in March 2020, while simultaneously arguing in a related matter (Agency Dkt. No. 94-5/20) that is based on the exact same allegation of HIB, that no decision had yet been made and therefore that the appeal was not ripe for review. In fact, the Board represented to the Appellate Division of the Superior Court (Appellate Division) that no decision had been made. The Board's prior representations that no decision was made by the Board resulted in an enormous expenditure of time and effort by petitioner; the Department of Education; the Office of Administrative Law (OAL); and the Appellate Division that now appears to be have been totally unnecessary given that the Board admits that a decision was made in March 2020. The Board cannot argue that petitioner had notice of its decision – sufficient to trigger the 90-day time limitation period – when the question of whether a decision was issued has been so complicated and confusing as to necessitate fact-finding proceedings.

Furthermore, the Commissioner notes that neither an Anti-Bullying Coordinator's report, nor meeting minutes reflecting a Board vote to approve that report, meet the Board's obligations under *N.J.S.A.* 18A:37-15(e) to issue a decision in writing to affirm, reject, or modify the decision of the superintendent. Therefore, the Board is directed to issue a written decision affirming, rejecting, or modifying the superintendent's HIB decision within seven days of the date of this decision, and to submit that decision to the petitioner and the Office of Controversies and Disputes.

The Commissioner also notes that there is an ongoing dispute in Dkt. No. 94-5/20 regarding petitioner's discovery request for video evidence that she alleges supports her claim regarding the merits of the Board's HIB decision. The Commissioner has previously declined to order the disclosure of the video because it did not appear that the Board's decision was ripe for review. However, as the Board will be issuing a decision pursuant to the Commissioner's directive herein, which will be ripe for review, the Board is ordered to provide a copy of the video to petitioner within ten days after the receipt of this decision.

Accordingly, the Board's motion for summary decision is denied. The Board is ordered to issue a written decision reflecting the vote taken at its March 18, 2020 meeting within seven days of the receipt of this decision. The Board is further ordered to produce the video sought by petitioner within ten days of the receipt of this decision. Petitioner shall not share the video with any third parties nor may she use the video for any other purpose than pursuing the merits of this matter.

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

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